Public Procurement Regulation in Bangladesh: A Preliminary Analysis[†]

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Abstract

Bangladesh's public procurement law has sought to ensure transparency, accountability and fairness in government procurements. Whether its accountability-goal has been satisfactorily achieved is, however, a debatable issue. I will argue that the procurement rules are somewhat de-effected both by bureaucratisation and technical avoidance of the rules. On the other hand, the judiciary does not follow a robust review of public contracts. With this background in mind, I will analyse the Bangladeshi procurement laws and practices with a view to fathom 'accountability' in public procurements. I conclude by urging for simplified rules, more circumscribed administrative discretion, and a robust but principled judicial review of procurement decisions. This has been a theoretical study, based on primary and secondary sources of knowledge.

I. Introduction

Public procurement involves acquisition through contracts of goods, works, or services required by governments. In such a public activity, transparency on the part of the given government is of higher value, which public law tends to promote. In Bangladesh, public procurement contracts have been a major source of corruption in the administration. Bangladesh's recent public procurement law, the Public Procurement Act 2006 (hereafter "PPA"), has thus sought to ensure transparency and accountability and 'fairness' in government or public purchases. Despite the procurement rules that have by and large followed international

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standards,[1] the accountability-goal of the Bangladeshi procurement regime has not become optimally successful. As this paper will show, this might be attributed both to over-bureaucratisation and technical avoidance of the rules themselves. The discretion given to procuring entities in choosing one or the other methods of procurement along with ineffective systems of appeals and review of procurement decisions appears to be a potential defect in the system. On the other hand, the judiciary has not developed a searching review of public contracts, thereby effectively leaving out certain government procurement decisions out of the bounds of judicial constitutional review.

In this backdrop, in what follows I will analyse the Bangladeshi procurement laws and attendant judicial responses, and to assess whether they have been successful in attaining the goals of competition, accountability, and fairness. At the outset, it needs to be mentioned that academic literature on public procurement in Bangladesh seems to be almost non-existing. There actually is no scholarly writing on this important subject, apart from a few reports and bare statues and rules, a gap which this paper seeks to address. Consequently, this literature-gap is a factor that produces limitations for the present paper in that the analysis below remains relatively new in Bangladesh and without insights from pre-existing debates and resources.

II. The Public Procurement Regime in Bangladesh

There are no direct provisions in the Constitution of the People's Republic of Bangladesh[2] that concern public procurement or right to honest and open governance. Despite the absence of direct constitutional provisions, the institutional and legal frameworks for public procurement, which are of recent origin, can be seen to have derived their legitimacy from the Constitution.

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[1] Although the Act of 2006 makes no reference to the UNCITRAL model law, its enactment has largely been inspired and influenced by the UNCITRAL Model Law on Procurement of Goods, Construction and Services 1994 (adopted in 26th and 27th sessions of the UNCITRAL in 1993 and 1994). The Term UNCITRAL stands for the United Nations Commission on International Trade Law.

[2] Adopted on 4 November 1972, Bangladesh's Constitution came into force on 16 December 1972.

The Constitution vests the executive powers of the Republic in the Prime Minister,[3] who in the discharge of governance functions takes support and advice from a Cabinet. The Constitution, however, mandates that all powers of the state must be exercised on behalf of the people and only under the authority of the Constitution.[4] The above provisions of the Constitution and the nation's foundational values[5] confirm that good governance (or rule of law) imperatives are constitutionally inherent, which undoubtedly bind the public procurement regime. The recently enacted Right to Information Act 2009[6] which requires information delivery systems to be set up in government departments to ensure the citizens' right to have information about their rights or entitlements can be regarded as a major contribution towards establishing a transparent public procurement regime.

The public procurement system in Bangladesh is decentralized. However, while every single department can procure services or goods, it is the Ministry of Finance and the Ministry of Planning which have distinct responsibilities *vis-à-vis* public procurement.[7] For example, to facilitate an efficient and open system of public procurement the Central Procurement Technical Unit has been working since 2002, providing for, among other things, information and technical know-how required in public procurements.[8] On the other hand, the Ministry of Finance issues,

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[3] Constitution of the People's Republic of Bangladesh, Article 55(2).

[4] *Ibid*. Article 7.

[5] The Preamble to the Constitution enumerates four basic constitutional principles: absolute trust in the Almighty Allah, nationalism, democracy, and socialism. The other national aim is to establish a democratic society based on the rule of law, justice, equality, and fundamental human rights and freedom.

[6] Notified on 6 April 2009, the RTI has been put into effect since 20 October 2008 (the day on which the RTI Ordinance 2008 was promulgated). A broader framework concerning public procurement in Bangladesh can be derived from the Contract Act 1872, the Sale of Goods Act 1930, and the Arbitration Act 2001.

[7] The powers and responsibilities of various ministries and government agencies are allocated by virtue of Rules of Allocation of Business 1996, promulgated by the President under Article 55 (6) of the Constitution.

[8] Please visit: <www.cptu.gov.bd>. The CPTU is an administrative cell under the Implementation, Monitoring and Evaluation Division (IMED) of the Ministry of Planning of the Government of Bangladesh. Since 2006, the CPTU has been acting under the legal basis given to it by the PPA 2006, s. 67.

from time to time, instructions as to financial powers which public entities may exercise in procuring goods or services.

A. *The Developments Towards the Public Procurement Act 2006*

Two principal legal instruments to deal with public procurement are the Public Procurement Act 2006 (PPA)[9] and Public Procurement Rules 2008 (PPR). Until the enactment of the PPA in 2006, the legal regime was based on procedures and practices that date back to the British era. For example, the *Compilation of General Financial Rules* (CGFR), originally issued under the British rule, broadly outlining the principles governing government contracts remained the primary legal framework for public contracts and procurements (World Bank, 2002).[10] Building on CGFR principles, several government departments and autonomous public bodies and corporations developed their own rules and codes of practices for public contracts and largesse to follow.[11] Interestingly, these regulations were greatly influenced by international development agencies and banks such as the World Bank, partly because Bangladeshi public procurements tended to rely mostly on external aid.[12]

Although the primary objective of the pre-1996 legal instruments was to ensure openness and transparency, the process in practice was far from satisfactory. The following factors were widely regarded as having contributed to the then tardy and dilatory procurement system: poor advertisement, inadequate bidding period, poor specifications, non-disclosure of selection/competition criteria, award of contract by lottery without having developed the tools of attracting quality bidders, conclusion of one-sided contract documents, negotiation with all bidders, re-bidding without adequate grounds, corruption and outside influences such as political interventions, and, so on.[13] The so detected poor

[9] Act No. 24 of 2006.

[10] The CGPR was once revised in 1951 during Pakistani rule and was reissued in Bangladesh in 1994 and 1999 with minor changes (World Bank, 2002).

[11] The CGPR allowed the public departments to frame procurements rules of their own. Two such codes of procurement rules, both framed in the 1930s, are: (i) the *Manual of Office Procedure (Purchase)* compiled by the Department of Supply and Inspection, and (ii) the Public Works Department (PWD) Code.

[12] World Bank (2002), as in note 10 above.

[13] *Id.*

performance of the public procurement regime drew the attention of many, including, as said, the international bodies. A World Bank-led assessment of the existing public procurement policy, legal frameworks, and institutions concluded with a finding of the aforementioned drawbacks in the procurement.

In the face of escalating concerns for streamlining the country's public procurement system, the government undertook an array of reforms in order to strengthen the regime.[14] The reform processes ultimately led to a unified procuring system under the Public Procurement Regulations in 2003. The PPR 2003 was supplemented by Public Procurement Processing and Approval Procedures (PPPA), a revised Delegation of Financial Powers (DOFP) and several Standard Tender Documents (STDs) and Standard Request for Proposal Documents for the procurement of goods, works and services. Further later, in order to intensify the improvement measures in the public procurement system, the Parliament enacted the much desired law, the PPA 2006 and PPR 2008 replacing the PPR 2003.

B. *Legal Framework of Public Procurement in Bangladesh*

Procurement systems share some common objectives such as value for money, fair treatment, non-discrimination, integrity, and social and industrial development (Arrowsmith, 2004: 18). In terms of employing transparency and competition, the procurement laws in Bangladesh are no exception. The preamble to the PPA 2006 says that the objective of this law has been to provide for procedures ensuring transparency and accountability in the procurements using public funds and equal treatment, free and fair competition amongst all persons participating in public procurements. While considerable flexibility is given to government departments, accountability remains at the core of concerns of the public procurement legal regime, as the preamble to the PPA shows.

In the PPA, the term 'procurement' has been broadly defined to include purchasing or hiring of goods or acquisition of goods through

[14] The World Bank assessment, styled as the Country Procurement Assessment Report (CPAR), disclosed its findings in 2001, identifying a number of deficiencies in the procurement regime of Bangladesh.

hiring and purchasing, execution of works and performance of any services by any contractual means.[15] Section 7 aims at widening the scope of the Act covering government, semi-government and statutory public bodies, other procuring entities that use public funds, and even companies that procure by using public funds, and any procurement under any loan, grant, or credit agreements with development partners.

1. *Methods of Public Procurement*

The PPA provides for several methods of procurement, prescribes rules to determine pre-qualification of the potential/participating bidders if applicable, leverages for competition amongst the tenders, segregates the procurement processes into stages and separates the procurements into domestic and international classes.

For domestic procurements, the preferred method prescribed is the open tendering method (OTM).[16] However, alternative procurement methods are also allowed subject to fulfilment of statutory conditions with the permission of the head of procuring authority and on technical and economic grounds. These alternative methods are: limited tendering method (LTM), direct procurement method (DPM), two-stage tendering method (TTM), and the request for quotation method (RQM). For example, LTM applies when suppliers of goods or services are limited in number or the time and cost required to receive and evaluate tenders would outweigh the value of the contract.[17] Direct method is allowed when, for technical reasons, only one tender is available, or for additional procurement of goods or services from the original supplier/contract, or for procurements of very urgent and essential nature.[18] Request for Quotation method may be used for off the shelf low value goods or

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[15] The PPA, s. 2(7). Interestingly, the Act envisages both 'public' and 'government' procurements, defining public procurement as procurement using public funds while government procurement is defined as public procurement by government 'procuring entities'.

[16] The PPA 2006, s. 31, broadly lays down the principles of this method.

[17] Section 32(1)(a), *ibid.*, provides for three grounds on which this method may be resorted to.

[18] The PPA 2006, s. 32(1)(b). There are 6 reasons for following this method.

physical strives available in the market or for the procurement of goods for urgent repairs or maintenance.[19] Two stage tendering methods may be followed for complex and large projects or when complete technical specifications may not be possible at one stage or where alternative solutions are available in rapidly evolving industries.

Similar processes and requirements for international procurements are made mandatory by the Act with certain significant differences to maintain standards and competition.[20] For example, in an international procurement through open tendering method technical specifications should be made in a way that conforms to international standards.[21] Moreover, in case of international procurements joint ventures with local partners by foreign suppliers/contractors may be encouraged but must not be imposed as a condition. Also, it is mandated that provisions for alternative dispute resolutions should be incorporated in the contract.[22]

In general the law provides the authority with wide discretionary power in terms of determining whether to procure locally or internationally and the method of procurement. Although, there are a number of statutory requirements operating as preconditions for specific procurement methods; the procuring authority enjoys unfettered power in preferring one method to the other. For example, it has been a condition precedent to taking 'limited tendering method' if and only if the subject matters, by reason of their specialized nature, are available only from a limited number of suppliers/contractors, local or international, as the case may be. In the absence of specification of exhaustive preferential guidelines, there are open chances for abuse by procuring entities of the discretion to prefer one particular method to the other.

The law also provides for 'emergency flexible purchases'. Section 68 of the PPA provides that in order to meet a national urgency or a

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[19] *Ibid.*, section 32(1)(d).

[20] For provisions concerning methods of local and international procurements for intellectual and professional services, see sections 37-39 of the PPA 2006.

[21] *Ibid.*, section 33.

[22] The PPA 2006 also provides that in such cases international arbitration should be made applicable for final resolution of disputes.

catastrophic event, the government in the public interest and with the recommendation of the Cabinet Committee on Economic Affairs may procure goods/services on an urgent basis by following the direct purchase method or any other method as provided in s. 32 of the Act.

It should be noted with emphasis here that the government preserves the power to exempt procurements from the operation of the PPA 2006 in the interest of national security and defence. Although the defence purchases in Bangladesh are also subject to the PPA and PPR as well as internal audit at the Defence Services, there is inadequate information about them in general and about large defence procurements in particular. This gap should be considered while initiating reforms in public procurement regime.

2. *Processes of Public Procurement*

Public procurements in Bangladesh, to be brief, are processed mainly through a four-tier process: (i) advertising the invitations for tenders/ quotations, (ii) evaluation, (iii) approval, and (iv) awarding of contract.

The first step for a procuring entity to take is to advertise[23] invitations for Pre-Qualification (IFPQ), Invitations for Enlistment (IFE), Invitations for Tender (IFT) and Request for Expressions of Interest (REI) concerning the procurement. The advertisements, following prescribed formats and maintaining the timeframe, are to be published in at least two widely circulating daily news papers, in choosing which the entity should apply 'sound judgment,'[24] and also in the procuring entity's website, if any. It means that having a website is still not mandatory.

Secondly, the procuring entity may opt for inviting only pre-qualified applicants in which case there is a list of such applicants drawn through the prescribed rule. A procuring entity may undertake pre-qualification for a number of large and complex procurements[25] such as

[23] For rules regarding publication of advertisements, see s. 40 of the PPA 2006, and rule 90 of the PPR 2008.

[24] In order to ensure 'wider distribution and transparency', the entity may advertise in a higher number of newspapers. See rule 90(e), PPR 2008.

[25] As per rule 91, PPR 2008.

construction works, maintenance works, design and so forth, subject to consideration of the merits and demerits of pre-qualification (PQ). PQ applications are opened by Tender Opening Committee (TOC), which shall then be evaluated by the tender evaluation committee (TEC) that may be supported by a Technical Sub-committee constituted by the Head of the procuring entity.[26]

The next step is the opening of tenders. There is a tender/proposal opening committee in each procuring entity. Following the deadline of submitting tenders, the procuring entity convenes the meeting for tenders-opening. Tenders are required to be opened promptly and publicly at the time and place specified in the IFT.[27] Thereafter, the evaluation committee evaluates the tenders on the basis of pre-disclosed criteria and technical specificities.[28] The members of evaluation committee, which need to be constituted fairly/transparently,[29] have to sign a declaration of impartiality, and certify that evaluation has been made in accordance with the rules of the Act. TEC sends its report along with recommendations to the Approving Authority and, the Approving Authority makes its decision as to whom to award the contract.[30] As a matter of rule, the lowest evaluated tender being the 'responsive tender', that is the one which does not meaningfully alter or depart from the technical specifications,

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[26] As per rule 91 (9), *ibid.*, if the number of pre-qualified applicants is below the legal minimum, "conditional Pre-Qualification" may be permitted. An applicant who substantially meets the qualification criteria apart from some minor deficiencies may be considered as "conditionally pre-qualified".

[27] Tenders are opened in presence of the tenderers or their representatives and no later than one hour after expiry of the submission deadline: rule 97, PPR 2008.

[28] There is an evaluation committee in each procuring entity in respect of a particular procurement or for all procurements in a given time. Rule 98 (2) says that "[t]enders shall not be evaluated on any basis other than the criteria specified in the ender Documents".

[29] See rules 8-9, PPR 2008.

[30] In or concerning each procuring entity, there is an approving authority, which is a higher body in rank that actually approves a given tender which has been evaluated. The approving authority may be a Minister of any concerned Ministry or may be the Cabinet Committee for Government Purchase. As per s. 8 of the PPA, the approving committee may consider the recommendations of the evaluation committee, or may, in the circumstances of a given case, decide to have the tender/ proposal re-evaluated.

characteristics and commercial terms and conditions of the Tender Document, becomes the successful tender.[31] A notification of award is then issued to the successful tenderer within one week of the approval of the award, attaching therewith the contract with detailed terms and conditions.[32]

Importantly, the powers of the approving authorities are limited in terms of the value of the contract to be awarded. Known as delegation of financial powers, a statutory instrument clearly delimits the procurement value and method involved and respective authority empowered to approve the same.[33] For example, in a project or work of more than taka 500 million, the procuring entity may purchase goods of taka 15,000 directly, *i.e.*, without following the quotation method.

C. *General Principles of Procurement*

The Act also provides for public accessibility to procurement documents and related papers, the issuance of standard documents, and framing of one yearly procurement plan with regard to development budget and another plan concerning procurements under revenue budget.[34]

The procurement regime being premised on the principle of non-discrimination the procuring entity is under an obligation not to prevent any tenderer from entering into procurement processes on the ground of race, colour, sex or any other ground.[35] The procuring entity has an obligation to facilitate competition by making available to all concerned all relevant information. To facilitate competition, the procurement entity has to disclose well in advance the required qualification or standards of performance. Importantly, a minimum time for the applicant/tenderer to respond has been mandated.[36] There is also a general prescription as not to split a single procurement into several packages, unless it is extremely

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[31] See the PPR 2008, rule 98(2).
[32] *Ibid.*, rule 102.
[33] See the Ministry of Finance's (Finance Division) miscellaneous order no. 76/02/682 of 11 September 2004.
[34] The PPR 2008, chapter 3.
[35] See PPA 2006, s. 25.
[36] *Ibid.*, s. 13(1) & (2).

urgent and unavoidable. It also provides that the 'validity period' of the procurement process/tender (from advertisement to awarding of contract), should be reasonable. The rules relating to deposit of security money, rate of charges of services, and deduction and rejection of deposited amount in case of unsuccessful bidding, have to be clearly specified.

A procurement entity has a duty to maintain the confidentiality of the whole process. Further, any person's attempt to influence the process shall lead to the rejection of his pre-qualification, tender, or proposal.[37] However, following the signing of a contract with the tenderer, the winning tenderer may have necessary information about his application. Any other tenderer may seek for information as to why his or her application or tender was unsuccessful. The procurement entity is obliged to maintain records and to administer efficient management of the contract awarded, and to conduct post-procurement review within nine months of each fiscal year.[38]

III. Rules-Compliance and the Legal Control of Procurement Decisions

The government has the general responsibility of monitoring the compliance, by all government bodies concerned, of the rules and prescriptions provided for in the PPA and the PPR 2008.[39]

The PPA 2006 and PPR 2008 set out rules of professional conduct and ethics in order to achieve the objective of legality and transparency in public procurements. No one engaged in (government) procurement is allowed to contravene the provisions of the Act and the PPR. Any public officer or employee who acts in contravention of the Act or Rules 2008 is made amenable to departmental punitive actions on the ground of 'misconduct' as defined in the disciplinary rules applicable to government servants.[40] Additionally, or as an alternative, criminal

[37] *Ibid.*, s. 18.

[38] *Ibid.*, s. 24.

[39] *Ibid.*, s. 67. The monitoring is conducted through Central Procurement Technical Unit of the Ministry of Planning.

[40] The PPA made reference to rule 3(b) and 3(d) of the Government Servants (Discipline and Appeal) Rules 1985. See PPA 2006, s. 64(3).

prosecutions may also be initiated for appropriate offence(s) of corruption of embezzlement of public funds.[41] As the most lenient consequence, debarment from further participation in procurement may be declared by the head of the given procuring entity. Section 64 of the PPA, read with rule 127 of the PPR, keeps room for debarment of unreliable or untrustworthy tenderers from procurement processes for misconduct in public procurement, or fraudulent or collusive practices.[42] Practically, a number of contractors or bidders have been debarred by concerned procuring entities for varying periods from taking part in public procurement processes.[43] Apart from debarment, defaulted suppliers or contractors are also amenable to other civil and criminal penalties, inclusive of cancellation of advance or 'security money' or suit for un-liquidated damages and contractual penalties. Under the PPA, the procuring entities have power to withdraw or rescind 'work order', for any serious fraud and collusion.

Notably, the PPA also imposes an obligation on the procuring entity to ensure that none of its officials or members of staff is engaged in corrupt, fraudulent, collusive or coercive practices during the processes of public procurements.[44] Set as the basis for best practices of ethical behaviour for people engaged in public procurement, the Code of Ethics aims at enhancing efficiency, competition, transparency and accountability in public procurement.[45]

There is a right on the part of any aggrieved applicant/tenderer to lodge formal complaint against any irregularity such as corrupt practices, insufficient time for the tenderer to respond, inadequate documents and

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[41] This may be either in accordance with the Prevention of Corruption Act 1947, or/ and the Penal Code 1860. See, PPA 2006, s. 64(4).

[42] Before the new legal regime, 'debarment' was provided for by the Public Procurement Regulations 2003, regulation no. 15.

[43] For example, *Contech Devices Pvt. Ltd, India* has been debarred on the ground of its fraudulent activities from participation in procurement by the Directorate General of Family Planning for a period of 10 years from 18 January 2010 to 17 January 2019. For a list of debarred companies, see <www.cptu.gov.bd/DebarmentList.aspx>.

[44] See PPA 2006, s. 64(2).

[45] See the Code of Ethics for Public Procurement 2007, attached as Schedule XII to the PPR 2008.

so forth done by the procuring entity during or through the several processes of public procurement. Generally speaking, according to rule 57 of the PPR, an aggrieved participant in the procurement process may challenge the action by the procurement authority by way of an appeal to the administrative authority on the ground that the entity failed to discharge obligations under the Act.[46] The complaint must, however, be lodged with the administrative authorities in a hierarchical order, starting, for example, from the project manager to the head of procuring entity and to the Secretary of the concerned ministry. Having remained dissatisfied, the complainant may then bring the complaint to the 'Review Panel', an expert body consisted of legal and technical experts in public procurement.[47] This is actually the last and the fourth step in the internal complaints mechanism ladder.[48]

Decisions of the review panel are, however, subject to judicial review by the Supreme Court's High Court Division (HCD). To make this and the other complaints processes further clear, a Supreme Court case under the old Public Procurement Regulation 2003 may profitably be cited here. In *St Electronics Pvt Ltd v Patimas Sdn Berhad and Others* (2008),[49] *Patimas International* along with two other companies competed in an international bidding of tenders involving works at the Central Bank and was evaluated as the lowest bidder. When *Patimas* was awarded the contract, another bidder, *St. Electronics Pvt Ltd.*, made several complaints to the authorities in which process the Review Panel held that *Patimas*'s bid was 'non-responsive', holding *St. Electronics* as the lowest eligible bidder by default. Against this, *Patimas* sought for a judicial review for the annulment of the Review Panel's decision on the ground, among others, that its bid was responsive and the Panel's decision breached the natural justice principle. It was also argued that the complainant, *St. Electronics*, did not follow all the remedial avenues before lodging the complaint with the Review Panel. The High Court

[46] See PPA 2006, s. 29.

[47] See, for details, rules 56-60 of the PPR 2008.

[48] As CPTU's website reports, "there are four (4) tiers in the complaints submission ladder..." The first three layers are complaints: (i) to concerned officer of the Procuring Entity, (ii) to the Head of Procuring Entity, and (iii) to the Secretary of the concerned Ministry. The fourth tier is thus an appeal to the Review Panel.

[49] (2008) 16 BLT (AD) 70. [BLT= Bangladesh Law Times; AD= Appellate Division].

Division annulled the impugned decision, holding that *Patimas's* bid was responsive. A 'leave to appeal' application against this judgment was summarily rejected by the Appellate Division.[50]

It should be noted here that no appeal lies in cases concerning the methods of procurement, a refusal to short-list any person as a qualified person, rejection of tenders/proposal, and awarding of contract with the approval of the Cabinet Committee on Government Purchase. Arguably, these broad-based exceptions can be said to be a block to the goal of accountability.

This may also be noted that as per rule 42 of the PPR 2008, the procuring authority or the contractor/the contract-awardee may terminate the contract for certain specified reasons. Importantly, rule 42 also provides that any disputes or claims arising out of the implementation of the (procurement) contract shall be resolved chronologically through amicable solutions, adjudications, and arbitration in accordance with provisions laid down in the contract.

To briefly turn to the issue of judicial control of procurement decisions, judicial review of public procurement decisions is possible as the *St. Electronics* case (above) shows. But a caveat should be entered here, which is that despite recent opening up of a small space in the Supreme Court's jurisprudence for the review of public contracts as well as the possibility of public interest challenges of outsourcing of public works,[51] Bangladesh's top courts are still largely conservative in reviewing public procurement/outsourcing contracts unless they are what they call "statutory" contracts.[52] For example, in *Syed Arif Niazi v Bangladesh*

[50] For the decision, see *ibid.*, (2008) 16 BLT (AD) 70.

[51] See, for example, *Engineer Mahmud-ul-Islam v Govt. of Bangladesh* (2003) 23 BLD (HCD) 80, in which case the High Court Division struck down the government decision to award a contract to a foreign private company to construct container terminals at the Chittagong Port on the ground of opaqueness and non-transparency in public functioning.

[52] It refers to contracts concluded under the authority of any statute. See *Ananda Builders Ltd v Bangladesh Inland Water Transport Authority* (2005) 57 DLR (AD) 37.

and Others (2008) the High Court Division held that a 'simple' contractual right cannot be enforced against a public functionary through a 'writ petition', *i.e.*, judicial review proceeding.[53]

We are constrained to be brief on the point of constitutional review of government contracts, but it would suffice to say that for ensuring accountability in public procurements, a robust judicial review of government contracts can hardly be overlooked, and the Bangladeshi Supreme Court should fundamentally shift its treatment of these contracts largely as 'private' affairs of the State.

IV. A Brief Critique of the Bangladeshi Public Procurement Regime

The above clearly shows that the Bangladeshi procurement rules have sought to attain the objective of accountability, competition, and fair dealing. The procurement processes in Bangladesh are fraught with demerits of over-bureaucratisation, complex and lengthy procedure with unguided discretion, discouraging thereby genuine tenderers or potential participants and fostering practices of corruption. Corruption in Bangladesh has indeed been a major problem for business and efficiency in the administration, and thus calls for special attention while reforming the public procurement regime.[54]

According to a newly inserted provision of law that has appeared much controversial, in case of domestic procurement of works through limited bidding method involving a value of not more than TK. 20 million, list of contractors should be prepared beforehand and preserved but previous experiences of the contractors are not necessary in determining

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[53] (2008) 60 DLR (HCD) 209, 212 (distinguishing this case from *Managing Director, Dhaka WASA*, below note 61) (the petitioner asked for a judicial review of the cancellation of a lease of property by a government agency).

[54] According to a recent report, corruption is the second major problematic for business. See World Economic Forum (2010), *Global Competitiveness Report 2009/2010*, at p. 82.

their 'personal capacity'.[55] This provision allowing wide discretionary power to overlook lack of experiences of certain contractors involving works of a prescribed financial value is highly likely to generate a scope for corruption or nepotism. Although, big and complex projects and purchases/hiring definitely need high-ranking policy-making bodies, the multiple layers involved in the approval and review processes of procurement including from a junior-ranking public servant to the Cabinet Committee makes the procedure highly complicated. Reduction of approving authorities to a minimum number would facilitate cost-effective and prompt public procurements.

The mechanisms to oversee the post-award progress of contracted works are not ideally rigorous. The process of debarment of contractors for default or breach of procurement rules is not sufficiently transparent and participative.[56] Also, availing of other ordinary remedies against a recalcitrant supplier or contractor under the contract law is not without problems, costs, and delays. There is no office of Ombudsman in Bangladesh, generally empowered to investigate into charges of offences in public offices, nor is there any centralized Ombudsman-like office to oversee government purchases. Appreciably, however, Parliament through its public accounts committee and the standing committee on public undertakings can potentially control financial corruptions or corruptions through public procurements. The experiences are, however, quite different from this possibility. While the relevant parliamentary committees continue to stand as a mode of surveillance over government procurements, there are practical problems (Ahmed 2006), both political

[55] See newly inserted section 26(1) of the PPA 2006 (as amended by the Public Procurement (Second Amendment) Act 2009, with effect from 12 November 2009). Surprisingly, procurements to a substantial degree have recently been reported to have been made even without inviting tenders, *i.e.*, ignoring the PPA and PPR altogether.

[56] Section 64 of the PPA keeps room for debarment of unreliable or untrustworthy tenderers from procurement processes for misconduct in public procurement, or fraudulent or collusive practices. The law does not, however, make it clear whether can the argument by a company of self-cleaning be a successful defence to debarment (as the company is in the process of riding itself of elements/practices that led it to misconduct). For the application of 'self-cleaning' in public procurement systems, see generally Puender *et al* (2009).

and legal, that have retarded effective parliamentary supervision of public procurements. Theoretically, the Anti-Corruption Commission (ACC) can prosecute government officials that might be responsible for bribery or embezzlement of public money in the process of procurements or contracting out. As is the case with parliamentary committees, Bangladesh's ACC is plagued with bureaucratic hindrance and with the problem of non-independence to some extent, causing the system to be non-responsive to accountability needs.

It also becomes apparent that although the existing procurement documents are by and large of a good standard, there is a lack of adequate professional competence on the part of the public officials involved in the process. There is only one centralized technical unit at the disposal of the government, which, though has so far trained a good number of people, has been unable to provide technical support to an increasingly greater member of staff and entities engaged in public procurements.

The existing review and appeal processes are exceedingly bureaucratic, and multi-layered, discouraging an aggrieved tenderer/ applicant to seek legal remedies. As seen above, for the same legal injury a potential participant can have resort to a plurality of channels without exhausting which the courts can not also easily be availed of. On the other hand, the judicial constitutional review of public contracts has not yet become robust enough. In order to achieve greater accountability and efficiency in the existing procurement system, there should be installed a systematic mechanism for administrative reviews and appeals. More importantly, the higher judiciary should adopt the public law approach towards scrutinizing public contracts arising from procurement decisions.

The current Bangladeshi procurement regime provides for the possibility of electronic government procurement (E-GP), which has not yet been made mandatory. One does not need to press hard to make the point that, by making E-Procurement including the payment through electronic devices compulsory, the state of administrative accountability

could have been strengthened to a significant degree.[57] The legal rules provide the public officials and procuring entities too much discretion to apply in choosing the method or modes of procurements.

V. Conclusion

This paper has argued that despite a modern procurement law in Bangladesh, the level of accountability, transparency and efficiency in public procurements is still far from satisfactory.

Needless to say, public procurement policies or systems are inherently complex (Snider & Rendon, 2008) but are society-specific. Despite certain global standards, procurement policies of any given country often go through changes. In the light of above analyses, it can be said that Bangladeshi procurement laws too have certain limitations which should be overcome in order to achieve wider accountability.

On a general level, taking the experience of some Southeast Asian nations, Jones (2007: 3) identified some common problems with public procurement systems: "*fragmented procurement procedures; the lack of professional procurement expertise; the absence of open, competitive tendering, especially for foreign suppliers; widespread corruption; and the lack of transparency*". He found two twin challenges the states under his review needed to meet – the need to reinforce the recent procurement reforms and to translate them into actual practices (Jones, 2007). These observations ring true also for Bangladesh's public procurement system. At present, the challenge that faces Bangladesh is to make its public procurement regime more transparent and operational through simplifying the procedures, and also by encouraging the officials concerned to avoid bureaucratic dilatory practices but not at the cost of transparency.

Further, in order to exercise an effective control over public resource-allocative decisions and to ensure administrative accountability,

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[57] It is reported that the government has recently decided to introduce electronic tendering system in four government entities such as the Rural Electrification Board and the Local Government Engineering Department. See the *Prothom Alo*, Dhaka, 15 May 2010, at p. 17, also available at <www.prothom-alo.com>.

the judiciary needs to seriously review public contracts or any decision involving public procurements.

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