

Title : Use of Reviewer approach (juridical data) to strengthen the integrity and effectiveness of public procurement

Submitted by :

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Background

Public Procurement refers to the purchase by government and state-owned enterprises of goods, services and works.[1] The process is the sequence of activities starting with assessment of needs through awards to contract management and final payment.[2] Public Procurement is the buying of goods and services on behalf of a public authority, such as a government agency. Governments spend public monies to secure inputs and resources to achieve their objectives and by doing so, create significant impact on key stakeholders and wider society.

Public Procurement in Nepal

Public Procurement Act was adopted by Nepal in the year 2007 having objective to make legal provision in order to make the procedure, processes and decisions relating to public procurement much more open, transparent, objective and reliable.[3] Furthermore, enactment of law aims to obtain the maximum returns of public expenditures in an economical and rational manner by promoting competition, fairness, honesty, accountability and reliability in public procurement processes.[4] Lastly, the act aims to ensure good governance by enhancing the managerial capacity of procurement of public entities in procuring, or causing to be procured, construction work and procuring goods, consultancy services and other services by such entities and by ensuring the equal opportunity for producers, sellers, suppliers, construction entrepreneurs or service providers to participate in public procurement processes without any discrimination.

Nepal Public Procurement Strategy Framework Phase II (2003-2016) has stipulated following seven guiding principles:[5]

1. Coordination - Coordination and collaboration with stakeholders
2. Transparency - Transparency in transaction
3. Fair (Competition) - Sound and fair environment
4. Value for Money - Public procurement for value for money
5. Efficiency and effectiveness - Development of professional skills, knowledge and experience and effective implementation of procurement legislation
6. Accountable - Accountability and responsibility to the public
7. e-governance - ICT based procurement management

Review of Public Procurement

In context of Nepal, the Public Procurement Act, 2007 has envisioned Public Procurement Monitoring Office along with Public Procurement Monitoring Committee for having an ordinary jurisdiction to hear the issue related to public procurement. Once an entity or person is procured if there is any legal or constitutional challenge in the procurement notice or decision then the case can also be heard at High Court and Supreme Court of Nepal under extra-ordinary jurisdiction or writ jurisdiction. Furthermore, there are disputes between procured and public entity being adjudicated by Arbitration body and forum. Lastly, in some instances the corruption and abuse of power in course of procurement has been reported to Ombudsman, i.e., Commission on Investigation of Abuse of Authority (CIAA). In short, the jurisdiction of reviewing the decision of public procurement has been provided to following institutes :

- Ordinary Jurisdiction : Public Procurement Monitoring Office and Public Procurement Review Committee
- Extra Ordinary Jurisdiction : High Court and Supreme Court
- Alternative Dispute Resolution : Arbitration
- Ombudsman Jurisdiction : Commission on Investigation of Abuse of Authority (CIAA)

Approach :

Following approach shall be adopted to **use the juridical data to strengthen the integrity and effectiveness of public procurement**

1. Use random purposive sampling method and select 30% cases of all jurisdiction mentioned above having limitation of year of study from 2007 to 2016.
2. Amongst *obiter dicta* and *ratio decidendi* in the selected cases, the attempt shall be made to study the juridical data on the basis of following parameter(s) :
 - a) Formalities and procedural fairness
 - b) Mandates and limitation of law
 - c) Corruption and Transparency
 - d) Market Fairness (Competitiveness)
 - e) Doctrine of Necessity and National Security
 - f) Value of Money
 - g) Competitive Fairness
 - h) Efficiency and Effectiveness in goods and Services
 - i) Accountability
 - j) Constitutionality and Fundamental Rights
 - k) Public Interest
3. The data obtained after aforementioned parameter based analysis shall be presented so as to show alert and caution (flag indicator)

Outcome

Upon completion of the aforementioned approach the possible outcome can be :

- a) Review of Juridical data and attitude of reviewer
- b) Formulate the indicator which are the basis of reviewer to review such cases
- c) Establish indicators
- d) Devise Red-Flagging Mechanism
- e) Formulate a Policy Paper

Beneficiary

The data, red-flagging mechanism and policy paper shall be beneficial to :

1. Public entity which will engage in procurement - to avoid the flaws in procurement decision which is subject to review later
2. Entity or person or bidder who will render service or provide goods or construction activities -- to avoid flaws in bidding application or contract which is subject to review later
3. Entity and Bidder - to find out legal parameter which ought to be careful about

[1] <http://www.oecd.org/gov/ethics/public-procurement.htm>

[2] <http://www.oecd.org/gov/ethics/public-procurement.htm>

[3] Preamble, Public Procurement Act, 2007.

[4] Ibid.

[5] Nepal Public Procurement Strategy Framework Phase II (2013-2016),
http://ppmo.gov.np/image/data/files/SBD/PPMO%27s%20NPPSF%20Phase%20II_Final%20Report.pdf