

PUBLIC PROCUREMENT LAW IN BANGLADESH: FROM BUREAUCRATISATION TO ACCOUNTABILITY

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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. The author argues 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 searching review of public contracts. In this background, the author analyses the Bangladeshi procurement laws and practices with a view to fathoming 'accountability' in public procurements urges for simplified rules, more circumscribed administrative discretion, and a robust but principled judicial review of procurement decisions.

I. INTRODUCTION

Public procurement involves acquisition through contracts of goods, works, or services required by governments. In such a public activity therefore transparency on the part of the given government is a 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 (*hereinafter* PPA), has thus sought to ensure transparency and accountability in public contracts and 'fairness' to the participants in government or public purchases. Despite the procurement rules that have by and large followed international standards,¹ the accountability-goal of the Bangladeshi procurement regime has not become optimally successful. As this paper shows, this might be attributed both to over-bureaucratisation of procurement processes and technical avoidance of the Rules themselves. Also, in some cases, 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

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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 UNCILTRAL stands for the United Nations Commission on International Trade Law.

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.

With this backdrop, in what follows I analyse the Bangladeshi procurement laws and attendant judicial responses, and to assess whether they are successful in attaining the goals of competition, accountability and fairness in public procurements. At the outset, it needs to be mentioned that academic literature on public procurement in Bangladesh seems to be almost non-existent. There actually is no scholarly writing on this important subject apart from few reports and bare statutes and Rules, a gap which this paper seeks to address. Contrarily, this literature-gap is a factor that produces limitations for the present paper in that the analyses below remain 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 Bangladesh² that concern public procurement. Nor is there explicitly provided a right to honest and open governance. The Constitution has, however, expressly entrenched such basic values as the rule of law, democracy, and justice, which can be interpreted to be the sources of public obligation of integrity in state activities. Despite the absence of direct constitutional provisions, the institutional and legal frameworks for public procurement in Bangladesh, which are of recent origin, can be seen to have derived their legitimacy from the Constitution of Bangladesh.

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 executive organ of the state has thus the constitutional competency to enter into and award public contracts for the purpose of procuring goods and services. The above provisions of the Constitution and the nation's foundational values⁵ confirm that good governance (or rule of law) imperatives are constitutionally inherent, which undoubtedly bind the public procurement

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

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

⁴ See *id.*, 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.

regime. Also importantly, the recently enacted Right to Information Act, 2009,⁶ which requires an information delivery system to be set up in government departments, and ensures the citizens' right to have information about their rights or entitlements, can be regarded a major contribution towards establishing a transparent public procurement regime.

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 some distinct responsibilities vis-à-vis public procurement.⁷ For example, to facilitate an efficient and open system of public procurement in Bangladesh, the Central Procurement Technical Unit (*hereinafter* CPTU) 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 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, 2006⁹ and Public Procurement Rules, 2008 (*hereinafter* PPR). Until the enactment of the PPA in 2006, the legal regime of public procurement in Bangladesh was based on procedures and practices that date back to the British era. For example, the Compilation of General Financial Rules (*hereinafter* CGFR), originally issued under the British Rule, which broadly outlined the principles governing government contracts remained the primary legal framework for public contracts and procurements.¹⁰ Building on CGFR principles, several

⁶ Notified on April 6, 2009, the RTI has been put into effect since October 20, 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 The CPTU is an administrative cell under the Implementation, Monitoring and Evaluation Division (*hereinafter* 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, §67 - Central Procurement Technical Unit, available at <http://www.cptu.gov.bd> (Last visited, August 31, 2010).

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, *Bangladesh: Country Procurement Assessment Report*. Report No. 24144-BD, Procurement Services, South Asia Region (May 11, 2002).

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

Despite the fact that the primary objective of the pre-1996 legal instruments was to ensure openness and transparency in the public procurement system, the procurement process that was 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, nondisclosure 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 performance of the public procurement regime in Bangladesh 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 just-mentioned drawbacks in the procurement.

In the context of escalating concerns for streamlining the country's public procurement system, the government undertook an array of reforms in order to strengthen the public procurement regime.¹⁴ The reform process ultimately led to the making and issuance of Public Procurement Regulations in 2003, providing a unified procurement processing system. 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 House of the Nation enacted the

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), *supra* note 10.

¹³ *Id.*

¹⁴ The World Bank assessment styled as the Country Procurement Assessment Report (*hereinafter* CPAR) disclosed its findings in 2001, identifying the following deficiencies in the procurement regime of Bangladesh: the absence of a sound legal framework governing public procurements; complex bureaucratic procedures causing delay; the absence of planning; multiple layers in the PPR, oval and review process; lack of adequate professional competence on the part of the members of the staff to manage public procurements; poor bidding documentations and poor biddings evaluation; faulty/ineffective awarding of contract; and the absence of adequate mechanisms for ensuring transparency and accountability in the public procurement processes.

much desired law, the PPA, 2006. Under the Act of 2006, the PPR, 2008 was framed and issued, which replaced the Public Procurement Regulations, 2003 which until then continued to have effect.

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.¹⁵ Generally, competition and transparency are widely regarded as the two principles which are utilized to achieve these objectives. In terms of employing these principles, the procurement laws in Bangladesh are no exception. The Preamble to the PPA, 2006, for example, says that the objective of this law has been to provide for procedures to be followed for ensuring transparency and accountability in the procurement of goods, works and services using public funds and for ensuring equal treatment and a free and fair competition amongst all persons wishing to participate in public procurements. While considerable flexibility is given to government departments with regard to purchases and contracting, accountability remains at the core of concerns of the Bangladeshi public procurement legal regime as the preamble to the Procurement Act projects.

In the Act of 2006, the term ‘procurement’ itself has been broadly defined to include purchasing or hiring of goods or acquisition of goods through hiring and purchasing, execution of works and performance of any services by any contractual means.¹⁶ §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 Act provides for several methods of procurement, prescribes rules to determine prequalification of the potential/participating bidders, if applicable, leverages for competition amongst the tenders, and stages of the procurement processes. The Act divides the procurement into domestic and international classes.

As for the domestic procurement of goods, related services and works, the preferred method prescribed is the open tendering method (*hereinafter*

¹⁵ Sue Arrowsmith, *Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard* 53 INTERNATIONAL & COMPARATIVE LAW QUARTERLY, 17 (2004).

¹⁶ See The PPA, 2006, §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’.

OTM).¹⁷ However, procurement methods alternative to the OTM are also allowed with the permission of the head of procuring authority and on technical and economic grounds. These alternative methods are: limited tendering method (*hereinafter* LTM), direct procurement method (*hereinafter* DPM), two-stage tendering method (*hereinafter* TTM), and the request for quotation method (*hereinafter* RQM). There are essential conditions that need to be met before taking resort to each of these alternative methods. 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.¹⁸ 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 the procurement of goods, services, and works of very urgent and essential nature.¹⁹ RQM may be used for off the shelf low value goods or physical strives available in the market or for the procurement of goods for urgent repairs or maintenance.²⁰ 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 (such as open tendering, limited tendering, quotation method, and the two-stage tendering method) and requirements for international procurements are made mandatory by the Act with certain significant differences to maintain standards and competition.²¹ For example, in an international procurement through open tendering method, technical specifications should be made in a way that conforms to international standards.²² 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.²³

It should be noted here that the law gives a wide leverage to decide whether to procure locally or to resort to an international procurement. Further importantly, although the law provides for certain conditions to be fulfilled in order for any procurement method to be conforming to the statutory requirements, it ultimately depends on the discretion of the procuring authority to follow one or the other method. This needs further specification. For example, it has been a

¹⁷ See *id.*, §31, broadly lays down the principles of this method.

¹⁸ *Id.*, §32(1) (a), provides for three grounds on which this method may be resorted to.

¹⁹ See *supra* note 16, §32(1)(b). There are 6 reasons for following this method.

²⁰ *Id.*, §32(1) (d).

²¹ See *id.*, §§37-39: For provisions concerning methods of local and international procurements for intellectual and professional services.

²² *Id.*, §33.

²³ The Act of 2006 also provides that in such cases international arbitration should be made applicable for final resolution of disputes.

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. It thus may be argued that despite the existence of administrative control mechanisms, there are open chances for the abuse by procuring entities of the discretion to prefer one particular method to the other.

The law also provides for ‘emergency flexible purchases’. §68 of the PPA provides that in order to meet a national urgency or a 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 §32 of the PPA.

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 big and complex defence procurements in particular. This gap in the legal control of defence procurements 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 advertise²⁴ for Invitations for Pre-Qualification (IFPQ), Invitations for Enlistment (IFE), Invitations for Tender (IFT) and Request for Expressions of Interest (REI) concerning the procurement of goods, services, works and intellectual services. The advertisements, following prescribed formats and maintaining the timeframe, are to be published in at least two widely circulating daily newspapers, in choosing which the entity should apply ‘sound judgment’.²⁵ It is important to note that all invitations shall also be advertised 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

²⁴ See *supra* note 16, §40 and PPR, 2008, Rule 90, for Rules regarding publication of advertisements.

²⁵ See PPR, 2008, Rule 90(e). In order to ensure ‘wider distribution and transparency’ the entity may advertise in a higher number of newspapers.

prescribed rule. A procuring entity may undertake pre-qualification for a number of large and complex procurements²⁶ such as construction works, maintenance works, design and build infrastructure, and so on. However, a procuring entity has a duty to carefully consider the merits and demerits of pre-qualification before initiating the pre-qualification process for procurement of goods or works. 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.²⁷

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.²⁸ Thereafter, the evaluation committee of the procuring entity evaluates the tenders on the basis of pre-disclosed criteria and technical specificities and by following the rules and principles of procurement.²⁹ The members of evaluation committee, which need to be constituted fairly/transparently,³⁰ have to sign a declaration of impartiality, and the committee is to certify that evaluation has been made in accordance with the rules of the Act. The TEC sends its report along with recommendations to the Approving Authority and, the Approving Authority shall make its decision as to whom to award the contract.³¹ 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, characteristics and commercial terms and conditions of the Tender Document, becomes the successful tender.³² A notification of award is then issued to the successful tendered within one week of the approval of the award by the Approving Authority, attaching therewith the contract with detailed terms and conditions.³³

²⁶ See *id.*, Rule 91.

²⁷ *Id.*, per Rule 91(9), 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".

²⁸ See PPR, 2008, Rule 97. Tenders are opened in presence of the tenderers or their representatives and no later than one hour after expiry of the submission deadline.

²⁹ There is an evaluation committee in each procuring entity in respect of a particular procurement or for all procurements in a given time. See PPR, 2008, Rule 98(2), "[t]enders shall not be evaluated on any basis other than the criteria specified in the tender Documents".

³⁰ See PPR, 2008, Rules 8-9.

³¹ 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 §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.

³² See the PPR, 2008, Rule 98(2).

³³ *Id.*, Rule 102.

Importantly, the powers of the Approving Authorities are limited in terms of the value of the contract to be awarded, i.e., the value of works, goods, and services to be procured. Known as delegation of financial powers, a statutory instrument clearly defines which authority can authorize the procurement of which value and also by following which method of procurement.³⁴ For example, in a project or work of more than ₹ 500 million, it may purchase goods of ₹ 15,000 directly, i.e., without following the quotation method.

C. GENERAL PRINCIPLES OF PROCUREMENT

The Act also provides for general guidelines. It provides for public accessibility to procurement documents and related papers, the issuance of standard documents, and for the framing of one yearly procurement plan with regard to development budget and another plan concerning procurements under revenue budget.³⁵

The procurement regime in Bangladesh is 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.³⁶ The procuring entity has an obligation to facilitate competition by making available to all concerned, all relevant documents, assessment criteria, and the process for evaluation of tenders/proposals, and so on. To facilitate competition, the procurement entity has to disclose well in advance the required qualification or standards of performance which it could require the tender to have possessed and to demonstrate. Importantly, giving of a minimum time for the applicant/tenderer/ to respond has been mandated.³⁷ There is also a general prescription as not to split a single procurement into several packages, unless it is extremely urgent and unavoidable. It also provides that the 'validity period' of the procurement process/tender, that is the time-frame within which the whole process, beginning from the advertisement to the awarding of contract, should be reasonable so that all necessary approvals be obtained by the procuring entity and the contract may be awarded. The law also mandates that the rules relating to deposit of security money, rate of charges of services, and whether any security money so deposited is to be later deducted or rejected in case of unsuccessful bidding, have to be clearly specified.

A procurement entity has a duty to maintain the confidentiality of the process from opening of tenders up to awarding of a contract. Further, any person's attempt to influence the process shall lead to the rejection of his pre-qualification, tender, or proposal.³⁸ However, following the signing of a contract with the tenderer,

³⁴ See the Ministry of Finance's (Finance Division) Miscellaneous Order No. 76/02/682, September 11, 2004.

³⁵ The PPR, 2008, Chapter 3.

³⁶ See *supra* note 16, §25.

³⁷ *Id.*, §13(1) & (2)

³⁸ *Id.*, §18

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.³⁹

III. RULES-COMPLIANCE AND THE LEGAL CONTROL OF PROCUREMENT DECISIONS

While everyone concerned is under an obligation to comply with procurement rules, 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, 2006 and the PPR, 2008.⁴⁰

At the level of rules of ethics and professionalism, 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 of goods, works, or services is allowed to contravene the provisions of the Act and the PPR, 2008 in conducting a procurement process. 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.⁴¹ Additionally, or as an alternative to the Departmental measures, criminal prosecutions may also be initiated against such a recalcitrant officer/employee for appropriate offence(s) of corruption or embezzlement of public funds.⁴² As the most lenient consequence, debarment from further participation in procurement of any officer/employee found involved in twisting or contravening the provisions of the PPA/PPR may be declared by the head of the given procuring entity. §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.⁴³ Practically, a number of contractors or bidders have been debarred by concerned procuring entities for varying periods from taking part in public procurement processes.⁴⁴ Apart from debarment, defaulted suppliers or

³⁹ *Id.*, §24.

⁴⁰ *Id.*, §67. The monitoring is conducted through Central Procurement Technical Unit of the Ministry of Planning.

⁴¹ The PPA, made reference to Rule 3(b) and 3(d) of the Government Servants (Discipline and Appeal) Rules 1985. *See* PPA, 2006, §64(3).

⁴² This may be either in accordance with the Prevention of Corruption Act 1947, or/and the Penal Code, 1860. *See*, PPA, 2006, §64(4).

⁴³ Before the new legal regime, 'debarment' was provided for by the Public Procurement Regulations 2003, regulation no. 15.

⁴⁴ *But see, e.g.* Contech Devices Pvt. Ltd, India has been debarred on the ground of its fraudulent activities from participation in procurement by the Directorate General of

contractors are also amenable to other civil penalties and criminal penalties. These might include cancellation of advance or ‘security money’ or simply a suit for unliquidated damages and contractual penalties under the contract law. Under the PPA the procuring entities do have a power to withdraw or rescind ‘work order’, i.e., the contract 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.⁴⁵ The existing procurement law has, thus, sought to prevent corrupt practices likely to be adopted both by the government officials and the participating entities/persons.

In addition to the concrete legal provisions, all government officers or private individuals involved directly or indirectly in any given procurement, such as the suppliers/tenderers, are also to abide by the Code of Ethics prescribed by the government. 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.⁴⁶

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 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.⁴⁷ 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 consisting of legal and technical experts in public procurement.⁴⁸ This is actually the last and the fourth step in the internal complaints mechanism ladder.⁴⁹

Family Planning for a period of 10 years from January 18, 2010 to January 17, 2019. For a list of debarred companies, See <http://www.cptu.gov.bd/DebarmentList.aspx> (Last visited on August 31, 2010)

⁴⁵ See PPA, 2006, §64(2).

⁴⁶ See the Code of Ethics for Public Procurement, 2007, attached as Schedule XII to the PPR, 2008.

⁴⁷ See PPA, 2006, §29.

⁴⁸ See, for details, Rules 56-60 of the PPR, 2008.

⁴⁹ 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.

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 Berhard and Ors.*,⁵⁰ 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 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.⁵¹

It should be noted here that no appeal lies in the following 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 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,⁵² Bangladesh's top courts are still largely conservative in reviewing public procurement/outsourcing contracts unless they

⁵⁰ (2008) 16 BLT (AD) 70.

⁵¹ For the decision, *see id.*, (2008) 16 BLT (AD) 70.

⁵² *See Engineer Mahmud-ul-Islam v. Govt. of Bangladesh* 23 (2003) BLD (HCD) 80 (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).

are what they call ‘statutory’ contracts.⁵³ For example, in *Syed Arif Niazi v Bangladesh and Ors.*, 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.⁵⁴

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 PROCURMENT REGIME

The aforesaid clearly shows that the Bangladeshi procurement Rules have sought to attain the objective of accountability, competition, and fair dealing vis-à-vis public contracts or the awarding of state largesse.⁵⁵ Despite every sincere effort of the law, the procurement processes in Bangladesh are fraught with demerits of over-bureaucratisation. The Rules and processes are exceedingly lengthy, causing delays and thereby discouraging genuine and performing tenderers or potential participants. The complex bureaucratic procedures underpinned by open-ended legal discretion may foster practices of corruption. Corruption in Bangladesh has indeed been a major problematic for business and efficiency in the administration, and thus calls for special attention while reforming the public procurement regime.⁵⁶

A source of corruption in public procurements might be, for example, the administration’s discretionary power to overlook lack of experiences of certain contractors involving works of a prescribed financial value. 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

⁵³ 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.

⁵⁴ (2008) 60 DLR (HCD) 209, 212 (distinguishing this case from *Managing Director, Dhaka WASA, infra* note 61) (the petitioner asked for a judicial review of the cancellation of a lease of property by a government agency).

⁵⁵ (2008) 60 DLR (HCD) 209. Apart from the provisions of the law discussed above, other Rules are also directed towards attaining these objectives. For example, to ensure competition amongst the participant in procurement processes all concerned documents are required to be made ready for issue or sale to interested applicants/tenderers by the time of the appearance of the advertisements. Also, to achieve the goal of fair treatment, it has been provided, among other things, that unsuccessful applicants have a right to be informed of the grounds for its exclusion. *See PPR, 2008, Rule 93(19)*.

⁵⁶ According to a recent report, corruption is the second major problem for business. *See World Economic Forum, Global Competitiveness Report 2009/2010* (2010) 82.

more than ₹ 20 million, list of contractors should be prepared beforehand and preserved but previous experiences of the contractors are not necessary in determining their 'personal capacity'.⁵⁷ This provision is highly likely to generate a scope for corruption or nepotism. As seen above, there are multiple layers in the approval and review processes of procurements. There is a line of approving authorities starting from a junior-ranking public servant to the Cabinet Committee. Big and complex projects and purchases/ hiring definitely need high-ranking policy-making bodies. Nevertheless, reduction of approving authorities to a minimum number would facilitate cost-effective and prompt public procurements.

There are mechanisms to oversee the post-award progress of contracted works, but those mechanisms are not ideally rigorous. Although the procuring entities are empowered to debar any contractors found to be in default of, or breaching procurement Rules and professional standards, the process is not sufficiently transparent and participative.⁵⁸ Also, availing of other ordinary remedies against a recalcitrant supplier or contractor under the contract law is not without problems, costs, and delays. It is pertinent here to also note that Bangladesh has not yet established the office of Ombudsman generally to investigate into charges of corruption in public offices. Nor is there any centralized Ombudsman-like office to oversee government purchases, unlike the one (the Tax Ombudsman) in the revenue sector of the country. Appreciably, however, Parliament has at its hand a monitoring system to control public expenses and financial irregularities in public offices. Through its public accounts committee and the standing committee on public undertakings, Parliament 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,⁵⁹ both political and legal, that retarded effective parliamentary supervision of public procurements. On the final note on the existing mechanisms of checking corruption in public procurements, reference could be made to prosecution of government officials that might be responsible for bribery or embezzlement of public money in the process of procurements or contracting out. Theoretically, the Anti-Corruption Commission (ACC) can prosecute such offenders and, as discussed above, there are legal checks against them as provided

⁵⁷ See newly inserted §26(1) of the PPA, 2006 (as amended by the Public Procurement (Second Amendment) Act, 2009, with effect from November 12, 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.

⁵⁸ The PPA, §64: it 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). See generally PUENDER *et al* (eds.) SELF-CLEANING IN PUBLIC PROCUREMENT LAW (2009) (For the application of 'self-cleaning' in public procurement systems).

⁵⁹ NIZAM AHMED, LIMITS OF PARLIAMENTARY CONTROL: PUBLIC SPENDING IN BANGLADESH (2006).

for in the PPA and PPR. 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. For example, as the law now stands, the ACC cannot prosecute any government official without prior approval of the government. This is sure to have negative impacts on the accountability of public officials engaged in government procurements.

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 who often engage in government procurement processes to manage public procurements. There is only one centralized technical unit at the disposal of the government, which, although it has so far trained a good number of public officials, cannot simply effectively provide technical support to an increasingly greater member of staff and entities engaged in public procurements. This undoubtedly has an impact on the efficiency and accountability of the system.

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 and the one legal injury a potential participant can have resort to a plurality of channels without exhausting which the courts cannot 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.

Also notably, in some cases the rules are notoriously rigid and cost-ineffective. For example, sometimes, even for the purchase of a low volume of goods, the procuring entity needs to publish advertisements to invite quotations, which may lead to a purchase costlier than ordinary market value.⁶⁰ In the same vein, when the rules disallow procurements valued beyond a monetary ceiling without permission of a higher approving authority, the concerned entity may split the purchase into several slots. This needs further explanation. To take the example of application of financial power of procuring body, described in part 2.2 above, when a procuring authority may not purchase goods valued at more than ₹ 15,000 without advertising and approval of the higher authority, it might tend to purchase goods of ₹ 15000 through a direct purchase method in several stages. This scope for avoidance of rules may negate the accountability goal that the procurements rules want to ensure.

⁶⁰ Although the relevant Rule (Rule 90(e) PPR) allows for a reduced size of advertisements to save money, this is simply not enough in many cases.

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.⁶¹

Also notable is the legal rules that provide the public officials and procuring entities too much discretion to apply in choosing the method or modes of procurements. For example, the rules regarding conditions for national and international procurements and direct and tendering methods are so loosely worded that the authorities may prefer one method to another. For the sake of ‘accountability, these leverages need reconsideration.

V. CONCLUSION

For Bangladesh’s social and economic development, there is no alternative to good public governance. An important yardstick of good governance is a system of efficient and accountable public procurement. 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 complex⁶² 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 of the government in procurements.

On a general level, taking the experience of some South-east Asian nations⁶³ has helped to identify 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”. In the context of these failings, he found two twin challenges that the states under his review needed to meet — the need to reinforce the recent procurement reforms,

⁶¹ 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, May 15, 2010, available at www.prothom-alo.com (Last visited on 31 August, 2010), 17.

⁶² Keith F Snider & R.G. Rendon, *Public Procurement Policy: Implications for Theory and Practice*, JOURNAL OF PUBLIC PROCUREMENT, 8(3): 310-33, (2008).

⁶³ David S. Jones, *Public Procurement in Southeast Asia: Challenge and Reform*, JOURNAL OF PUBLIC PROCUREMENT, 7 (1): 3-33, (2007).

and to translate them into actual practices.⁶⁴ 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, the judiciary needs to seriously review public contracts or any decision involving public procurements.

⁶⁴ *Id.*

