

CHINA'S LEGAL FRAMEWORK FOR PUBLIC PROCUREMENT

Robert Rothery*

ABSTRACT. Since the mid 1990s, the Government of China has been developing the regulations, laws, and implementing procedures necessary to bring public procurement under a comprehensive administrative and legal framework. This paper traces the history of its development and explains the motivations: improved quality of public projects, increased transparency, development of national standards, and the relationship with trade. It describes the unique aspects and challenges of China's procurement system, notably the existence of two laws (the Tendering and Bidding Law and the Government Procurement Law), the influences of social and economic policy, and the use of procurement agents. The paper concludes with an assessment of future needs to consolidate the various procurement-related laws, develop implementing regulations, disseminate information, and strengthen the oversight function.

INTRODUCTION

Worldwide, governments spend about 10% of GDP on the procurement of goods, works and services annually. This presents an enormous market to contactors, suppliers of equipment and materials, and service providers. Although accurate statistics for China are difficult to obtain, best estimates, summarized in Table 1, indicate that "government procurement" for 2002 will reach RMB100.0 billion (about US\$13 billion), an increase of about 50% over 2001.

In China, "government procurement" (zhengfu caigou) refers only to procurement by state agencies (Guojia jiguan) as well as "institutions" (tuanti zuzhi) and "social organizations" (shiyeh danwei). Other elements of what may otherwise be described as "public procurement," such as the

* *Robert Rothery is Principal Procurement Specialist, Central Operations Services Office, Asian Development Bank.*

TABLE 1
Government Procurement

Year	Government Procurement (In Billion RMB)
1998	3.1
1999	13.0
2000	32.8
2001	65.3
2002	100.0 (Estimated)

Source: Ministry of Finance (2001). Military expenditures and those by state-owned enterprises are not included.

tremendous volume of procurement by state-owned enterprises, for example, are not currently considered to fall within the definition of "government procurement." In this paper, the terms "government procurement" and "public procurement" are used to reflect the narrow and broad definitions, respectively.

As more and more procurement is brought within the scope of "government procurement," the amount is expected to stabilize at around RMB 400 billion (about USD 50 billion) and thereafter growth will follow that of the general economy. Other factors contributing to the substantial year-on-year increases in the value of government procurement include:

- Gradual implementation of the government procurement rules—what started as essentially pilot projects in the mid-1990s is now a nationwide, albeit developing, system;
- Reduced use of "extra-budgetary funds" (such as collected fees) for procurement in favor of the more accepted practice of budgeted expenditures; and
- Greater availability of funds for fiscal expenditures due to a broadening of the tax base and improvements in enforcement of the tax system.

Market considerations aside, procurement in China is, as elsewhere, at the heart of delivering public services. It is the process by which the government constructs infrastructure, supplies schools and clinics, and contracts professional services. As it also involves the management of large amounts of money, it is the largest single cause for allegations of government inefficiency and corruption. With such a broad impact, it is

little wonder that constructing a legal framework for conducting government procurement has become a top priority. Over the past five years, the Government of China, in cooperation with the Asian Development Bank (ADB) has been developing the regulations, laws, and implementing procedures such that it now has the basis of such a framework.¹

A HISTORY OF CHINA'S GOVERNMENT PROCUREMENT SYSTEM

Public procurement has been evolving in China since the mid 1990s, starting with the issuance of various ministerial and local government directives and regulations, the passage of related sectoral laws (such as the Construction Law of 1997), and the issuance of Ministry of Finance (MOF) regulations in 1999. Prior to these initiatives, ADB and World Bank introduced a “tendering and bidding system” to China to implement their projects. It was this system that first revealed to China how beneficial modern approaches of competition and transparency could be to the state. This led to a number of pilot projects in various provinces, municipalities, localities, cities and ministries, and ultimately to the passage of the MOF regulations. China's modernization in this area reflects the fundamental transition from a state-controlled to a market-based economy. The objective has been, and continues to be, the establishment of a modern government procurement system (GPS) in China. Building a legal framework is a key pillar of the development of that new GPS.

The MOF regulations had limited legal force and were essentially a statement of policy. As they and various other directives emerged, an effort began to consolidate them into a comprehensive, national legal framework. This led to the drafting of the Tendering and Bidding Law (TBL), which was passed in 1999 and came into effect on January 1, 2000. The TBL was the first legislation on procurement passed by the National People's Congress. Procurement of consulting services was addressed separately by the Ministry of Science and Technology (MoST). In September 2000, it issued *Guidelines for the Selection and Engagement of Consultants for Government Financed Projects in The People's Republic of China*. Although not carrying the weight of a law, these guidelines set out clear procedures to be followed by government agencies when procuring consulting services.

The TBL, developed by the State Development Planning Commission (SDPC), was the first public procurement law with broad national coverage. Following its promulgation, another two years of effort was spent on developing administration instructions for the TBL and training government agencies on its use.² The TBL governs projects financed from "Fixed Asset Funds" (large public works projects that fall outside operational budgets). In 2001, it was decided to expand the legal framework to cover procurement under "budgetary funds" (procurement of most goods and services) and a drafting group formed under the auspices of the Financial and Economic Committee of the National People's Congress began work on drafting the Government Procurement Law (GPL). This law, passed by the 9th National People's Congress on June 20, 2002, will come into effect at the beginning of 2003. It is the latest development in the evolution of China's legal framework for procurement. This leaves China in the unique situation of having two, in some areas overlapping, procurement statutes. Although not an ideal development, it can be explained by the drive to modernize and expand legal coverage.

As mentioned above, the term "government procurement" refers only to the direct procurement by state agencies above a specified threshold, and only procurement paid for with certain funds is covered. Below the threshold, procurement is not considered as government procurement, nor is procurement by public entities other than institutions and social organizations. Another narrowly defined term is "tendering and bidding" (zhaobiao toubiao). It describes a bidding process inspired by the rules of ADB and the World Bank. As a logical progression, the GPS has gradually adopted a more comprehensive concept of government procurement, as can now be seen in the GPL. The intention is gradually to expand the scope of coverage as the GPS matures. As Table 1 shows, the dollar value of what is defined as government procurement is more than doubling each year as more and more transactions are brought under the GPS. With the entry into force of the GPL in 2003, this trend should accelerate and deepen.

MOTIVATION FOR PROCUREMENT LAW

Once considered the exclusive realm of technocrats, it is now not uncommon in many countries to find stories on public procurement in the popular media. In China, this change in how procurement is perceived, and the importance it is being given by the public, is matched

by a leadership drive to transform China into a modern nation-state open to the world. It is this combination that is behind the development of a sound GPS regulated by a national legal structure. More specifically, three interrelated factors are at work.

Good Governance

Procurement is central to the operation of government. It is a key component of expenditure management, which along with revenue management (primarily taxation) comprises the financial management function. Moreover, public procurement is interwoven with key development issues—economic growth, poverty reduction, decentralization, and private sector development. It is also closely linked to trade and foreign investment. As a governance issue, weakness in the procurement system adversely affects welfare and prospects for growth.

A dominant governance concern is transparency in the management of the taxpayer's money. At the same time, contractors and suppliers are asking for procedures that are open, fair, and unambiguous. The demand for increased transparency is worldwide, driven by concern over corruption. And corruption is all too commonly linked to the award of government contracts.³ International best procurement practices recognize that transparency is best achieved through such practices as clear and consistent regulations, public tendering, widely advertised opportunities, price-based contract award, full disclosure, and inspection and audit. Although the Chinese legal framework does not yet fully meet these objectives, significant progress has been made over the past decade.

In addition, China's government agencies have had to respond to public demand for better quality and improved value for money. Although recently the concern seems to have waned somewhat, there is no doubt that a few years ago the public was incensed at the almost daily reports of bridge collapses, road accidents, other disasters, and problems caused by "shoddy construction." Doing something about this became a major preoccupation.

Trade and Economic Development

Public procurement is becoming increasingly linked to trade and foreign investment. A country's procurement system is a statement to its trading partners on how it conducts business. If the national procurement

policies are incomplete, contradictory, and not embodied in law, then foreign firms will be less inclined to bid on contracts and invest in production facilities; or, if they do, foreign firms will seek a price premium to cover the added risk. Policies and laws that explicitly discriminate against foreign firms are also damaging to trade and investment. For a country to participate fully in international trade organizations and regimes, it must signal to the world that its procurement system is based on law and is open to foreign firms, although government procurement agreements are not a prerequisite for membership in the World Trade Organization (WTO).

Indeed, the WTO Government Procurement Agreement (GPA) prescribes equal treatment of foreign and local bidders, but the GPA is not one of the core WTO disciplines—it is, rather, a “plurilateral” accord and therefore binds only those who agree to it. However, WTO membership brings with it demands for transparency that inevitably draw attention to the need for an open procurement system. China began developing the GPL in 1999, based in part on the understanding that an acceptable procurement system was, in effect, a prerequisite for its WTO membership. Through its WTO accession discussions with the United States and particularly the European Union, China made a number of commitments related to public procurement, one of which was to enter into GPA negotiations within 2 years of WTO accession.

As it moves into WTO membership, China will need to address other accords related to public procurement. These include the General Agreement on Trade in Services (where discussion revolves around whether government procurement of services should be regulated through a separate protocol or whether such coverage should be included in the GPA) and the proposed “transparency of government procurement agreement,” also called the transparency accord (which would address procedural aspects of government procurement rather than market access aspects). Similar, non-binding, yet important, provisions can be found in the Asia-Pacific Economic Cooperation (APEC) Government Procurement Expert Group Non-Binding Principles on Government Procurement. As in its WTO negotiations, China has made a number of ambitious market opening and transparency commitments through the APEC negotiations.

Although trade and investment are significant goals in China, perhaps more important is the broader concept of economic

development, industrial policy, and the creation of a national market—all aspects of the transition to a market-based economy. It is therefore not surprising to find provisions for counter trade, offsets, domestic preference, and other restrictions show up in different laws and regulations, although these are not consistently spelled out. The TBL and GPL, for example, are silent on the topic of offsets.

Common National Standards

China historically has devolved responsibility for public procurement to national ministries or departments, the provinces, and local governments.⁴ The municipal government of Shanghai, for example, was an early user of modern methods when in 1995 it adopted the World Bank procedures. Local government autonomy in procurement is desirable. It puts the decision-making on procurement in the hands of those responsible for delivering the services, and puts the delivery closest to the end-user—the public. Accountability is established and, at the same time, public visibility into how public funds are spent is enhanced.

But devolved authority creates challenges. In a decentralized environment, there is a danger that different practices, and possibly different regulations, will proliferate. Ideally, bidders should not face different procedures when bidding on contracts in different parts of the country, or to different ministries. This argues for consistent national laws and standards and for a central body to set, update, and monitor compliance. The central body can also set policies, audit the performance of implementing agencies, and arbitrate disputes, but under no circumstances should it actually conduct procurement or approve contract award decisions of others.

Decentralization presents other challenges as well. The most obvious is the shortage of skilled procurement specialists and other resources, a problem in many national ministries, but more acute in local governments. China's approach has been to use procurement agents. If a government agency does not have in-house capability, it can use one of a number of procurement agents. This arrangement, or the greater use of consultants, introduces the professional skills needed, but still allows for devolution of decision-making. The key is to focus on quality decision-making—timely decisions made on the basis of professional analysis, motivated by cost and quality, and minimizing political interference.

TODAY'S EVOLVING LEGAL FRAMEWORK

In most countries, public procurement is a crosscutting process used by government to acquire goods, works and services, and to address several, sometimes conflicting, demands (ensuring value for money, addressing social goals, and fostering competition are examples). In China the impact is even greater because of the deeper involvement of government in the commercial economy. Public procurement encompasses many facets beyond the mere act of buying. The nature of the goods and services procured requires specific technical and professional skills. And the fact that public procurement invests a fiduciary responsibility on public officials means that the system must ensure accountability and transparency. As Table 2 illustrates, an effective system must be based on a clear and comprehensive legal

TABLE 2
Components of an Effective Public Procurement System

Component	Description or Function
Legal Framework	Based on a procurement law that defines responsibility of procuring entities, suppliers, and oversight agencies
Policy	Consistent, national policies and standards to be followed by all procuring entities, including bid challenge and dispute settlement procedures
Institutional Set-up	Defined structures for conducting and supervising procurement that minimize subjective decisions and politicization (including approval mechanisms, authorities, composition of bid and evaluation committees)
Professional Civil Service	Procuring entities staffed with procurement professionals, trained and recognized as such under civil service regulations
Resources	Procuring entities supported with adequate budget, standard documents, and operations manuals
Anti-corruption	Clear laws applicable to procurement officials and suppliers that increase transparency, encourage inclusion of civil society, and punish wrong-doing

framework. The procurement law is central, and to some extent directs other components of the system, such as policy. However, other laws related to civil service regulation and corruption are also necessary parts of the legal framework.

Coverage

Under the TBL, legal coverage is restricted to large-scale infrastructure projects which exceed a threshold value as formulated by SDPC and are financed by central or state governments. Coverage of the GPL is broader and includes both centralized and decentralized procurement of goods, works and services, but as with the TBL, only where the value exceeds specified thresholds. Depending on the source of funding, the state council, provincial government, or authorized agency publishes a procurement catalog and a prescribed threshold. Procurement, which is published in the catalog and exceeds the threshold, falls under the GPL. Interestingly, while procurement by state-owned enterprises is covered by the TBL, it is not covered by the GPL.

Military procurement and procurement concerning state security, emergency circumstances, and disaster relief are exempted under the GPL and TBL.⁵ Furthermore, the laws recognize that procurement financed with loans from foreign governments or international organizations generally will be governed by the procurement regulations attached to the funding.

Procurement Agents

Procurement agents, also commonly referred to as tendering agencies and procuring intermediaries, have historically played an important role in Chinese public procurement, and continue to do so. They can broadly be categorized as either non-profit, or commercial, but their function is the same—to carry out the procurement on behalf of the government department that needs the goods or works procured (referred to as the “procuring entity” or the “tenderer”). The TBL lays out basic requirements for the tendering agency and describes who has the authority to qualify them, and the administrative instructions (PASI) provide detailed instructions and criteria for selecting the agency. However, the TBL leaves to the procuring entity the choice of whether or not to use an agent. The GPL similarly delegates authority to qualify intermediaries (local governments for example), but more strictly

mandates their use. Under the GPL, intermediaries must be used for procuring items published in the procurement catalog.

Procurement agents are unique to China and, for foreigners, require elaboration. For those who have followed the evolution of the legal framework, the "tendering and bidding agencies" described by the TBL, are descendants of the "tendering agencies" first encouraged by ADB and World Bank. The procuring intermediaries envisaged by the GPL are new and will come in two types, "institutions for centralized government procurement" (quasi-governmental entities) and "commercial procuring intermediaries". The latter are like the tendering and bidding agencies but will have a different scope of operation and probably a different licensing scheme as well. The system is designed, in part, as an anti-corruption measure but its effectiveness is unproven both in China and elsewhere (no other country deems such intermediaries necessary). Furthermore, the intermediaries described by the GPL are supposedly "not-for-profit" entities, but it seems that they will operate in many respects on a commercial basis, as do the existing tendering and bidding agencies.

Competitive Bidding

A good public procurement legal framework is based on the principles of openness and transparency, fair competition, impartiality, and integrity. China strives to satisfy these principles, through a system that encourages qualified firms to compete on the basis of price, while insuring quality objectives are met. Both the TBL and GPL prescribe competitive procedures, although the GPL allows for some non-competitive forms of procurement with prior approval.

Bidding is advertised under "open" or "public" tendering, and bidders are given a prescribed period of time to prepare their bids. Alternatively, bids may be invited from a predetermined number of bidders. This is called "selective" or "invited" tendering. In either case, bidders compete on the basis of price. A weakness of the GPL is that it does not have meaningful provisions regarding public advertising. Also, the 20-day minimum bidding period provided for in both the GPL and TBL is considered by many to be too short, especially for public works contracts.

Several measures safeguard against non-transparent and anticompetitive practices (such as collusion among bidders as well as

other malpractices relating to tendering and bidding). First, the laws specifically prohibit collusion among bidders. Second, bids must be sealed and remained sealed until the date of bid opening. Lastly, each bidder can submit only one bid and a bidder may be a party to only one bid—it cannot be associated with more than one joint venture. This avoids the situation of a bidder deciding which bid it wants to be associated with after seeing the outcome of the bidding.

Qualification Requirements

A basic principle of most procurement systems, including those of international organizations such as the Asian Development Bank and World Bank, is that a contract should be awarded only to a supplier or contractor who is qualified to do the work. It must be able to demonstrate that it has the required experience, technical expertise, and financial capacity. Furthermore, the offered goods must meet minimum requirements.⁶ No matter how low the offered price, a contract is not awarded to a bidder who cannot do the job. Bidders can be qualified before the bidding, in which case bids are invited only from qualified bidders (this is called prequalification). Alternatively, the qualifications of bidders are assessed at the same time as their bids are evaluated (this is called postqualification). A third approach is to maintain lists of qualified suppliers, contractors, and consultants, possibly based on a licensing or certification system.

China's GPS incorporates the concept of qualification, although at the statutory level it is unfortunately lacking in specifics. The TBL simply states that the bidder must be qualified, although the administrative instructions for the TBL (PASI) lay out the specific criteria that may be used if the procuring entity so chooses. The GPL specifies required qualifications related to legal requirements, financial capacity, and expertise. Bidders are required to demonstrate that they are financially sound, and have the necessary technical expertise. They must also show that they have paid their taxes, have the legal capacity to assume civil liabilities, and have a clean legal record for the past three years. Other qualification requirements, such as technical requirements of offered goods and services, are left to the procuring entities. The GPL and TBL do not state which of the three methods—prequalification, postqualification, or vendor lists—are to be used, and it is expected all three may be used in differing circumstances. Moreover, the laws do not expressly require the inclusion of qualification criteria in the solicitation

for bids. Although the administrative regulations for the TBL and GPL may at some point clarify qualification procedures and requirements, the procuring entities currently have significant latitude for defining the process and imposing additional requirements.

Selection of the Winning Bid

A Bid Evaluation Committee is responsible for evaluating received bids and determining the winning bid. This system, adopted first in connection with the TBL, and now also enshrined in the GPL, is an important achievement in the development of China's legal framework for procurement. The TBL lays out specific requirements on appointment, composition, responsibilities, and expertise of the committees. When the tendering and bidding procedure is used, bids are evaluated in two stages; the first in public and the second in confidence. The public part of the evaluation is the bid opening, which must be done in a public meeting with all bidders present (if they choose) and with all bids read out. The objective is to make sure everyone with an interest in the procurement knows who has bid and what were the offered prices. The confidential part is the detailed evaluation of the technical and financial aspects of each bid.

The objective of the evaluation is to identify the bidder offering the best value. The bidding documents provide bidders with the purchaser's minimum requirements. Any offer that exhibits material deviations, omissions or reservations is not acceptable. It is rejected irrespective of how low the price may be. All bids that pass this initial test are assessed to see which offers the best value.

Best value generally means lowest price, but not always. The TBL of 1999, for example, provides two procedures; one based purely on quality and another based on price. The latter states the winning bid is the one that meets the "substantive requirements stipulated in the tender documents and has the lowest bid price." The GPL of 2002 introduces factors in addition to price, stating requirements for "lower than average market price, high efficiency, good quality goods and services..." although this applies only to procurement carried out by "institutions for centralized government procurement." Accordingly, it is not just the lowest offered price that the purchaser looks at. Some bidders may offer equipment with lower operating costs than others. Some may offer longer delivery times or less-than-asked-for terms of payment. Where it is possible to do so, these differences are equalized by assigning to them

a monetary value. The contract is then awarded to the bidder offering the “lowest evaluated price,” a value that takes into account the differences.

Although the current legal framework strongly indicates that bidders compete mainly on the basis of price, issues remain regarding critical details on (i) lowest price or lowest evaluated price (ii) scoring systems to determine “best bids”, and (iii) determination of lowest price, technically acceptable bids. It should also be noted that the TBL provides for the rejection of bids that are determined to be below cost, but does not include specifics on how cost is determined. Each of these needs to be addressed to ensure that China achieves a proper balance between economy concerns, on the one hand, and the need for transparency and fairness, on the other.

Other Procurement Methods

Apart from the competitive tendering system described above, China’s legal framework provides for other methods. It recognizes, for example, that in some instances it may be more appropriate to purchase items “off-the-shelf” or through limited tendering, or enter into a negotiated contract. And when extending existing works, ordering an additional quantity of goods or purchasing proprietary goods (such as spare parts), a noncompetitive form of procurement such as direct purchase can be more appropriate. The GPL provides three additional forms of procurement.

- ***Competitive Negotiation*** is used where tendering has failed (no qualified bidders, no bids, etc.), where it is not feasible to specify the technical requirements, or under emergency circumstances. Technical specifications and price are negotiated with a specified number of firms according to predetermined procedures and criteria.
- ***Single Source Procurement*** may be used where there is only one supplier and where consistency and compatibility with previously procured goods or works is required.
- ***Request for Quotation*** is used mainly for procurement of supplies with uniform standards and specifications.

Foreigners who have been following the development of China’s legal framework for procurement have expressed concern about the competitive negotiation procedure. They believe it lacks the transparency and competitive features envisaged in the WTO-GPA (Government

Procurement Agreement). Negotiation is specifically restricted for procurement following an unsuccessful tendering and bidding process. The TBL of 1999 states: "Before determination of the winning bidder, the tenderer shall not undertake negotiation with the bidders on substantive contents of the bids such as bid price, bidding scheme, etc."

Procurement of professional services poses unique requirements. By its nature, selection must be based, to a certain degree, on professional qualifications and experience of firms and key individuals. Selection procedures are therefore only partly based on price, and in some cases price is not a criterion. Neither the TBL nor GPL addresses the unique requirements for the procurement of services. Consulting services are covered by most guidelines, but as yet these have not been made law and are not mandatory.

Oversight, Bid Challenge, and Complaints

Centralized oversight is generally recognized as an important component of a country's procurement system and is an evolving feature of China's legal framework. The TBL lays out specific sanctions for violations of its provisions, and states that determination of those sanctions will be made by "administrative supervision departments designated by the State Council". The TBL goes on to state that any interested party has the right to raise an objection or file a complaint to the administrative supervision department. Although this provides the basics of oversight, the scope and authorities are limited. Moreover, it falls short of establishing a truly centralized and independent body.

The GPL designates the finance departments of government at different levels as the Government Procurement Regulatory Authority (GPRA) and delegates to them the administration and supervision of government procurement activities (at the central government level the GPRA is the Ministry of Finance; at the local level it is the finance departments). The GPL is more specific than the TBL on the matter of complaints and bid challenges, including provisions on how bidders are to challenge the results of a bidding or complain about the process to the procuring entity (the complainant can involve intermediaries if it chooses). Bid challenges must first be submitted to the procuring entity (or procurement intermediary, as applicable). Only after this step can complaints be addressed to the GPRA, and only after this can the complainant appeal to the courts. Specific responsibilities of the GPRA as established by the GPL include

- Enforcement of laws and regulations;
- Implementation of methods and procedures; and
- Ensuring professional qualifications and ethical performance of procurement personnel.

It should be noted that the regulatory or supervisory authority provided for in the legal framework is a central policy-making body, no doubt introduced to insure policies are truly national.

PROMOTING ECONOMIC AND SOCIAL POLICIES

Many countries leverage public expenditures to address economic and social policy objectives. Measures are often incorporated in public procurement regulations to promote local business, develop small enterprises, to further labor and environmental standards, and to assist disadvantaged groups. In principle, international best practices discourage these measures. It is felt they are best dealt with outside the procurement system, through local labor laws for example. Within the procurement system, collateral objectives are difficult to quantify, sometimes contradictory, problematic determining who qualifies, subject to manipulation, and often contrary to the principles of fairness and obtaining best value for money.

The TBL emphasizes transparency and does not provide for the consideration of collateral factors in the tendering and bidding process. The GPL, however, significantly extends inclusion of such considerations into the legal framework. It states:

All government procurement shall be carried out to facilitate the realization of the economic and social development policy goals of the state, including but not limited to environmental protection, assistance to underdeveloped or ethnic minority regions, and promotion for small and medium enterprises.

The details of this policy objective are not spelled out, and it is not clear at this time if these objectives will be pursued secondary to the objective of best price, or if they will override financial and performance considerations. The GPL leaves all significant questions concerning collateral policy issues to be handled in future regulations.

In the area of domestic preference, again the TBL does not provide such a provision while the GPL is more specific. It states that domestic

goods, works, and services should be preferred, unless they cannot be acquired in China. However, the law is not clear if imported goods will be prohibited or only a margin of preference is to be given, or if the application of domestic preference will be discretionary and if so, by whom it might be decided. Giving a preference to domestic suppliers and contractors is a controversial topic as it represents a non-tariff barrier to foreign firms wishing to tap the huge market potential offered by government procurement. It is practiced to varying degrees in many countries and will almost certainly become a topic of public debate when China begins negotiations on the WTO Government Procurement Agreement next year.

LOOKING FORWARD

China has made tremendous strides over the past decade to bring public procurement under a comprehensive legal framework. The Asian Development Bank is pleased to have been a partner in this important development. As with any program of reform, the constraints of politics, compromise, and competing demands must be taken into account. As a result there is much that remains to be done.

- Ideally, there should be one law and the ultimate objective should be to combine existing laws into one. In the meantime, there is a need to clarify coverage of the GPL as compared to other legislation, especially the TBL, but also other legislation on contract law and competition.
- The authority, role, and function of the GPRA need clarification. It appears this role will be assumed by MOF but the law remains vague on how this is to be handled, especially the range of MOF responsibilities and how local governments will be regulated. Ideally, the regulator should be independent of line ministries.
- The law calls for intermediaries to act as procuring agents (between the procuring entity and the supplier). Using procurement agents is an acceptable practice, but the GPL is not clear on its definition of these agents and whether or not they can be in practice—like the tendering agencies under the GPL—“for profit” organizations.
- China needs to prepare comprehensively for the various trade-related government procurement discussions—the WTO discussions on the Government Procurement Agreement, General Agreement on Trade

in Services and the proposed transparency accord, as well as the APEC discussions. Current legal provisions such as those on domestic preference will become increasingly problematic as China begins to focus on the linkages between trade and government procurement.

- As modern procurement methods continue to expand, the already acute shortage of skilled human resources will require training, coupled with reform of civil service regulations to recognize procurement professionals in terms of salary and career progression. Rules on ethics, certification of practitioners, and disciplinary measures will need to be developed.
- A large public dissemination program is required to educate governments at all levels, procurement agents, consultants, contractors, and suppliers on all aspects of the relatively new and evolving legal framework.

Most importantly, the legal framework needs comprehensive implementing regulations. This work has been started for the TBL with the development of the PASI (project administration and supervision instructions), but these are more of a guide rather than regulations previously defined. As noted throughout this paper the GPL will require extensive elaboration in many areas if the law's provisions are to be effective. To some extent, regulations are also required to address areas largely excluded from the laws (for example, there is little in the GPL on procurement planning or on procurement of services such as consulting). Although it will probably take some years to fully develop comprehensive regulations, initial work is urgently required to insure a smooth introduction of the GPL in January 2003.

CONCLUSION

On behalf of the public, governments at all levels in China spend huge sums of money on the procurement of goods, public works, and services. The difference between doing and not doing this well can be significant. Sound public procurement policies and practices are among the essential elements of good governance. Good practices reduce costs and produce timely results while poor practices lead to waste and delays.

Procurement capacity must be built on several fronts—laws, institutions, procedures, and human resources all require attention. A

comprehensive legal framework is an essential element. This is known, as is the importance of public procurement for the promotion of trade, foreign investment, and the private sector. Putting the system in place is challenging. China has made good progress over the past decade but much remains to be done.

ACKNOWLEDGEMENTS

The author acknowledges with thanks the contributions made to this paper by Benny Kwong, Tay Sin Yan, Scott Overall, and Zhu Jianyuan of the Asian Development Bank.

NOTES

1. Over the past five years, the Asian Development Bank has funded six technical assistance projects related to procurement and recruitment of consultants, valued at approximately \$3 million.
2. These instructions, called the Project Administration and Supervision Instructions (PASI) were issued in December 2001 by SDPC to guide procuring entities in applying the TBL.
3. See OECD, 2001. A summary of procurement assessments carried out by the World Bank in 9 countries concluded that in all instances there was reported widespread corruption in the procurement process.
4. Broadly speaking, China has three main levels of government: (i) the State or Central Government (Zhongyang); (ii) provinces, autonomous regions (for minority nationalities), and municipalities that are directly under the control of the central government; and (iii) various levels of local government such as prefectures, counties, townships, villages, etc.
5. Military procurement falls under a separate legal framework, administered by the Central Military Commission of the Chinese Communist Party.
6. In international practice, for goods to be qualified, they usually must be shown to have been in production for a minimum period of time and in minimum quantities, and to have been produced in factories that meet minimum standards (often an ISO or similar standard). They must also meet minimum technical specifications.

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