

## REFORMING PUBLIC PROCUREMENT IN THE PHILIPPINES: PROGRESS AND CONSTRAINTS

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**ABSTRACT.** In recent years the Philippines government has introduced reforms to deal with the longstanding shortcomings of its procurement system. The reforms focused on, in relation to procurement, fostering competition, increasing transparency, standardizing procedures, enhancing end-product quality and contractor reliability, ensuring proper planning and budgeting, combating corruption, and strengthening accountability. Whilst the reforms in theory have created a procurement system in line with international best practices, they have all too often been undone by serious weaknesses in the system of implementation, as revealed by continuing widespread corruption in day-to-day procurement practices. The paper will examine the reforms and consider how and why such failings in implementation, as indicated through widespread corruption, have occurred.. In conclusion, the paper will relate the reasons for such failings, as evidenced by widespread corruption, to two features of the Philippine civil service: a) a long established culture of informal influence in decision-making at the expense of rule compliance; b) elite capture of the policy implementation process by powerful political, business and family networks to favor their own financial and business interests.

### INTRODUCTION

After the overthrow of President Marcos in 1986, a new constitution in the Philippines was adopted in the following year. After nearly 15 years of autocratic rule, this laid the foundation for a new democratic political order. Under the more open and representative system of government, attention was focused on the low standards of governance that had hitherto characterized policy making and public administration in the Philippines. The features

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were waste, inefficiency, lack of transparency, widespread corruption, low levels of capacity, and the absence of accountability. Public procurement was as much affected as other sectors of public administration, resulting in poorly resourced public services and an under-developed infrastructure (World Bank [WB], 2008: 8).

A wide range of measures have been implemented to remedy these shortcomings. Amongst them have been reforms to improve the system of public procurement, the centerpiece of which have been the Government Procurement Reform Act of 2003 (GPRA) and its Implementing Rules and Regulations (IRR's). The intention was to create a system of procurement in line with international standards (WB, 2008: 8-9). Priority was given, in relation to procurement, to fostering competition, increasing transparency, standardizing procedures, enhancing end-product quality and contractor reliability, ensuring proper planning and budgeting, combating corruption, and strengthening accountability. Whilst the reforms on paper have created a procurement system in line with international best practices, they have all too often been undone by serious weaknesses in the system of implementation, as revealed by continuing widespread corruption in day-to-day procurement practices.

The paper will examine the organization, process and methods of public procurement in the Philippines as stipulated in the procurement laws and regulations and in the procurement instruction manual. It will consider the reforms to improve the system of procurement, focusing on the GPRA and its IRR's, as well as other measures to combat procurement-related corruption and increase the accountability of procuring entities. The paper will then consider how and why the impact of the reforms has been undermined by weaknesses in implementation, signified through continuing widespread corruption in the procurement process. In conclusion, the paper will relate the reasons for the lack of effective implementation to a long established culture of informal influence in the Philippine state bureaucracy and of elite capture of policy implementation processes by powerful and well-established networks of families that dominate the business and political life of the country. The paper will draw upon a range of sources. These include the reports and data of the Philippine government agencies, those of various international organizations, findings of survey organizations, relevant statutes and regulations, and the procurement manual and the bidding documents of the Government Procurement Policy Board of the Philippines., as well as academic studies of corruption in the Philippines.

## SYSTEM OF GOVERNMENT AND ADMINISTRATION IN THE PHILIPPINES

The 1987 Constitution established a democratic form of government in the Philippines based on the presidential-congressional model in the United States. It functions on the basis of checks and balances between three co-equal and separate branches of government: the executive, legislature and judiciary. At the head of the executive is the President, who is also head of state, supported by the Vice-president, and a cabinet appointed by the President comprising mainly political heads of the executive departments, known as secretaries. The President and Vice-president are each elected in separate elections, which are themselves separate from elections to the legislature. Each incumbent serves a single fixed term of six years. The legislature comprises the congress, which is bi-cameral, consisting of a 24 seat senate (upper house) and house of representatives (lower house), presently comprising 240 seats. Senators serve a six year terms while representatives 3 year terms.

There are four main types of institution in the state bureaucracy of the Philippines. At the core are 17 executive departments directly under the control of the executive, and various constitutional and specialist commissions (both commonly referred to as national government agencies). In addition, currently 78 government-owned or controlled corporations exist, many of which provide basic services and engage in business-related activities. Some of them are stock corporations in which the government, through its holding companies, owns all or the majority of the shares. Others are non-stock corporations. All are governed by a board of directors, and though raising their own revenue, most continue to rely upon government subsidies. At the local level, public services are delivered and certain types of infrastructure project undertaken by local government units. These are organized into three tiers: provinces (plus the autonomous region of Mindanao) at the highest level, which are divided into cities and municipalities, each of which is sub-divided into barangays (local councils). Under the civil service decree, all of these organizations are counted as part of the civil service, including somewhat surprisingly government-owned or controlled corporations and local government units (De Leon, 2002; Brillantes, 2009: 186-206; Government of the Philippines [GOP], 2010).

The size of the state bureaucracy is not excessive by international comparison. The payroll at the end of 2009 totaled 2,891,000 (just over 8 per cent of the working population) including those working in government-owned or controlled corporations, local government units, the police force and teaching service. Of this number, 1,774,000 are engaged in "public administration, defense and social security"

(Bureau of Labor and Employment Statistics, 2010). Total government expenditure was a modest 16.8 per cent of GDP at the outturn of 2008, dropping steadily from 19.3 per cent in 2000 (ADB, 2009a: 260). Only two of the nine countries of Southeast Asia have a lower aggregate of public expenditure. The deficit of 5.3 per cent of GDP recorded in 2002 had been brought down to almost zero in 2008 (ADB, 2009a: 257). Despite the recent record of fiscal restraint and sound finance, subsidies to government-owned or controlled corporations, and general waste and inefficiency continue to be a drain on the public purse.

## **THE SYSTEM OF PROCUREMENT**

### **Organization of Procurement**

The system of public procurement in the Philippines is based on a conventional two tier structure. At one level, operational responsibility for procurements is delegated to the line agencies (national government agencies, state-owned or controlled corporations and local government units), which in performing this role, are known as procuring entities. In each procuring entity, management of the procurement is undertaken and the recommendation of the contract award is made by the bids and awards committee. Amongst the key tasks of the committee are to advertise an invitation both to apply for eligibility to bid and to submit a bid, conduct pre-bid conferences, determine the eligibility of prospective bidders, receive and open bids, conduct the evaluation of them, undertake the post-qualification process, recommend a contract award to the head of the procuring entity, and resolve bid challenges (GOP, 2009; Government Procurement Policy Board [GPPB], 2009a: 12-13; GPPB, 2009b: 14-127). The bids and awards committee is supported by a technical working group, consisting of suitably qualified personnel with technical, financial and legal expertise in the area relevant to a procurement. Its role is to help the committee in aspects of procurement which require such expertise, including drafting specification and contracts and evaluating bids (GOP, 2009; GPPB 2009a: 18-19).

Over and above the procuring entities is an umbrella body, known as Government Procurement Policy Board. It is responsible for the formulation of procurement policy, recommending amendments, when required, of the GPRA, as well as drafting and amending the IRR's. Also part of its brief is to draft and amend the generic procurement manual and standard bidding documents. Whilst not involved in day-to-day purchasing, the Board exercises supervision over procuring entities to ensure that they comply with the GPRA and

its IRR's, and other laws relating to procurement. Another part of its remit is to build up expertise in procurement by organizing and conducting training courses through its technical support office, that cover the legal, financial and technical aspects of the procurement process (Congress of the Philippines [COP], 2003; GOP, 2009).

The importance of the Government Procurement Policy Board is reflected in the fact that its membership largely consists of the secretaries of key executive departments. It is chaired by the secretary of the Department of Budget and Management, with the secretary of the National Economic and Development Authority designated as vice-chairman. Other positions on the Board are occupied by secretaries from a range of departments, as well as a representative from the private sector appointed by the President on the recommendation of the Board. Representatives from the Commission on Audit, and from other public bodies and private companies may be invited to serve as resource persons (GOP, 2009).

### **The Procurement Process**

The process followed in public procurement involves the following stages. At the outset, the procuring entity draws up an annual plan detailing all the approved procurements for the financial year, followed by a detailed drafting of specifications for each procurement. At the appropriate time, an invitation to apply for eligibility and to bid is advertised.

For the procurement of goods, one or more pre-bid conferences are conducted, which can be attended by all would-be bidders, in order to clarify specifications, tender procedures and other relevant matters, as well as to answer queries from those attending. After this, bids are submitted, consisting of three envelopes to be handed in at the same time: one containing application for eligibility to bid, a second containing technical proposals and the third the financial proposals. An eligibility screening is conducted, which focuses upon, amongst other things, the track record of the company, its financial standing, any commitment it may have to on-going contracts, and its fulfillment of nationality requirements. If any company fails to meet eligibility requirements, its bid proposals cannot be considered and its bid rescinded. In the case of infrastructure projects and consultancy services, the eligibility screening is undertaken separately from the tender and prior to the pre-bid conference. Those companies declared eligible are then required to submit only two envelopes: one containing the technical and the other the financial proposals (GOP, 2009; GPPB, 2009a: 45-47).

In all tenders, the technical and financial proposals are subject to a preliminary evaluation to check if all necessary documents and information have been submitted. A bidder will be disqualified if any of the required documents is missing or does not contain the information required. After this, a detailed evaluation of both sets of proposals is undertaken. This involves an assessment of the technical proposals to determine if they meet the specifications of the procurement. For those that do, the corresponding financial proposals are then considered and ranked based on price offered. In the case of goods and infrastructure procurements, “the lowest calculated bid” is then identified. For consultancy services, the “highest rated bid” is identified within a ranking based either on quality of the technical proposals only, or on both the quality of the technical proposals and price or fee offered. The “lowest calculated bid” or “highest rated bid” is then subject to a post-qualification check to confirm the validity, authenticity and accuracy of all documents and particulars submitted. If everything is in order, the bid is deemed “the lowest calculated responsive bid” or “highest rated responsive bid” and the bidder is awarded the contract (GOP, 2009; GPPB, 2009b: 57-58; GPPB, 2009c: 53-54; GPPB, 2009d: 58-59; GPPB, 2009e: 30-31).

### **Methods of Procurement**

All the normal methods of procurement may be used by procuring entities in the Philippines. Under the GPRA and its IRR's, the main method is the open tender, in which all interested suppliers and contractors are invited to apply for eligibility to bid, and to submit a bid. In cases of technically complex projects, the open tender may entail a two-stage bidding process. In the first stage the technical specifications may be broadly defined. On receipt of proposals and after negotiation with eligible or short-listed bidders, the specifications are revised and expanded. A second stage of bidding is then conducted based on the more detailed specifications, in which bidders submit revised proposals. The two-stage bidding process may too allow bids which are inadequate to be weeded out in the first stage with the remaining bidders invited to bid in the second round (GOP, 2009; GPPB, 2009a: 95).

Alternatives to open bidding, involving less or no competition, may be adopted in certain situations defined in the IRR's. These include limited source or selective tendering, in which only pre-selected suppliers are invited to bid, and shopping, applicable to low value and routine purchases, in which three or more pre-selected

suppliers are invited to submit price quotations. The maximum threshold for shopping is normally Philippine Peso (PhP) 500,000 (US\$11,000), but can be below this in smaller local government units. In addition, single source procurement may be undertaken. The main one is negotiated procurement in which the procuring entity, instead of adopting a tender, pre-selects one company who is awarded the contract after negotiation. Single sourcing can also be applied to simple and low value purchases, being referred to as direct contracting (GOP, 2009; GPPB, 2009b: 81-96; GPPB, 2009c: 73-77; GPPB, 2009d: 81-87).

### **REFORMS OF PUBLIC PROCUREMENT**

In response to the long standing failings in public procurement in the Philippines, reforms have been implemented in recent years. These are contained within the GPRA, the IRR's and an extensive procurement manual, as well as in measures to improve the accountability of the state bureaucracy and to combat corruption. The aims of these reforms will be discussed below.

#### **Creating a More Competitive System of Procurement**

Over the years, many of shortcomings in public procurement in the Philippines were due to the lack of a genuinely open and competitive system of procurement. A central aim of the GPRA and the IRR's is to establish this, so as to ensure value for money and fairness based on equal access. Both the GPRA and the IRR's stipulate open competitive bidding as the standard method of public procurement, while the IRR's states also that the bids and awards committees "shall evaluate all bids on an equal footing to ensure fair and competitive bid comparison" (COP, 2003; GOP, 2009).

Further enhancing competition are the restrictions and prohibitions placed on the various means that could be used by procuring entities to avoid competitive bidding. Of particular importance are the restrictions imposed on less competitive methods of procurement mentioned above - selective bidding, shopping, direct contracting, and negotiated procurement, as well as repeat orders and adjacent or contiguous projects. The range of situations in which these are permissible is narrowly and clearly defined, and entail circumstances in which it is obviously sensible and justified to avoid competitive tendering. For example, the conditions in which negotiated procurement is permitted, as stipulated in the IRR's, are two failed rounds of bidding, emergency cases, projects requiring "highly technical consultants", contiguous contracts, purchases

involving NGO and community participation, and small value purchases. For the most part, a clear elaboration is provided of each of these conditions. Competition is enhanced too by the strict prohibition on the splitting of contracts under the GPRA and its IRR's. Splitting involves dividing the quantity of a bulk item to be purchased into several smaller quantities. The value of the procurement of each quantity is thus reduced to the extent that a less a competitive form of procurement is permissible such as shopping or direct contracting (GPPB, 2009b: 59-65, 94).

Despite the strong commitment to competition under the GPRA and its IRR's, restrictions still remain on access to the procurement market for overseas firms. Apart from a few exceptions, for a business to be eligible to bid for the supply of goods and to provide consultancy services, 60 per cent of the ownership must be in the hands of Philippine nationals, with a further requirement that the actual delivery of consultancy service be undertaken by a Philippine national(s). In tenders for infrastructure projects, it is mandated that, in most cases, 75 per cent of the ownership of the company belongs to Philippine nationals (GOP, 2009; GPPB, 2009b: 43-45; GPPB, 2009c: 31-33; GPPB, 2009d: 34-35; GPPB, 2009e: 16).

### **Enhancing Procurement Planning and Budgeting**

Another reform under the GPRA was to establish a mandatory framework of procurement planning and budgeting. Hitherto, government agencies often did not draw up detailed yearly procurement plans, since there was no legal obligation to do so. Those that did, did not then always adhere to them. Without proper planning, there was little way of determining whether the procurements were compatible with the policy priorities of the procuring entity and how much of its capital and current budgets to earmark for them. A consequence of the latter was that approved procurements were not undertaken or projects were abandoned or delayed for lack of sufficient funds (WB, 2003: 22, 28; GOP, 2009; GPPB, 2009a: 31-42).

As the first stage in the planning process, according to the GPRA and its IRR's, end-user units of a procuring entity draft a list of requested procurements for the following financial year, including a statement of the need for each procurement, and providing details in each case of the type and extent of the goods, services and works to be procured, the procurement method to be adopted, time schedules of the procurement and contract implementation, and the estimated contract value. The list, known as the project procurement

management plan, is then submitted to the budget office of the procuring entity for its evaluation. If approved, it is then vetted by the head of the procuring entity, following which, subject to any amendment, it is consolidated with the plans of the other end user units to form the annual procurement plan of the procuring entity. Once the budget for the procuring entity has been finalized, the end-user units will be asked to adjust their project procurement management plans in light of the funding allocated to their programs and activities. The annual plan is then accordingly amended and submitted to the bids and awards committee for its evaluation and approval.

### **Creating Greater Transparency and Standardization in Procurement**

Down the years, public procurement in the Philippines has been characterized by a lack of transparency. While the laws and regulations governing procurement prior to the GPRA emphasized transparency, they were often ignored or sidestepped. Although procurements were generally advertised and bid awards published, during the procurement process itself behind the scenes influences prevailed to ensure that a contract was awarded to a particular company, even in open tenders. Alternatively re-bidding was permitted without any explicit justification or reason, so as to allow a favored company to re-submit a price or proposals to ensure that it secured the contract (WB, 2003: 22). Making matters worse was the fragmentation of the procurement system. The World Bank noted in its assessment report of 2003 that there existed a “proliferation of outdated and fragmented laws and [a] multiplicity of uncoordinated executive issuances”. It further commented that “at times they are inconsistent with one another” and “constitute a source of confusion” (WB, 2003: 10-11).

The GPRA has sought to address both these issues, including transparency and standardization amongst its guiding principles. A number of measures were stipulated to enhance transparency. One was to allow outside observers from the Commission on Audit and civil society to attend meetings of bids and awards committees, and be given access to all relevant documents. This is provided for in Section 13 which states:

To enhance the transparency of the process, the BAC (bids and awards committee) shall, in all stages of the procurement process, invite, in addition to the representative of the Commission on Audit, at least two (2) observers to sit in its proceedings, one (1) from a duly recognized private group in a

sector or discipline relevant to the procurement at hand, and the other from a non-government organization: provided, however, that they do not have any direct or indirect interest in the contract to be bid out (COP, 2003).

The private group mentioned above may include for goods, a relevant chamber of commerce, for infrastructure projects one of the recognized associations in the construction and engineering sector, and for consulting services a professional association such as the Philippine Institute of Certified Public Accountants (PICPA) and the Confederation of Filipino Consulting Organizations (GOP, 2009). A key civil society organization that has been involved as an observer is Procurement Watch Inc, whose task is to expose corruption and waste in procurement (Kristina & Pimentel, 2005: 42-44).

After the award of the contract, the observers individually or jointly are required to submit a report to both the head of the procuring entity and to the Public Procurement Policy Board. These contain their feedback on the meetings attended and the documents examined, pointing out any irregularities that may have been committed. It is reasoned that with outside observers the procurement process can be independently assessed to determine if due procedures have been followed, the method of procurement adopted is in accordance with the conditions laid down in the GPRA and its IRR's, and the awards made are in favor of "the lowest calculated responsive bid" for goods and infrastructure projects or "highest-rated responsive bid" for consulting services (Kristina & Pimentel, 2005: 43; COP, 2003; GOP, 2009).

Also in the interests of transparency, the GPRA mandated the disclosure of the approved budget for the contract in the tender notice, with the stipulation that any bids above that would be discarded. This is intended as well to forestall collusion resulting in awards at abnormally high prices. The ceiling is now specified in all tender notices, though the World Bank and the Asian Development Bank have expressed misgivings on the grounds that normal price competition may be distorted by such disclosure (WB, 2008: 10, 28, 34-35).

Another aspect of the procurement process introduced by the GPRA which has promoted transparency are pre-bid conferences. Under this arrangement, the bids and awards committee of the procuring entity meets the prospective bidders, before bids are submitted. The purpose of the meeting is to explain eligibility requirements, and specifications, provide clarifications in response to

queries, and where necessary to arrange on-site visits for infrastructure projects. Pre-bid conferences are useful in the case of technically complex procurements and reduces confusion and uncertainty on the part of bidders when they submit their bid proposals. For contracts with an approved budget of PhP1 million (US\$21,800) or more, at least one pre-bid conference is mandatory. Under that amount, any pre-bid conference is at the discretion of the procuring entity (ADB & OECD, 2006a: 4, 8; GOP, 2009).

The most significant step to enhance transparency was the creation of a comprehensive E procurement system, known as PhilGEPS, set up in 2007. The expressed aim is that it becomes “the primary source of information” for procurement, and creates “a more efficient, convenient, transparent, and open procurement process” (Philippine Public Procurement Service [PPPS], 2009). PhilGEPS publishes procurement laws, regulations and bidding procedures, and announces procurement opportunities, known as bid notice abstracts, with a facility to download bid documents. Bid notice abstracts contain information on the type of goods, services and infrastructure project to be procured, the approved budget ceiling for the contract, and the mode of procurement to be adopted (shopping, open bidding etc.) and details of any pre-bid conference. The on-line portal too discloses the name of the company awarded a contract, the reason for the award, and the contract sum. A further provision is an E catalogue for purchasing low value items (PPPS, 2009). However, there is no facility yet for submitting on-line quotations and bids, although this, together with electronic payment of suppliers and contractors, are part of the plan to expand the functionality of the E procurement system over the next two years (WB, 2008: 9-10, 16, 18-19, 40).

Also facilitating greater transparency in the Philippines has been the standardization of procurement procedures and the use of a generic procurement manual (comprising five volumes), model contracts, and uniform bid documents. The bid documents sent to the would-be bidder must comprise or state the approved budget for the contract, invitations to apply for eligibility and to bid, eligibility criteria, detailed technical or functional specifications, bid evaluation criteria, information of post-qualification, conditions of contract, instructions for submitting a bid, and date, time and place of both the pre-bid conference, and the submission and opening of bids. Included too are standard bid submission forms to be completed or signed by the bidder and returned to the procuring entity, including forms stating price offered, detailing the technical proposal, and indicating delivery

time or completion schedule (GPPB, 2009e: 1-35).. This contrasts with the previously fragmented and opaque procedures, instructions, and document formats which varied from one procuring entity to another (ADB & OECD, 2006b: 4, 6-7; Global Advice Network [GAN], 2007; WB, 2008: 6, 10, 16, 51-55). Standardization has been achieved in part by aligning the procurement rules, procedures, manual, and bidding documents with those of the World Bank and the ADB (WB, 2008: 51-55)

### **Promoting Quality and Reliability**

In response to long standing concerns about the quality of the end product and reliability of suppliers and contractors, measures to improve both were incorporated into the GPRA and its IRR's. Reliability refers to the likelihood of suppliers and contractors finishing a project or completing it on schedule.

With respect to quality, the main priority has been to upgrade the standard of consultancy services for infrastructure projects. To ensure a high caliber of technical or design proposals, either of two methods of evaluation are used in consultancy tenders. One is called the quality-based evaluation procedure. The consultants submit technical or design proposals and fee offer in separate envelopes. The technical or design proposals of each submission are numerically rated and after a ranking is done, the highest rated bid is identified. The fee offer of that bid is then considered, and the firm in question is then asked to negotiate a final fee which cannot exceed either the approved budget for the contract or the fee offered (GPPB, 2009: 58-60). The second method of evaluation is the quality-cost evaluation procedure. Again the consultants submit two separate envelopes for the technical or design proposal, and the fee offer. Separate numerical ratings are given for the technical or design proposal and the fee proposal. The fee proposal rating is calculated based on the lowest bid scoring method, so that the maximum rating is given to the lowest bid (100 points) with the scores of the other bids being inversely proportional to it. The overall rating of each bid is then calculated with a weightage of 60 to 85 per cent accorded to the rating of the technical or design proposal and a weightage of 15 to 40 per cent given to the rating of the fee proposal (GPPB, 2009d: 58-61; GOP, 2009).

The evaluation of the technical or design proposals must take into account the “plan of approach and methodology” with the emphasis on “the clarity, feasibility, innovativeness and comprehensiveness” together with “the quality of interpretation of

project problems, risks, and suggested solutions” (GOP, 2009). Also included in the evaluation is the caliber of personnel assigned to the project with respect to their experience, qualifications, education and training, as well as the overall experience of the firm and its “quality of performance” in similar and other projects (GOP, 2009).

To determine if a company is reliable and equal to the task of undertaking and completing a project, certain requirements have been incorporated into the eligibility screening. To be eligible, the company must prove it has the financial means to undertake the project. For this purpose, it must have completed in a recent period (specified in the bidding documents) a similar contract worth at least half of the approved budget for the contract under tender, or two similar contracts which together are equal to this amount (of which one contract must be 50 per cent of this amount). In addition, the company must have a cash facility in or a credit line certificate from an approved bank equal to 10 per cent of the approved budget for the contract, or a net financial contracting capacity (NFCC) at least equal to the approved budget. The NFCC is a multiple of its current net worth discounted by the value of the uncompleted portion of its on-going projects. The multiple ranges from 10 for contracts of less than one year to 20 for contracts extending over two years or more. To further ensure reliability, the company must declare contracts either on-going or in the immediate future to which it is committed. This is intended to address the concern that suppliers and contractors often are unable to complete a project or may finish it behind schedule as a result of such commitments (GOP, 2009; GPPB, 2009c: 31-34).

To further attain high standards in public infrastructure projects, contractors are evaluated under the Constructors Performance Evaluation System (CPES). Ratings are given for standards of workmanship, the quality of materials used, the progress made if an on-going project, and the timeliness of completion, regard for environmental health and safety and the use of resources in site management. Two overall ratings out of 1.0 are given, each as an aggregate of the individual weighted ratings: one is given during project and the other at the end. A score below .75 is poor, and between .75 and .82 unsatisfactory. A score between .82 and .89 is satisfactory and from .89 to .96 very satisfactory, with any score above that rated as outstanding. The individual and aggregate ratings are taken into account in eligibility screening and in bid evaluation in a subsequent project. As well, they facilitate quality control during the project, and help to determine whether the

certificate of completion should be issued at the end (Construction Industry Authority of the Philippines & Philippine Domestic Construction Board, 2009: 1-5; GPPB, 2009c: 82-83).

Furthermore, when goods, services and works are sub-standard, the supplier, consultant or contractor can be disqualified from public bidding for one year, and if repeated in a subsequent contract, for two years. In the case of consultants, this applies to producing defective designs and prescribing materials which are “inappropriate” and “sub-standard”. Contractors may be blacklisted for abandonment of project, tardy progress in its execution, and failure to meet other contractual terms relating to the quality of materials and workmanship (GOP, 2009; GPPB 2009a: 63-72; GPPB, 2009c: 58-59).

### **Combating Corruption in Procurement**

Corruption has been widespread in public procurement. All the major types of corruption have been pervasive including bribery, kick backs, embezzlement, fraud, cronyism, nepotism, and collusion. Since 1987 a number of reforms have been instituted to combat procurement-related and other forms of corruption (Quah 2003a: 91-94; Quah 2003b: 251-252). The foundation for these reforms was actually laid as far back as 1960 through the Anti-Graft and Corrupt Practices Act. Several key reforms have been passed in recent years to build upon this legislation. One were provisions within the Constitution of 1987, spelling out the ethical responsibilities of public officials. These were followed by an Act Establishing a Code of Conduct and Ethical Standards for Public Officials and Employees, passed in 1989, which laid down in a more detailed form the legally binding standards of personal integrity of civil servants (COP, 1989). In addition, in 1991, the Act Defining and Penalizing the Crime of Plunder was passed, intended to deter mass embezzlement. Referred to as “ill-gotten wealth of at least 75 million pesos” (US\$1.65 million), such embezzlement “shall be punished by life imprisonment with perpetual disqualification from holding any public office” (COP, 1991).

The proscriptions of corrupt practices were specifically applied to procurement and spelt out in detail in the GPRA, its IRR's and the procurement manual. Amongst the forms of corruption highlighted are “unduly influencing or exerting undue pressure on any member of the BAC (bids and awards committee) or any officer or employee of the procuring entity to take a particular bidder” and “offering, giving, receiving, or soliciting of anything of value” to influence key decisions

in the procurement process (COP, 2003; GOP, 2009; GPPB, 2009a: 63; GPPB, 2009e: 14). This is designed to combat bribery, kick backs and influence pedaling, involving members of bids and awards committees, other public officials (including elected politicians), and private individuals. To combat nepotism, no head of a procuring entity can reject bids as a result of “manifest preference to any bidder who is closely related to him”. A family member or a close relative is legally defined in the Philippines as “consanguinity or affinity up to the third civil degree”. Equally important are specific provisions prohibiting collusion and bid rigging by companies, feigning of competition through multiple bids by one company and fraudulent practices (submitting false information to gain eligibility to bid or to win a bid) (GOP, 2009; GPPB, 2009a: 63-67).

The GPRA, its IRR’s and procurement manual specify the penalties (both judicial and administrative) that can be levied for the man types of corruption-related offenses. As a measure of the seriousness with which such offenses were viewed by the framers of these reforms, those who have been convicted, whether public officials or private individuals, are liable to prison terms ranging from 6 to 15 years. If a company or partnership has committed the offense, then any directors, officers, or employees directly involved are liable. Furthermore, the partnership or company may incur civil liabilities, requiring it to pay liquidated damages for any resultant loss incurred by the procuring entity, and to pay compensation to its competitors in the tender (COP, 2003; GOP, 2009).

In addition, administrative penalties are levied on offending individuals and entities. Those who are public officials will be permanently or temporarily disqualified from holding office in a public agency. Businesses who have engaged in unsolicited bribery, collusion, and fraud, as well as committing other forms of default, can be disqualified for one year from public bidding, and then two years if the offense is repeated. When the corrupt or defaulting practice occurs during project implementation, the contract can be immediately terminated (COP, 2003; GOP, 2009; GPPB, 2009a: 63-67).

What’s more, if the president, chairman, and any shareholder owning 20 per cent or more of the equity of a disqualified corporation (as well as their family members), holds any of these positions in another company, that corporation will be likewise disqualified from public bidding for the same period. One of the intentions is to prevent a firm debarred for corruption or other

defaulting practices being re-registered under a different name and articles of association and so continue to tender for public contracts (GPPB, 2009a: 70).

In addition to the direct prohibition on corrupt dealings, attention has been given to preventing conflicts of interest in the procurement process, which could result in officials favoring businesses to which they or their families are connected. Under the Constitution of the Philippines, public officials (both elected and non-elected) are required on taking office to declare their assets, liabilities and net worth. Under the Code of Conduct and Ethical Standards referred to above, they are obliged to relinquish any position, shareholding, or partnership stake in a business where a conflict of interest arises, and “shall not, directly or indirectly, have financial or material interest in any transaction which requires the approval of their office” (COP, 1989; Quimson, 2006: 19, 29). This is reinforced under the GPRA by the stipulation that no bidder can be related to the head of the procuring entity, any member of the bids and awards committee, its secretariat, and the technical working group, the head of the project management office, or any of the project consultants. The bidder includes the sole proprietor of a business, or any partner, director, officer, or shareholder with 20 per cent more of the ownership of a partnership or company (CP, 2003; GOP, 2009; GPPB, 2009e: 15).

### **Strengthening Watchdog Institutions**

A key aspect of the reform of public procurement in the Philippines has been the strengthening of the accountability of procuring entities. Through such accountability, so-called watchdog bodies may monitor their procurement practices, expose anomalies, and enforce procurement-related laws and regulations when violations occur. There has now arisen a significant group of institutions, a central part of whose remit is to exercise oversight over the procurement process, to unearth evidence where anomalies have occurred, and, where appropriate, to facilitate, initiate or undertake enforcement action. The key watchdog institutions, which have been created or whose powers have been increased, are the Commission on Audit, the Ombudsman’s Office, the Government Procurement Policy Board, the Presidential Anti-Graft Commission, Sandiganbaya (anti-graft court), and the Procurement Transparency Board. Worth noting is the revamped Ombudsman’s Office, established under the Ombudsman Act of 1989, which has become the lead investigative and enforcement agency in combating corruption and has the power

not only to investigate corrupt dealings but also to prosecute those who are charged, even supplanting the role of the public prosecutor (Quimson, 2006: 26-27; GAN, 2007; Office of the Ombudsman, 2009). The work of the Ombudsman has been helped by the Procurement Transparency Board, set up in 2007. Composed of a mix of senior public officials and civil society representatives, its mandate is to oversee the management of a tender. When deviations from the provisions of the GPRA and its IRR's occur, it may recommend to the Ombudsman the filing of penal, civil and/or administrative charges (Office of the President, 2008).

### **FAILINGS IN IMPLEMENTATION OF THE REFORMS AND THE PREVALENCE OF CORRUPTION**

Despite the range of measures and institutions that have been introduced to improve procurement practices, their impact has to some extent been undermined by failings in implementation within both procuring entities and watchdog bodies. As pointed out by the World Bank in its 2008 report. "much progress has been made in procurement reform in terms of rules and regulations but implementation and enforcement are still weak, and the objectives of the reform have not been fully achieved" (WB, 2008: 45; Carilo, 1994: 113-118).

#### **Prevalence of Corruption**

Corruption remains the main manifestation and consequence of weak implementation. Despite the range of measures introduced to combat it, it is still prevalent in day-to-day procurement. Surveys conducted by three international organizations and one domestic organization continue to indicate widespread corruption in government administration, including public procurement. These organizations are the World Bank, Transparency International, World Economic Forum, and the Philippines survey organization, Social Weather Stations.

The World Bank's measure of "control of corruption" in 2008 gave Philippines a point score -0.75 within the range of -2.5 to +2.5, compared to a score of -0.31 in 1996, and a global percentile rank of only 26.1 compared to 44.7 in 1996 (the lower the rank the greater the extent of corruption) (WB, 2009). These scores are corroborated by references to continuing corruption in public procurement in the World Bank's recent procurement assessment reports of the Philippines (WB, 2005: 15; WB, 2008: 24, 40-41). The findings by the World Bank are supported by those of Transparency International. In

its corruption perception index in 2009, the Philippines was ranked at 139 out of 180 countries (the higher the rank the greater the corruption), and given a score of only 2.4 out of 10. In 1999, its rank was 54 out of 99, with a score of 3.6 out of 10. Both surveys showed if anything that corruption has increased (Transparency International, 2009).

These findings are consistent with the survey of conditions affecting business competitiveness in 133 countries conducted by the World Economic Forum and published in its *Global Competitiveness Report* in 2009. Three questions in the survey focused upon corruption and unethical conduct. One of the questions was: "In your country, how common is the diversion of public funds to companies, individuals, or groups due to corruption?" (1 = very common; 7 = never). This focused on embezzlement, bribery and kick backs involving officials and politicians, and companies to which they or their families are connected. The average score for the Philippines was 2.3 giving it a rank of 122 out of 133 (the higher the rank the greater the degree of corruption). In response to a second question, "To what extent do government officials in your country show favoritism to well-connected firms and individuals when deciding upon policies and contracts?" (1 = always show favoritism; 7 = never show favoritism), the average rating given by respondents in the Philippines was 2.1 giving it a rank of 128 out of 133. In response to a third question, "How would you rate the level of public trust in the ethical standards of politicians in your country?" (1 = very low; 7 = very high), the rating for the Philippines was 1.6 giving it a rank of 130. The ratings and rankings are the worst in Asia (World Economic Forum, 2009).

The most telling survey evidence to indicate the extent of corruption in public procurement are the finding of the polls conducted by Social Weather Stations. In its most recent survey of corruption conducted in 2008, 402 private sector managers were interviewed with 267 from small and medium enterprises and 135 from large enterprises. On a four point scale measuring the extent of corruption from "a lot" to "none", 62 per cent of the sample indicated that there was "a lot". Nearly 50 per cent of respondents stated that "almost all/most companies" in their line of business paid bribes to secure a public contract while 41 per cent declared to having "personal knowledge of public sector corruption" in their line of business in the past three months. The median amount paid as a bribe was 15 per cent of the contract value (Social Weather Stations, 2009).

Many of the bribes are paid to senators in the Philippine congress who can influence contract awards, especially in large infrastructure projects. The money received is used by senators for their own personal benefit, or to illicitly fund their election campaigns. The source of the payments are wealthy elite families in the business community who can ensure that the preponderance of government contracts go to their businesses (GAN, 2007; Quimson, 2006: 12-14). There is little doubt that such bribery makes it difficult for firms to compete for contracts on a fair and equal basis.

In addition, collusion has been a persistent problem. According to the Philippines country procurement assessment report of 2008 by the World Bank, "there is a perception that collusion or rigging of bids is common, particularly for big ticket contracts" (2008: 33). As an example, the World Bank found that in two contracts it was sponsoring in the Philippines, all the bids were suspiciously clustered together at a high price level. Such a pattern was repeated in three separate rounds of bidding, resulting in rejection of the bid offers in each case. The World Bank concluded that "the analysis of the bid data presented unmistakable evidence of collusion" (WB, 2008: 33-34). The 2008 report, mentioned above, also pointed to the difficulties of taking action against collusion rings in the Philippines. It cited the example of the Panaon local government unit, which in the last few years discovered a repeated pattern of high and often identical bid offers in its tenders, but the companies concerned have continued to bid for contracts. Despite its best efforts the local government unit has been unable to obtain enough hard evidence for a prosecution to be undertaken (WB, 2008: 34). Such collusion is not surprising given the extent to which the businesses sector in Philippines is controlled by a small group of elite families, as will be discussed below.

### **Reasons for the Continued Prevalence of Corruption**

Various reasons may be posited to explain the ineffectiveness of implementation and the prevalence of corruption in the procurement system in the Philippines. One reason is that bids and awards committees, technical working groups and senior officials in procuring entities do not always adhere to their ethical responsibilities, as legally prescribed in the reforms discussed above. These are simply by-passed or ignored. Furthermore, loopholes and ambiguities in certain provision of the reforms relating to eligibility, procurement method and bid evaluation criteria can be readily exploited to ensure that special consideration is given to a particular

company or companies, which are linked to influential politicians and powerful families.

Such failings can as well be attributed to the lack of effective monitoring and enforcement by watchdog institutions responsible for overseeing the procurement process (Quah, 2003a: 99-100; Quah, 2003b: 244-245). The World Bank procurement report of 2008, and a Transparency International report of 2006 expressed serious misgivings about the performance of the Commission on Audit, the Ombudsman and the anti-graft court. They revealed that the Commission on Audit failed to finally determine that anomalies had occurred in the majority of procurement-related cases it investigated (Quimson, 2006: 23-24; WB, 2008: 41-42). Of the cases that were forwarded to the Ombudsman for further investigation and prosecution, and of complaints of alleged procurement-related corruption received by it from other quarters, according to the World Bank, report, “a large number” had not been acted upon, and those that were “take a very long time” to bring to court. The report concluded that “the low enforcement capacity of the Ombudsman’s special prosecution office and that of the courts is a major concern” (WB, 2008: 41-42). A similar lack of effectiveness has characterized the other key anti-corruption body, the Presidential Anti-Graft Commission. Of over 1,500 cases of alleged corruption investigated from 2001 to mid-2007, in only about 10 per cent of them was punitive action taken (dismissal, suspension and reprimand) (Quimson, 2006: 29-30; Presidential Anti-Graft Commission [PAC], 2007a: 4-5; PAC, 2007b: 5-6).

It should be noted that the work of the watchdog and enforcement bodies is handicapped by the absence of regular and accurate reports from the procuring entities on the procedures followed in each procurement, the outcomes achieved, and the results of bid challenges when they occur. Procurement entities either ignore requirements to compile and submit such reports, often due to a failure to institute formal arrangements to systematically gather information on their procurement programs and to compile and keep detailed records of each procurement. In consequence the scrutiny of procuring entities is weakened (WB, 2008: 37-38).

Also preventing effective accountability is corruption in the watchdog and enforcement bodies themselves. How widespread this may be is difficult to tell but the World Bank drew attention in recent reports to how corruption in the enforcement and judicial process allowed politicians, bureaucrats and business leaders who had

allegedly engaged in corrupt practices relating to procurement, to escape prosecution and conviction (WB, 2005: 15; WB, 2008: 24, 40-41; Quah, 2003b: 252). The nearest to securing a conviction in such cases occurred in 2002, when a motion to impeach the Ombudsman for alleged bribe-taking was tabled in the Congress. While it was not passed, it gave rise to suspicions of irregular practices in the Ombudsman's Office (Bolongaita, 2003: 144).

Further limiting the accountability of procurement entities is a weak bid protest mechanism. Under the GPRA and the IRR's, a would-be bidder declared ineligible to bid and a failed bidder can appeal to the bids and awards committee for a "motion of reconsideration". If that is rejected, an appeal can be lodged with the head of the procuring entity, whose word is normally final. If all else fails, the extreme option is available to take the matter to the Office of the President or to the courts for a presidential or judicial review. To file a bid challenge, the appellant must pay at least one per cent of the approved budget for the contract (GOP, 2009). However, as pointed out by the World Bank in its procurement report of 2008, neither the bids and awards committee, nor the head of the procuring entity can claim to be impartial. In its view, the courts and the Office of the President also lack independence. From several pilot studies conducted after 2002, it was found "there are hardly any protests from the bidders, because of the restrictive provisions on protests and the lack of an independent review body". For this reason the World Bank has called for the lowering of the fees for a bid protest and the setting up of an independent tribunal with quasi-judicial powers outside the procuring entity to review bid challenges (WB, 2008: 23-24, 39, 62).

Another reason for the continued prevalence of corruption in public procurement is the limited use made of the means created to ensure transparency. It was hoped that the attendance of civil society organizations (CSO's) at bids and awards committee meetings and their access to all relevant procurement documents would lead to the exposure of corrupt dealings and discourage procurement officials and bidders from engaging in them. But the World Bank in reference to this arrangement in the 2008 procurement report stated that "its implementation is not producing the desired impact on the ground". The report warned that "its sustainability is at risk unless serious remedial measures are introduced by the GPPB (Government Procurement Policy Board) and the CSO's themselves", and urged "for a study to be undertaken on sustaining the involvement of CSO observers in the bidding process, including

contract implementation” (WB, 2008: 43). It is evident that the initial enthusiasm of CSO observers to use the opportunities to observe the proceedings of bids and awards committee meetings and highlight irregularities may have waned. Possibly, they may have been discouraged by suspicions of behind the scenes and unrecorded deals or by restrictions imposed by officials on access to crucial information in the procurement process.

The E-procurement system, PhilGEPS, critical to enhancing transparency, has likewise not been fully availed of by procuring entities. Although most national government agencies and local government units have now registered with PhilGEPS, a substantial minority of state owned or controlled corporations have not. Moreover, the World Bank’s 2008 report found from pilot surveys that “bid notices sometimes provide insufficient information and instructions to prospective suppliers about the items being procured, or insufficient online access to the bid documents”, and that “the requirement to publish contract awards as well has still to be fully complied with” (WB, 2008: 28; ADB, 2009b: 2). This is reflected in the continuing narrow range of procuring entities posting bid notices and contract awards on PhilGEPS (PPPS, 2010).

#### **CONCLUSION:**

##### **INFORMAL INFLUENCE AND ELITE CAPTURE**

The reforms discussed in this paper were intended to create a system of public procurement in the Philippines commensurate with international standards, and to replace what had hitherto been a highly wasteful, disorganized and corrupt system. They have been part of a wider reform agenda to upgrade standards of governance and administration in the Philippines following the establishment of a democratic political system in 1987. On paper the reforms have succeeded in doing this, especially in promoting competition, transparency, accountability and more rigorous evaluation and screening (although restrictions on foreign competition remain).

However, for these reforms to gain traction resulting in concrete improvements in everyday procurement practices, effective implementation is essential. This has been noticeably lacking in the Philippines. The implementation process has been undermined by several failings. Procurement officials may disregard their legal and ethical responsibilities, or exploit ambiguities and loopholes in the reforms, so as to serve their own interests and those of influential politicians and business leaders connected to powerful elite families.

For the same reasons, watchdog bodies may avoid proper scrutiny of the procurement process or decline to take action when anomalies occur. The dominant motive in such failings is to allow corrupt practices to continue.

Weaknesses in implementation and associated widespread corruption are related to two important features of the Philippine state bureaucracy. One is the existence of a culture of informal influence in decision making which often prevails even when there is a conflict with the formal rules. The other feature is the control of the bureaucracy, often through such informal influences, by a powerful network of politicians and business leaders drawn from or connected to well-established group of elite families (what may be termed as elite capture). This has been pointed out by Kang in his recent study of corruption in the Philippines, who highlighted as well how far the political and economic life of the country continues to be dominated by such families (Kang, 2002: 8-9, 63-64, 74-84, 175-180; Timberman, 1991: 14-20; Franco, 2001: 292-298).

These two features of the bureaucracy have combined to frustrate the effective implementation of the reforms of public procurement and to ensure continued widespread corruption. Given how powerful the elite network is, procurement officials, even at a senior level, may feel impelled to accede to pressure from prominent politicians and business leaders linked to it, so agreeing to crony deals, ignoring collusion and fraud, and in the process accepting bribes and kick backs. Such pressure is all the more difficult to resist when procurement officials are motivated by deference, fear, and a desire for self-enrichment and career advancement. Under similar pressure from politicians and business leaders within the elite network, even senior officials in watchdog and enforcement bodies may be reluctant to expose anomalies in the procurement process or take action against those involved, perhaps also motivated by deference, fear and career interest. Illustrating such influence, Transparency International in its report on the Philippines in 2006 cited evidence of officials in the Commission on Audit, who, when exposing corruption, are subject to harassment or are re-assigned to other tasks. They are further demoralized by the fact that most of their findings result in no action. One official was quoted as describing his colleagues in the Commission as "small people waging a war against political giants" (Quimson, 2006: 23-24)

To redress elite capture, a significant change in the culture of the Philippine government and civil service is required, whereby

compliance to formal laws and regulations takes precedence over the informal influences exerted by elite families. This in turn depends on the loosening of the dynastic hold on the political and economic life of the country, and a weakening of the ascriptive culture which foments deference to such families not least amongst officials in procuring entities and watchdog bodies. Also required is an increased role of civil society groups, and, as several writers have pointed out, a commitment at the highest reaches of government to stamp out corruption and ensure effective implementation that goes beyond simple formal pronouncements. This includes protecting the independence of watchdog bodies. The chances of such changes occurring in the foreseeable future, to reduce informal influences and elite capture, however, remains far from certain.

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