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IS THERE ROOM FOR DISCRETION? REFORMING PUBLIC PROCUREMENT IN A COMPLIANCE-ORIENTED WORLD

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Abstract:

The management of public expenditure is widely recognized as a crucial element in the global governance agenda and a key area of focus for the development community. However, public procurement—the purchase of goods, works and services by governments—is often examined with a focus on process and procedure, and seldom discussed in terms of outcomes and effectiveness. For the first time in several decades, the international finance institutions (IFIs), in response to the rapidly evolving landscape of development aid in general and the procurement profession in particular, are undergoing a major overhaul of their procurement policies. The dialogue around the potential reforms provides a juncture for "rethinking" the traditional approach to and understanding of public procurement. The purpose of this paper is to advocate a holistic view of the procurement process, to ensure the engagement of the broadest range of stakeholders, to raise key issues with implications for public sector governance, and to lay out a framework for addressing contentious and seemingly irreconcilable differences among the various actors.

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INTRODUCTION

Public procurement—the purchase of goods, works and services by governments—is treated too often by policy-makers and development aid practitioners as an administrative "plumbing and wiring" issue, best left to procurement technicians and contract attorneys. Like the car engine for the typical driver, procurement is recognized as important for the functioning of the overall system, but not necessary to understand on its own. Follow the instructions (comply with the rules), and all will go well. What is at stake, however, is a powerful instrument in the toolbox of good governance proponents. To look at procurement as simply an issue of compliance is to view its development impact through too limited a lens. Procurement, representing on average 13 percent of GDP and a third of government expenditures in OECD countries,[1] helps determine the quality of government expenditures as well as the fiduciary credibility of public sector management. It is a key variable in determining development outcomes. To be effective, it requires the active engagement of the full range of development stakeholders.

The timing of this discussion at a conference on governance is important, as international financial institutions (IFIs), particularly the World Bank and the African Development Bank (AfDB), are in the process of reviewing and overhauling procurement policies and guidelines for the projects they finance—the first such overhaul in decades. Both the World Bank and the AfDB have developed framework papers to guide their reforms and are consulting extensively with stakeholders all over the world.[2,3] Between June and December of 2014, the proposed reforms will be detailed and discussed. These efforts coincide with the evolution of development finance as well as worldwide procurement reforms (EU guidelines, the WTO Government Procurement Agreement, and the United Nations Commission on International Trade Law).

The purpose of this paper is to ensure the engagement of the broadest range of stakeholders, especially policymakers and aid practitioners, to raise key issues with implications for public sector governance, and to lay out a framework for addressing contentious and seemingly irreconcilable differences among the various actors. The paper is based on a range of sources, including the substantial reviews and analyses conducted in recent years by the IFIs.[4] The sections are set forth according to the following five questions:

- Where does procurement fit in the global governance agenda?
- Why isn't anyone looking at procurement in terms of development outcomes?
- Is it really only about the bid and award stage of the procurement cycle?
- Should I follow the rules or apply my best judgment?
- Where do I fit in as a stakeholder?

WHERE DOES PROCUREMENT FIT IN THE GLOBAL GOVERNANCE AGENDA?

The Achilles' Heel of Governance

The relationship of public procurement to the governance agenda should seem obvious to anyone involved in development projects. Procurement represents the translation of the agreed design of the project into detailed specifications, leading to the contracting and implementation of works, goods, and services to be financed.[5] The public perception is that procurement is rife with fraud and corruption and represents the Achilles' heel of public sector management in developed and developing countries. The results of the 2013 Eurobarometer survey on corruption found that "more than half of all companies say corruption in public procurement…is widespread."[6] High profile cases continuously hit the news, raising a range of procurement-related governance concerns from the general public. Recent examples include the Montreal roads case in Canada, the U.S. government's buying of military uniforms from sweatshops overseas, and the tainted purchase of bed nets in Cambodia under Global Fund financing.[7,8,9] Increasingly, public procurement is being recognized as a crucial element in the governance agenda. As the OECD recognized in 2009,

> "Public procurement is at the interface of the public and private sectors, which requires close cooperation between the two parties to achieve value for money. It also requires the sound stewardship of public funds to reduce the risk of corrupt practices. Public procurement is also increasingly considered as a core element of accountability to the public on the way public funds are managed."[10]

Similarly, in its updated Governance and Anti-Corruption Strategy from 2012,[11] the World Bank placed an emphasis on procurement, stating, "Poor governance and corruption in procurement invariably reduce development outcomes…" One outcome of this enhanced focus at the World Bank has been the integration of procurement and financial management staff with public sector management staff as part of a new Global Governance Practice (GGP).[12]

IFI Policies as a "Gold Standard"

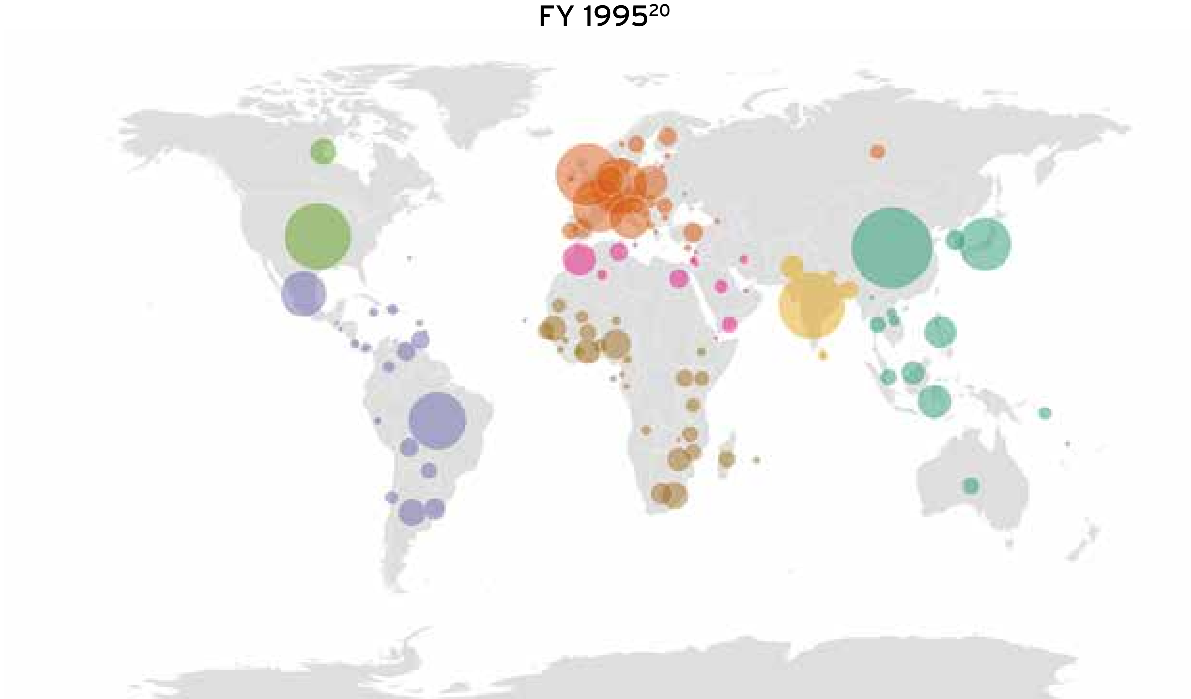
With this broadened perspective, the question is raised as to how well IFI procurement policy and practice is serving the governance agenda. Historically, the IFIs, particularly the World Bank, have been proud of their reputation for promoting the "gold standard" for procurement under their lending policies.[13] These policies contribute significantly to the reputation of the IFIs as appropriate stewards for managing donor funds. There is substantial evidence that overall IFI financing has raised the credibility and security of developing markets' procurement. The IFIs have accomplished this through establishing clear rules and procedures of competition; enhancing predictability, transparency of processes, and fair and accessible competition; and supporting the growth of local industries. The IFIs have substantially harmonized their policies to promote consistency and have increasingly adapted them to better address fraud and corruption, including cross debarment, by which one IFI's debarment decision is recognized and enforced by the others.[14]

The scale and scope of IFI procurement is exemplified by World Bank statistics. The World Bank finances about 100,000 new contracts every year in support of 1,600 ongoing projects.[15] It is important to distinguish between two major types of contracts for the procurement of goods and works. The first are contracts bid through international competitive bidding (ICB), which applies bank rules and standardized documents and are considered the most amenable to international competition. They are the primary focus of current IFI policy.[16] The second are contracts considered not likely to attract foreign bidders and hence bid through national competitive bidding (NCB), which uses local rules and documentation in the local language and incorporates procedures or legal clauses that the World Bank considers critical to maintaining appropriate standards.[17] In the universe of ICB and NCB contracts, about 10,000 receive some form of prior review by the World Bank before bid and award can be authorized. These represent ICB contracts as well as other contracts that raise issues of complexity and/or risk. In fiscal year 2013, fewer than 2,000 prior-reviewed contracts were bid through ICB; however, these made up 71 percent of the total annual value of the prior-reviewed contracts.[18]

Most striking is how effective IFI policies have been in stimulating competition and opening markets for developed and developing country firms. In the 1980s, the top ten supplier countries for goods and works purchased through ICB, in terms of the value of contracts, comprised nine OECD countries plus South Korea. In recent years, the top 10 supplier countries have included China, India, Russia, and Turkey. An illustrative example of the change over time is presented in Maps 1 and 2, which reflect the number of ICB contracts won by country source between fiscal years 1995 and 2013 for goods and works. Overall, about 83 percent of all ICB awards for civil works and goods now go to a firm from the borrowing country or from the region of the borrowing country. The

Map 1. Supplier Countries, sized by Number of ICB Contracts for Goods and Works and shaded by Region

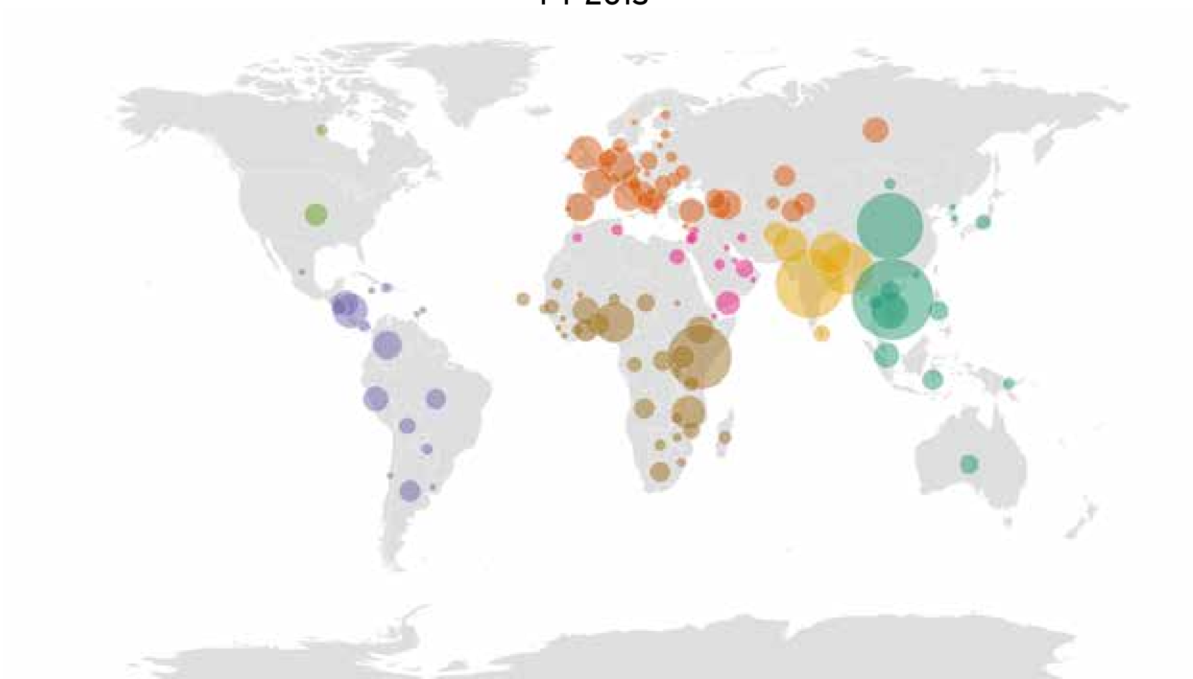
FY 1995[20]



Note: Map constructed by author with World Bank data.

Map 2. Supplier Countries, sized by Number of ICB Contracts for Goods and Works and shaded by Region

FY 2013[21]



Note: Map constructed by author with World Bank data.

most dramatic shift is from United States, Japan, and Europe to the borrowing countries themselves.[19]

The Case for Reform

If the IFI policies have been so effective, one might ask, "Why is there a need for reform?" The World Bank and AfDB Framework papers present the case for reform as a convergence of factors in development finance in general and the procurement profession in particular: the changing nature of IFI financing beyond traditional hard infrastructure to a range of investments; the evolving toolkit of procurement instruments and approaches tailored to different types of investments; the growing role of new actors in development finance and opportunities for alternative partnerships; and the declining share of IFI financing in developing country budgets, reducing the historical leverage and influence of the IFIs beyond specific investments.[22] If the IFIs are to maintain their cutting-edge leadership credentials, it is essential that they modernize their policies.

This paper focuses on the potential of the reforms to ensure the quality of IFI-financed investment project outcomes.[23] While there may be agreement on the overall need to modernize IFI policies, the discussion of the details reveals a wide divergence, both between different types of stakeholders and among stakeholders belonging to the same group. Borrowing countries focus on having greater flexibility in adapting IFI rules and procedures to their country contexts. Donor countries focus on promoting more flexibility, while emphasizing adherence to fiduciary standards.

Private sector representatives prefer consistent procedures and documents across countries and appreciate the involvement of IFIs as a monitoring presence. But at the same time, many private sector firms are promoting the broader use of award criteria, beyond price, which raises challenges in terms of measuring and monetizing for bid evaluation.[24] Civil society organizations emphasize transparency and anti-corruption, with many promoting parallel or horizontal objectives in the award process to address environmental or social issues. Lastly, procurement professionals want clarity on what is and is not allowed, on the risk appetite of management, and on the beginning and end of their specific role in the process.[25]

These perspectives represent different aspects of the governance agenda. Some stakeholders emphasize fiduciary concerns and anti-corruption, others stress improving the delivery of public services, and others are concerned with fairness and equity in managing public resources. Over the next six months, there will be discussions and consultations on the actual drafting of the policy reforms of the World Bank and the AfDB. With each stakeholder bringing to the table a different perspective and level of understanding of procurement, a framework is needed to help guide the dialogue. The following section argues that the discussion requires looking at procurement beyond the individual transaction; it requires looking at procurement as an essential factor in realizing development outcomes.

WHY ISN'T ANYONE LOOKING AT DEVELOPMENT OUTCOMES?

Procurement Principles

Over the last 10 years, development practitioners have been challenged to clearly define the results they hope to achieve through their policy and investment initiatives.[26] This has led to a clear distinction between the inputs to and physical outputs of a particular investment and the actual quality of the outcomes generated. It is insufficient, for example, to just measure the issuing of contracts for a road project (an *input*) or the actual building of the road (an *output*) without indicating the ultimate *outcome* that is to be achieved, either in terms of mobility or in terms of accessibility. This gap between inputs, outputs, and outcomes has generated extensive efforts across all sectors to move away from inputs and outputs, which are relatively easily measured, to more complex indicators of outcomes and impacts. As indicated in the World Bank's updated governance strategy, "A more rigorous framework to measure results is essential to ensure that Bank efforts are helping achieve development outcomes."[27]

Consistent with a results-based approach, one would expect, then, that procurement policies would be evaluated based on how they have contributed to *outcomes*, rather than how efficiently they have mobilized *inputs*. Unfortunately, for IFIs, the opposite is the case. It is clear that procurement can make or break a project outcome. IFIs, however, pay very little attention to this linkage.

The bias toward inputs is evident in the four principles that are set forth and that guide IFI procurement policies:[28]

- "the need for economy and efficiency in the implementation of the project, including the procurement of the goods and works involved;
- the World Bank's interest in giving all eligible bidders from developed and developing countries the same information and equal opportunity to compete in providing goods and works financed by the Bank;
- the Bank's interest in encouraging the development of domestic contracting and manufacturing industries in the borrowing country; and
- the importance of transparency in the procurement process."

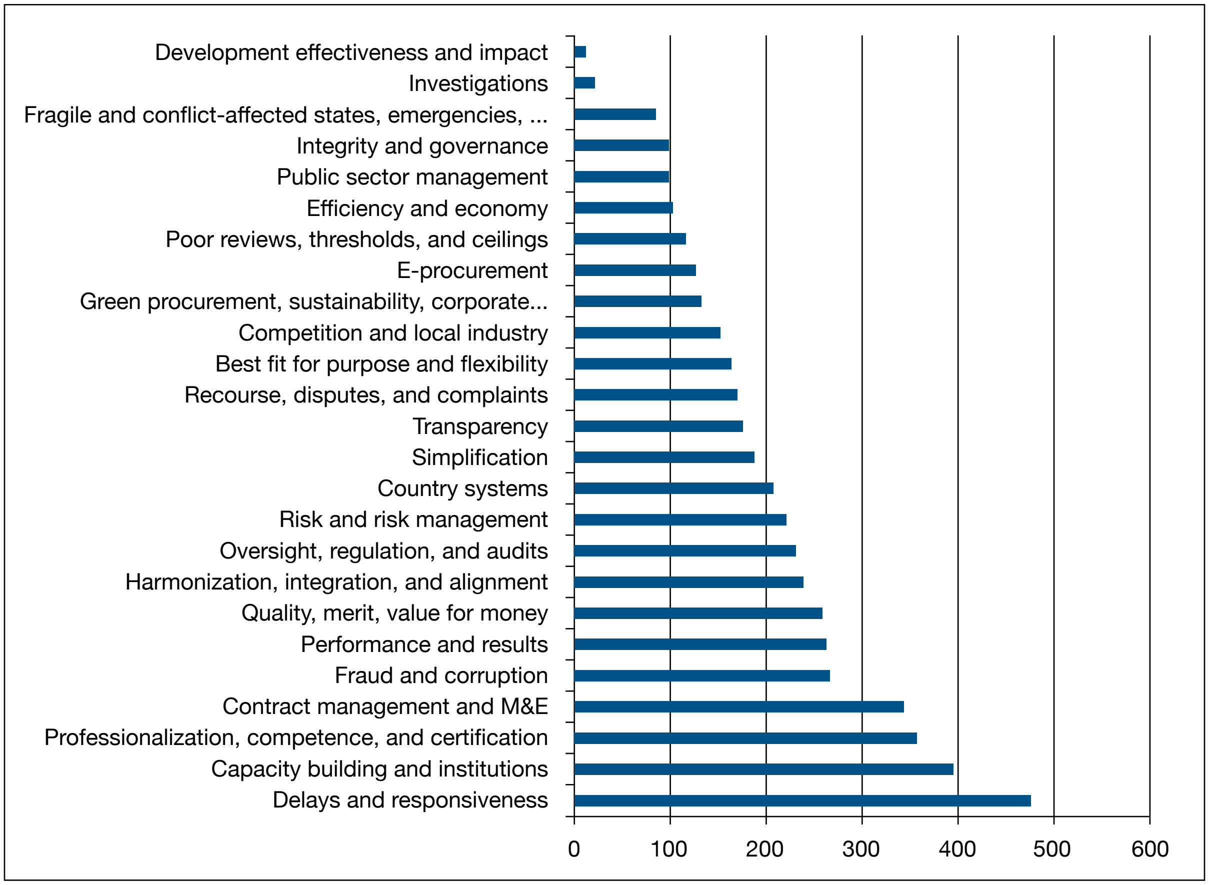
Evaluating procurement against these four principles ignores the overall contribution to ensuring the realization of project outcomes. These are more directed to how the procurement is carried out in terms of bid and award.

Such a biased focus is evident in the responses of stakeholders during the World Bank's consultation for the framework paper, illustrated in Chart 1. Of the 25 procurement topics raised, the highest number of responses were directed at "delays and responsiveness" of procurement policies and procedures, while "development effectiveness and impact" received the least responses. It is doubtful that this means that stakeholders are satisfied with the development impact of present policies, but the lack of such discussion of the linkages represents an important missing piece in evaluating procurement.

Institutional Reviews Ignore Outcomes

A review of annual procurement reports from the World Bank illustrates this issue. Looking at the reports from 2006 to 2011,[29] there is arguably no substantive

Chart 1. Frequency of Procurement Topics Raised During Consultations[30]



Source: World Bank (2013), "Procurement Policy Review: Feedback from Consultations with External Stakeholders," p. 6.

reference to project outcomes. Instead, the discussion is mainly process-driven; in particular, there is an emphasis on the level of complaints and number of misprocurement cases. Similarly, in the 2011 report by the African Development Bank, the focus is on the process rather than the outcomes. For example, the principle of economy and efficiency is measured by the cost and time required to conduct the bid and award. Similarly, the principles of equal opportunity and transparency are measured in terms of publication, competitive procedures, and bidder participation as well as complaint handling. There is no mention of ultimate results.

While such a limited focus might be expected of the procurement community, one would expect a broader emphasis on development effectiveness by the Independent Evaluation Group (IEG) of the World Bank, a freestanding unit tasked with providing an objective assessment of the Bank's work. The IEG publishes an Annual Report on Development Effectiveness (ARDE) that evaluates the outcomes of completed projects and draws lessons for achieving development results going forward. A review of the ARDEs from 1997 to 2009, however, reveals (at best) sporadic mention of the issue of procurement in assessing project outcomes. Similarly, the first (2011) and second (2013) editions of the African Development Bank's Annual Development Effectiveness Review have failed to address procurement in an outcome-based framework. Nobody seems to ask the obvious question: "How much of the success or failure of the project outcome is attributable to how the procurement was designed and executed?"

World Bank Evaluation Ignores Outcomes

Most striking is the recent IEG Evaluation of Bank Procurement,[31] one of the most extensive reviews of IFI procurement ever undertaken and an important source of information and analysis of key issues. Yet, despite a volume purportedly devoted to "Achieving Development Effectiveness through Bank Procurement," there is no assessment of the actual impact on project outcomes. Instead, the IEG concentrates on the economy and efficiency of the bid and award process, just as in other reviews. There are glimpses of examples that come close to illustrating how Bank inflexibility in the application of its policies has negatively affected the final project outcome, including a failed loan for the supply of vaccines during an influenza epidemic in Mexico.[32] But these examples are few and anecdotal. They are not discussed in the context of developing a framework for analyzing the impact on development effectiveness of Bank procurement policies. In short, there is no consideration of how changes would affect outcomes.

Instead, the IEG drops the proverbial "ball" and declares:

> "Regarding development impact and the Bank's own lending, IEG finds that present Bank guidelines are broadly adequate instruments for Bank lending, including new areas of lending. IEG finds that there is need for review of select provisions, for example on consultant selection or new and complex forms of procurement such as information and technology projects or public-private partnership (PPPs). Bank procurement processes, in contrast, are time consuming and have posed difficulties because of inflexibilities in interpretation. Process change requires better monitoring, clear standards, and changes in incentives that would lead to the exercise of reasonable judgment and less risk aversion."[33]

Within this statement are clues to more fundamental weaknesses in procurement that are not mentioned—weaknesses with serious implications for outcomes. The IEG evaluation does look at certain sectors (eg. information and communications technology, or ICT, and Community Driven Development, or CDD) and assesses whether past procurement in these areas has led to poor or limited outcomes. ICT procurement has been a continuing challenge worldwide as the procurement profession has had to contend with the fast-moving changes in the sector. The Affordable Care Act website problems[34] are only the latest example of these challenges. In 2006, the Quality Assurance Group at the World Bank in 2006 reviewed 22 projects financed by the Bank that included substantial ICT components. It found serious weaknesses in procurement planning, contributing to the finding that 77 percent of these projects were rated less than satisfactory.[35] The IEG's evaluation in 2011 echoed the same findings that "procurement is a major constraint to implementing ICT projects."[36] It pointed to the inadequacy of applying Bank procurement policies, designed for infrastructure, to ICT procurement and the lack of appropriate technical expertise in the Bank. While ICT may be the most dramatic example of procurement failure due to inadequate policies and technical capacity, the question arises as to whether procurement approaches have also led to suboptimal results and possibly failures in other sectors.

Value for Money

The global procurement community has recognized the limitations of the current procurement model's objective function and has embraced the concept of Value for Money (VfM) as an overarching procurement objective. While there is no single accepted definition of VfM, Quinot and Arrowsmith write that VfM consists of:

- ensuring goods, works and services are suitable to meet the requirements and not overdone;
- concluding an arrangement to secure it on the best possible terms; and
- selecting a supplier who is capable to provide it.[37]

Many countries and organizations have adopted the concept in various forms. For example, under the European Union's directives for MEAT (most economically advantageous tender), procurement can incorporate factors such as quality, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period, in addition to price.[38]

The IFIs' policies do allow for the equivalent of MEAT in the form of "life-cycle costing," which basically considers the present value of costs and benefits of a good or civil works over time, though there is an understandable reluctance to accept non-quantifiable factors. Indeed, although United Kingdom, European Union, and Australia as well as the Asian-Pacific Economic Commission and the United Nations' International Atomic Energy Agency have adopted some form of VfM, the IFIs, and many developing countries, have been reluctant to open the gates to greater discretion by government entities in light of concerns about transparency and corruption. Unless non-price factors can be fairly translated into financial terms, there is a concern that they will lead to subjective decisions and jeopardize the perception of fairness for those markets. Consequently, incorporating such factors could lead to legal challenge and delays.

Despite the challenges, the concept of VfM is serving as the cornerstone of the World Bank reforms. The World Bank's Framework paper starts the process of addressing outcomes as an overarching objective with its "vision" statement:

> "Procurement in Bank Operations supports clients to achieve value for money with integrity in delivering sustainable development."

The paper continues that "this vision seeks in the first instance to maximize development results."[39]

Incorporating Other Parallel Objectives

Moving toward VfM and an outcome-based approach to procurement policies and procedures, however, raises the issue of how to define the target outcome(s). Governments in developed and developing countries have superimposed "parallel" or "horizontal" public policy objectives on the primary procurement objective of the quality of the investment. These are mainly related to environmental concerns as well as supporting specific groups such as small enterprises or enterprises owned by women, ethnic groups, the disabled or youth.[40] The IFIs are especially silent on the social concerns and are playing catch-up on "green" procurement. The challenge is designing measureable, monetized criteria and weighting of other objectives to incorporate within the evaluation framework without which the procurement process can be questioned in terms of equity and fairness.

Refocusing public procurement policy on the resulting outcomes is a concept which is gaining momentum and is evident in the framework papers of the IFIs. However, it challenges traditional perceptions and perspectives on how to evaluate and measure the development effectiveness of procurement. Moving beyond the words of a framework paper to what this means in practice has serious implications that are discussed in the following sections.

IS IT REALLY ONLY ABOUT THE BIDDING PROCESS?

The Procurement Cycle

The most significant implication of applying an outcomes-based approach to procurement policy is that it is immediately apparent that a singular focus on the bidding and award stage of the cycle, as presently embedded in IFI policies, is seriously inadequate. Applying an outcomes-based approach to evaluating the development effectiveness of procurement requires a "holistic" assessment, looking at the whole procurement cycle, from design and planning to bid and award, to contract management and implementation. Evaluating the strengths and weaknesses of the procurement process necessitates careful consideration of each stage in the cycle. Chart 2 provides an overview.

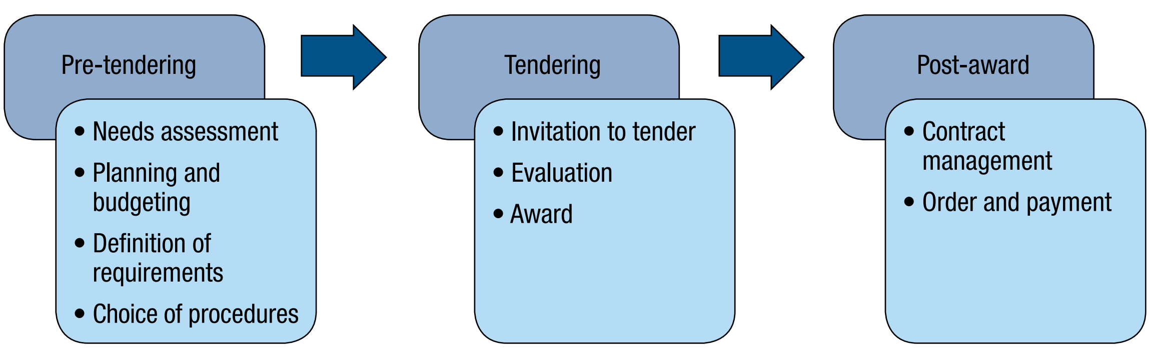
First, design of the process and the crafting of specifications, or "pre-tendering," represent the translation of the project concept into practical actions. Then, the bid and award, or "tendering," process ensures the participation of qualified suppliers at a competitive price. Finally, the contract management and implementation, or "post-award" stage, ensures that what was planned is what is ultimately provided, with appropriate adaptations to circumstances. Failure at any stage can lead to poor outcomes. Moreover, success and compliance at one stage are necessary but not sufficient to ensure a good outcome. As stated in the World Bank's 2012 updated governance strategy:

> "Traditional approaches have been based on the notion of best practice procedures. Such approaches overwhelmingly focus on regulations covering selection and evaluation procedures of suppliers, contractors, and service providers. Evidence shows that such a focus on procedures in the absence of a clear definition of procurement performance objectives can lead to reduced accountability and possibly poor results."[41]

The Bias toward the Bid/Award Stage

While IEG does raise the concern about the relative imbalance toward bid and award and it was mentioned during the World Bank consultation, the IEG recommendations fall short of incorporating all stages of the cycle into the IFI policies. There could be two main reasons for this imbalanced perspective and reluctance

Chart 2. Main Phases of the Procurement Cycle[42]



Source: OECD (2009), OECD Principles for Integrity in Public Procurement, OECD Publishing. http://dx.doi.org/10.1787/9789264056527-en to incorporate, especially the contract management stage, into the policies. The first reason is that the bid/award process is clearly considered to be within the professional responsibility of the procurement expert, whereas the design and execution stages represent a gray area in which the technical expert has greater involvement. In the European Union (EU) guidelines as well as the United Nations Commission on International Trade Law, the role of the procurement expert ends with the award.

A second reason is that the interests of private sector firms are mainly directed at the bid and award stage of the process. Such firms represent the core constituency that monitors and reacts to changes in IFI policy and practice. Understandably, they want to ensure that they have the opportunity to compete and that the process is fair and transparent. Donor countries' representatives on the IFI boards similarly reflect such interests as market access of IFI financing is often referred to as a crucial justification for countries' support to the IFIs.

From a broader development practice perspective, however, one is faced with such questions as the following: how did the bed nets get delivered without anti-malarial treatment; why did the website crash; what contributed to the early failure of the road? Each question points to potential weaknesses beyond the bid and award, either upstream in the design and specifications or downstream in the execution or delivery. In fact, the bid and award may have been fully compliant in these cases, but the project still ultimately failed. The operation was a success, but the patient unfortunately died. It is the whole chain that must be considered to ensure the right outcomes and to assess when outcomes fall short of expectations.

The Upstream Stage

Upstream in the procurement cycle, the design stage is when the specifications are established and the type of bidding process is determined. A good knowledge of the supplier market for goods, works and services is essential. Also, the project team for the client country and the IFI must make judgments about whether the acquisition is relatively straightforward, or whether other considerations—such as life-cycle costing, maintenance concerns or spare parts—should be taken into account. The team must also decide whether other objectives should be considered, such as environmental factors or the preferential treatment of certain subsets of the population, and, if so, how to quantify or monetize such factors.

A key consideration is whether the investment involves a complex or rapidly changing sector for which one wants to consider alternative solutions and for which the client agency may not have sufficient expertise. This determination could require interaction with the industry of suppliers ensuring timely adaptation of new technology or promoting and inviting innovation in proposals.

It is seldom, if at all, that post-project reviews actually look back at this stage to determine if a better result could have been achieved What is apparent is that the project team at this stage should encompass more than just the procurement professional; rather, the technical expert(s) must also have a significant role. Yet this critical stage remains a gray area in terms of responsibility, guidance and expertise.

The Downstream Stage

The most serious blind spot of IFI policy is the lack of attention to what happens after the contract is awarded. Downstream in the procurement cycle, contract management and execution is recognized by all as crucial; yet despite the "bureaucratic hype" on delivery, this essential stage is ignored officially as an element of procurement. The technical experts assume that the procurement staff is still monitoring while the procurement staff believes their responsibility ended with the award.

While the IFIs emphasize the importance of integrity during bid and award, there is clear evidence that contract execution represents an equal if not greater threat to governance with serious consequences for outcomes and the integrity. In 1991, Klitgaard[43] offered a stylized model for representing corruption via the following formula:

Corruption **=** **M**onopoly **+** **D**iscretion **–** **A**ccountability

When there is a lack of competition and a high amount of discretion in the decision-making process, combined with a low degree of accountability (and/or transparency), the risk of corruption is high. It is clear that this formula has influenced the rules governing the bid and award stage, which encourage competition, limit discretion, and foster a high degree of transparency to enhance accountability. In terms of the downstream dynamics, however, the tables are turned. During contract execution, the selected supplier has a virtual monopoly by virtue of the award and there is greater discretion on the part of the responsible parties, often leading to a lack of credible oversight of materials or cost overruns. Furthermore, unless the deficiencies during contract execution are immediately visible, the results of a given project will not be clear until years afterwards, limiting any accountability by the participating parties.

A further sign of the inadequate attention given to contract execution is the lack of transparency by the IFIs. During the efforts to reform disclosure policy at the World Bank in 2010,[44] a key yet controversial target was the disclosure of the Bank's supervision report regarding the status of project implementation. Despite all the transparency of the preparation and bidding documents and processes for a given project, the supervision report (now referred to as the Implementation Status and Results Report (ISR)), generally issued twice a year per project, was not disclosed. The internal concern of staff was that such disclosure would jeopardize the candor in reporting if it were to be made public. Potentially serious but unconfirmed concerns about fraud or corruption, for example, might be withheld. In the end, the World Bank is disclosing supervision reports while highly sensitive internal "deliberative" issues are recorded but not made public. Despite the information now being disclosed on project implementation, however, the format of the reporting is quite inaccessible to all but the most knowledgeable of practitioners. In this case, disclosure alone is not sufficient to gain the benefits of transparency unless the information is accessible.

The Cost of Ignoring Contract Execution

Charles Kenny's research over the past decade has revealed what is at stake when the oversight of contract execution is ignored. In his 2006 paper, he argues that "its [*sic*] not how much you divert, but how you divert it that matters."[45] He stresses the importance of not confusing the financial and economic costs of bribe payments: "The major damage done by corruption is probably not the narrow financial loss of bribe payments but the economic cost in terms of skewed spending priorities, along with substandard construction and operation." The use of substandard materials shortening the useful life of a road can seriously impact the economic benefits more substantially than the financial value of the bribe to a supervisory official. Estimating the costs and benefits of various approaches to fighting corruption should determine where to direct anti-corruption resources. In this case, it would appear that more attention should be paid to contract implementation.

The failure to address contract management is increasingly being recognized in developed and developing countries. The OECD Public Governance Review on Integrity in Public Procurement in 2013 found: "Despite the risks involved in the contract management phase, few countries have taken active steps to supervise contractors' performance and integrity…"[46] The 2014 European Commission, EU Anti-Corruption Report found that "while the efficiency of control mechanisms concerning pre-bidding, bidding and award phases has improved in Member States, the implementation (post-award) phase is less closely monitored."[47] The EU report finds that "construction, energy, transport, defence [*sic*] and healthcare sectors appear to be most vulnerable to corruption in public procurement."[48]

The World Bank's own experience confirms the risks of not sufficiently monitoring contract execution. Ben Olken has done serious work in estimating the level of corruption in rural roads construction under World Bank-financed village development projects in Indonesia.[49] By conducting an engineering post-review of a number of roads and comparing the results to what was actually charged, he estimated a loss of 24 percent of the expenditures. Similarly, the Bank's Integrity Department's (INT) Detailed Implementation Review (DIR) for the Indian Health Sector 2006-2007 documented the lack of focus on the deliverables and its results.[50] Yet, despite this recognition of the vulnerability during contract execution, INT's caseload remains concentrated on fraud and corruption in bid and award. Only 20 percent of its Final Investigation Reports (FIRs) relate to issues arising during contract execution.[51]

Initiatives to Address Contract Management

Recognition of this imbalance has led to a series of initiatives in recent years. One is the Construction Industry Transparency Initiative (CoST).[52] CoST is a country-focused effort to increase transparency in the delivery of construction projects. Through a partnership between the country (combination of government, private sector, and civil society stakeholders) and international organizations, the initiative focuses on raising transparency throughout the project cycle from preparation to bid/award and during contract implementation. It attempts to identify key information to be shared and how to make accessible and understandable to stakeholders. The implications for the improved governance and accountability have been tested through a three year pilot in eight countries and launched more broadly in 2012.

A related initiative to enhance transparency is the Open Contracting Partnership (OCP).[53] A group of international NGOs, governments, and the World Bank Institute (WBI) comprise a steering group to advocate policies for greater disclosure and related monitoring of public contracts—including those for the procurement of goods, works and services—at all stages of the contracting cycle. Its efforts include increasing public disclosure of and accessibility to contract data, enhancing the quality of information on contracting, and promoting public participation in and monitoring of the contracting process. Most recently, in January 2014 the OCP announced the development of the Open Contracting Data Standard, a common standard for publishing contract level data, with a view toward eventually complementing the International Aid Transparency Initiative data standard for project-level aid spending data.[54]

What these efforts illustrate is the importance of a holistic approach to the procurement cycle if one is to ensure the quality of outcomes. The IFIs' reforms must address all stages of the cycle if the procurement process is to remain an effective instrument in the toolkit for good governance. Such an approach should guide the relative level of resources assigned to each stage and the appropriate level of compliance versus discretion as discussed in the next section.

SHOULD I FOLLOW THE RULES OR APPLY MY BEST JUDGMENT?

A Clash Among Governance Proponents

The title question of this section illustrates the most difficult and contentious debate in public procurement. It is one that is consistently raised over the years in both developed and developing countries, and it is a central issue in the dialogue over the reform of IFI policies. It is a debate, however, in which each side can wrap the mantel of governance around its arguments. With rising concerns about corruption and declining confidence in public sector management, there are those that say we must continue to tighten the rules and limit discretion. There are others, however, who argue that the pendulum may have swung too far in response to "zero tolerance." They say that the proliferation of rules has stifled innovation and hampered a "solutions-based" approach to development challenges. The following section presents the arguments on both sides of the scale and offers an approach to evaluating the tradeoffs, one that starts from an outcomes-based perspective and assesses the corresponding integrity risks at each stage of the procurement cycle.

Turning again to the results of the World Bank's consultations with external stakeholders in 2010, one can see the tension in expectations. Figure 1 shows the relative weight that stakeholders place on the key procurement issues. On the one hand, stakeholders most often bring up concerns about delays and the lack of responsiveness in IFI procurement processes (note that this is with regard to bid and award). On the other hand, fraud and corruption management is also among the top five concerns. Donors press for faster and more flexible processes in order to minimize time spent on procurement. At the same time, the donors hold the IFIs to a high fiduciary standard and demand more controls when issues of fraud and corruption arise.

Even the private sector offers mixed messages. Certainly the private sector wants a level playing field, along with clarity and predictability in the bid processes and transparency in the award decisions. More recently, however, many private companies from OECD countries are arguing for awards to be made on broader criteria than the seemingly straightforward price evaluation. "Value for Money," as discussed earlier, implies the incorporation of other variables, including life-cycle-costing and green procurement, which may be more difficult to quantify or monetize with wider scope for judgment calls.

The Case for Discretion

> "In an environment too complex to be reducible to simple rules or in one that changes more rapidly than the rules can be changed, a decision-making system that depends on rules invites disaster...
>
> The problem with the current system is that public officials cannot use common sense and good judgment in ways that would promote better vendor performance. I believe that the system should be significantly deregulated to allow public officials greater discretion. I believe that the ability to exercise discretion would allow government to gain greater value from procurement."
>
> —Steven Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance*

The case for the application of greater discretion is made most forcefully by Steven Kelman (Administrator of the Office of Federal Procurement Policy in the Office of Management and Budget from 1993-1997) in his 1990 book, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance*. His basic premise is that cynicism about the behavior of public officials has led to elaborate rules intended to rein them in. With each scandal, we typically add and tighten regulations.

His argument continues that such extensive rules do support good governance when government purchases are rather straightforward and standardized, such as the buying of office supplies. However, when public procurement begins to deal with complex transactions, such as the acquisition of information technology products, innovative approaches and adaptive solutions are required. In these cases, rules can be a serious constraint to development outcomes.

The book is focused on the purchase of computers and related technology and support by the U.S. government in the 1980s, but it is still relevant today. The excessive focus on the rules and related compliance distracts attention from the resulting performance or outcome of the acquisition. Kelman argues that various aspects of procurement bid and award regulations limit the government's ability to learn, adapt, and ensure the best results. He contrasts this with the private sector, where long-term relationships with vendors are taken into account and open discussions on the overall value and probability of results are emphasized, rather than a single price indicator. Clearly, when we make significant purchases for ourselves (i.e., "personal procurement" of homes, cars, etc.), we apply substantial judgment beyond simply price. While public procurement must be held to a higher standard because it entails spending other people's money, do the rules lead to an acceptable outcome in terms of quality?

With regard to development aid, Andrew Natsios, former administrator of the U.S. Agency for International Development describes the equivalent clash between the "compliance" side of aid programs and the "technical, programmatic" side in similar terms as Kelman.[55] He states, "The essential balance between these two in development programs has now been skewed to such a degree in the U.S. aid system (and in the World Bank as well) that the imbalance threatens program integrity."[56] He calls for reducing the layers of oversight and regulation and refers to it as a story of "good intentions—accountability and transparency—gone bad."[57]

This is not to say that Kelman and Natsios do not recognize the risks of corruption. But Kelman argues that such risks should be addressed by investing more in investigative capabilities and in harsher penalties for fraud and corruption, which would serve as effective deterrents.[58]

The Case for Compliance

Those who argue against discretion are proponents of compliance. The case for compliance is strong and gaining traction in developing countries. As indicated by the OECD, "...public procurement is the government activity most vulnerable to waste, fraud and corruption due to its complexity, the size of the financial flows it generates and the close interaction between the public and private sectors." The Eurobarometer survey, referred to earlier, confirmed this cynicism for European countries. The developing world, with weaker institutions, raises even greater cynicism.

Surprisingly, until the 1990s, the IFIs rarely used the word "corruption" when discussing suspect regimes.

The evolution of the investigative apparatus of the IFIs has only recently reached a significant scale, highlighting preventive approaches as well as investigations of fraud and corruption. The multilateral cross debarment agreement, in which multilateral development banks agree to honor each other's sanctioning of specific firms, only took effect in 2012. Even then, experts argue that "the anti-corruption movement has not been able to effectively transition from the awareness-raising stage to the concrete action-oriented stage."[59] The IEG evaluation of World Bank-financed procurement hardly touched upon anticorruption efforts. In response to comments over this gap in coverage, IEG argued that much of the corruption evident in procurement was related to systemic corruption in borrower countries or governments, and thus was not easily addressed through Bank transaction controls.[60]

Corruption is not a "disease" specific to developing countries, as demonstrated by the recent roads case in Canada. But in developing countries, the capacity to identify corruption issues, let alone investigate and prosecute, is seriously weak. The IFIs can only do so much through monitoring and review. The Integrity Department of the World Bank, which investigates complaints, seeks to collaborate with local officials and make case referrals for country follow up. The track record, however, is poor in this regard. The relevant country agencies or institutions are overwhelmed and under-budgeted, and their legal systems are often inadequate. Even the governments themselves are reluctant to allow discretion, even to ministers, in order to avoid any perception of corruption;[61] bid processes follow the wording of the bidding documents to the letter, even when some variation could be justified without substantively harming the process. It is often the IFIs that press for more flexibility in differentiating between material and minor deviations in supplier responses.

Thus, Kelman's call for a more effective deterrent through investigation and punishment in the United States seems a long way off for many developing countries. Without such a deterrent, then, it would seem that developing countries are left with the second-best option: the establishment of extensive rules. In their policy reform frameworks, the IFIs recognize this dilemma as does IEG. Their response is to develop a more targeted approach to assessing risk. Rather than applying a blanket risk measure at a country level, the proposal is to look more specifically at the borrowing entity/agency in the country and its relative strengths and weaknesses in terms of procurement. The higher the risk rating of the agency, the greater would be the oversight and monitoring.

Reconciling the Differences

> "One person's 'red tape' may be another's treasured safeguard."
> —Herbert Kaufman, *Red Tape: Its Origins, Uses, and Abuses*

It should be evident that both sides of the debate have strong arguments. The solution, then, is not so black and white. For those who argue for greater discretion, it is important to be specific about where greater discretion would contribute to better outcomes with limited risk and by whom it should be exercised. Similarly, for those who argue for stricter compliance, it is important to address the relative effectiveness of such rules and to consistently review the rules for continued relevance. Such a reconciliation requires a holistic focus on outcomes and an assessment of benefits versus risks at each stage of the procurement process.

Oddly enough, for all the rules, oversight, and transparency applied to the bid and award stage, the contract management stage appears less constrained, with fewer rules, ineffective oversight, and a lack of transparency. The IFI policy is virtually silent on this fundamental discrepancy. Parallel efforts for enhanced transparency are being promoted, such as CoST and Open Contracting, but these are outside formal policy and procedures. Applying the lens of "compliance versus discretion" to this stage of the cycle, there appears to be a case for more compliance. In the early design stage, extensive rules constrain the degree to which procurement staff can solicit the insight of potential suppliers as specifications are being prepared, for fear of a perception of conflict of interest and potential influences on the bidding documents. This "Chinese wall" between procurement staff and potential supplier firms limits the ability of the procuring entity to take into account other ways of addressing its needs.

Addressing the Risk-Averse Culture

Revising the rules and adopting a more discriminating and detailed determination of risks, however, will not be effective unless the widely perceived "risk-averse culture" is addressed. IEG finds that often "task team leaders and procurement staff have a limited awareness of available flexibilities and hesitate to use them, in part because of risk aversion, but also because of a limited understanding of their benefits."[62] The IFIs set value thresholds, so that contracts beyond a certain value must receive more attention in the form of prior review by the Bank before bid and award can proceed. Despite raising these thresholds to reduce the number of contracts requiring such reviews, the average value of such contracts remains low on average, as staff continues its tendency to see risks and push decisions upward.[63]

The issue of risk-aversion is not limited to the IFIs. It can be seen worldwide. Kelman identifies risk-averse behavior as endemic to the procurement profession.[64] Similarly, Natsios calls the federal system in the United States "overly risk averse."[65] More recently, political scientist Darrell West opined about the U.S. system: "government bureaucrats know that a failure gets you on the front page of the newspaper; ten successes probably don't. And so there are kind of skewed incentives against risk-taking in the public sector."[66] Applying judgment instead of following detailed rules leads to potential challenges from bidders as well as process delays. As timely conduct of procurement is often the key factor in a procurement agent's assessment, rather than procurement outcome, the incentive for procurement staff is to avoid the potential "noise" of deviating from the rules. There is little to compensate the contracting officer for taking risks. What good, then, is providing for discretion if it won't be applied?

The solution requires a broader look at the relative roles of the various stakeholders in the procurement cycle. A policy that focuses only on the procurement professional is bound to fail. While the procurement agent's success is generally measured by a smooth and timely process, the success of the technical staff or program manager is measured by the quality of the outcome. Thus, it is usually the technical staff that can provide judgment on what is and is not material in the process and what will contribute most to the quality of the outcome. Procurement policy cannot ignore the role of technical staff and the importance of their commitment and integration into the process. The weight of the roles of these two stakeholders will vary according to the stage of the procurement cycle with heavy input from technical experts during design versus the heavy input by the procurement expert during the bid/award process. And the contract management stage represents the stage in which there is disagreement or lack of clarity over the relative roles. The next section further expands on the roles of the procurement and technical staff as well as the other stakeholders in the procurement process.

WHERE DO I FIT IN?

The last point of the previous section raises the question of roles. If there is one lesson to be learned from the procurement experiences of the past decades, it is that the responsibility for procurement requires inputs beyond those of the procurement professional. We have tended increasingly to add to the load of the procurement staff, complacently placing more and more objectives onto the process and delegating responsibility for aspects well beyond the scope of that person's expertise. The reform frameworks of the IFIs do not touch upon this critical issue; rather, they look at capacity in procurement to be an upgrading of the skills of the expert. In reality, the comprehensive governance agenda as discussed in this paper—covering the quality of outcomes as well as fiduciary aspects incorporating all stages of the process—requires the active engagement of all the stakeholders involved, and each must recognize and address their role in the whole procurement cycle.

The Procurement Expert

There is a recognition that procurement requires a professional stream and due accreditation. Presently there are independent efforts to set standards and provide accreditation but it is far from taking hold worldwide, especially in developing countries. Even within the IFIs, there is a need to upgrade staff skills to be able to handle the range of modes of procurement in the toolkit in order to advise client countries. The profession is quickly changing, and staff preparation has fallen behind. This contributes to the risk-averse reluctance to apply flexibility even when the policy allows.

The procurement expert considers his or her job done when the contract is awarded. It is hard to believe that such an expert would not be involved in ensuring that the contract is carried out according to what was agreed and to learn lessons from implementation to help guide future procurement. This is not to assign the primary burden for such implementation to the procurement expert (as some technical staff might argue), but rather to ensure they take a role and an interest in such oversight and evaluation.

The Technical Expert

A holistic perspective on the procurement cycle, including the design and setting of specifications and contract management, clearly indicates the important role that only the technical expert can play at key stages in the cycle. Procurement for information technology is different than procurement for pharmaceuticals, which is different from procurement for roads. The technical expert should understand the nature of the market and the important elements required to ensure the quality of the outcome. One would expect the technical expert to provide the professional judgment on what is material and what is not from a sectoral perspective. While the procurement expert is the virtual keeper of the rulebook, it is the technical expert that is key to applying effective discretion.

Moreover, the technical expert oversees project implementation, with a responsibility to ensure that contract management is consistent with expectations, that controls are in place to protect against corruption, and that the terms continue to be relevant to quality outcomes. This refers to technical experts in the country as well as in the IFIs. In the earlier days of the IFIs, with most funding going toward infrastructure and a staff complement of engineers to match, the supervision function (now referred to as implementation support) was carried out by the IFI engineer who incorporated both technical and procurement expertise. In today's IFI, with fewer engineers on board and a broader sectoral focus beyond infrastructure, a technical expert tends to steer clear of procurement.

The active engagement and commitment of the technical staff to the procurement function and cycle is absolutely essential. It is not that they need to be experts in procurement but that they are knowledgeable and engaged. It is unfortunate that most if not all university programs for development practitioners and policymakers exclude any exposure to procurement, despite the fact that all of those who ultimately enter such fields will face this issue at some point in their careers.

The Government

The incentives that drive the procurement process are set by government. The government sets the rules and determines the accountability and related indices. If the focus is on turnaround time and minimum number of complaints, the procurement staff will focus accordingly. If it focuses incentives and accountability on the outcomes and recognizes the whole cycle, the results could be different. The World Bank's updated strategy for governance states the need for "…an operational policy framework that is less focused on transaction-based compliance and a corporate culture that provide incentives for both candor in the discussion of risks, and innovation and appropriate risk-taking for long-term development impact."[67]

Most importantly is how the government actions contribute to the credibility of the process. Procurement needs to be seen as a core element in good governance. By encouraging and supporting transparency and the role of civil society, government can enhance credibility. By further supporting auditing, investigative functions and effective legal remedies, governments can deter fraud and corruption and permit greater discretion.

The IFIs and the Donor Community

Although IFI and donor funding for development represents a declining share of government expenditures, the impact of these institutions can still be significant in setting the standard, promoting credible approaches that balance fiduciary responsibility and the quality of the outcomes, and offering technical assistance and capacity building. This requires adopting policies that represent the best practice in procurement adapted to the needs and context of the individual country and client institution. This also requires that the IFIs and donor community ensure the competency of their staff and the transparency of their mode of operation.

The IFIs and the donors also must address the issue of risk aversion by staff. It seems evident that the efforts to promote accountability and fight corruption have had an effect on the ground. But it has also caused a reaction in avoiding decision-making and pushing issues up the chain of command. While some of this can be addressed through better training and preparation and greater collaboration between technical and procurement staff, there is a need to clearly define the appetite for risk. Development aid is naturally risky business; otherwise, the private sector would have filled the void. But when management is unclear about what it means by "informed" risk-taking and "zero tolerance," it should not be surprised at the response of staff. Similarly, the aid community should be more strategic and targeted in its fights against corruption. Rules and procedures should be continuously reviewed to determine effectiveness.

Finally, the IFIs and the donor community need to move beyond simply disclosing information and look at the accessibility of the information they are disclosing. The true impact of their disclosure policies will be determined by the accessibility of the information by all types of stakeholders. Transparency in procurement is meaningless without attention to this issue.

The Private Sector

The private sector worldwide has largely benefitted from the procurement policies of the IFIs and donors. The opening and maturing of markets and the expansion of participants have been the greatest contribution of these policies. There will be further benefits to upgrading the systems and practices of the developing countries beyond the transactions of the IFIs and donors. While there is support for moving beyond price to incorporate more value-for-money variables in the award equation, there is also a reluctance to lose the comfort of the IFI presence to monitor processes.

The private sector can do more to explore ways to encourage innovation through procurement. It can also help to define industry standards that would normalize approaches to life-cycle costing and green procurement for various sectors. This assumes that developing country views are adequately represented. Both the IFIs and the private sector must encourage more interaction to address the challenges of applying a VfM approach.

Lastly, the private sector can do more to promote transparency and integrity. Active involvement of the private sector in initiatives such as CoST and Open Contracting can be the key ingredient to enhancing credibility and reducing cynicism surrounding public procurement.

Civil Society

Over the last 10 years, there have been an increasing number of initiatives to engage civil society and related organizations in the monitoring of procurement. A major focus has been on watching over the bid and award process. But where there is more opportunity for effective monitoring is with regard to contract implementation and management. As more information is made available and more accessible, civil society organizations will have greater opportunities to fill an important oversight gap on this crucial stage. There are extensive examples underway with regard to small-scale infrastructure investments for community development. There is less experience with larger scale investments but the potential benefits should be high.

A major issue to overcome with such monitoring is finance. In the past there were concerns that government financing would lead to conflicts of interest or at least the perception of conflicts. Another option is financing by the IFIs, but conflict of interest concerns affect the credibility of such funding as well. A good option is donor funding. But this is generally unsustainable for extended periods as such budgets cannot be guaranteed from year to year. The best option would seem to be a category for funding under a project for which financing is made for the duration of the project via a trust fund of donors not directly involved in the project. A second best option would be a fund financed by government but independently managed.

What this section emphasizes is that the key to addressing public procurement as the Achilles' heel of governance is the broad commitment and participation of all stakeholders.

CONCLUSIONS

The management of public expenditure is widely recognized as a crucial element in the governance agenda. Yet public procurement, which determines how expenditure plans are to be implemented and by whom, is often ignored or at best misunderstood by those other than the procurement experts and related lawyers. It is viewed through a limited governance lens as a major source of fraud and corruption and managed through an extensive set of rules and procedures focused on bid and award. Adopting a broader governance perspective that focuses on the desired outcomes of the procurement process would result in more robust set of policies and procedures that recognize the essential balance between compliance and discretion. Doing this, however, requires a "holistic" approach to the procurement process as well as the active commitment and involvement of a broad range of stakeholders.

The premise of this paper is that the development community, for all its emphasis on results and outcomes, continues to view and measure procurement in terms of inputs and outputs. There is little if any discussion about how the outcomes of investments were either helped or hindered by the procurement process. Were the specifications correct? Was the bidding process appropriate? Did the contract execution meet the expectations?

An outcomes-approach represents a substantial departure from the current IFIs' policy and raises serious implications for the discussion and framing of the new policy and related guidelines. Among the key elements that should be incorporated are the following:

- The quality of outcomes should be recognized as an overarching objective of the policy and not simply one of several parallel principles;
- The scope of the policy should include the upstream stage of design as well as the downstream stage of contract execution in addition to the focus on the bid and award stage;
- The issue of compliance should be addressed and analyzed for all stages of the procurement cycle in terms of impact on procurement outcomes and cost effectiveness;
- The exercise of discretion should be seen as an essential exercise of one's professional training, experience, and responsibility. The policies and guidelines need to concretely address this crucial aspect;
- The responsibilities for the procurement cycle must incorporate the roles of others beyond the procurement expert.

In the end, advancing good governance through procurement is about more than policies—it is about people. It is about empowering all stakeholders by raising understanding, fostering participation, and ensuring clarity of purpose.

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