Seek Truth & Ensure Justice

ISSUES AND GAP ANALYSIS IN THE PUBLIC PROCUREMENT OF WORKS (ABOVE FIVE MILLIONS); CONTRACT IMPLEMENTATION; AND SETTLEMENT OF DISPUTES

2021

Financial and Corporate Division

Foreword

His Majesty the King in several occasions has commanded the need to build the capacity of our judges, lawyers and legal practitioner in the area of financial and corporates laws. In solemn obedience and to fulfill the sacred vision, the Office of Attorney General as per section 7 of the *Office of the Attorney General Act 2015* has established "*Finance and Corporate Division (FCD)*" under the Department of Legal Services in the OAG.

The Division is expected to: build legal expertise in the area of financial, commercial and corporate laws; provide technical and expert legal opinion; ensure sound contract drafting; provide in-house legal advice while prosecuting or defending financial, commercial, corporate and contractual related cases; and carry out advance research and conduct legal dissemination.

Accordingly, the FCD was directed to carry out gap analysis in the public procurement and contract implementation concerning works above five million as a part of the FCD's research function with the aim to study the pressing issues. This report is first of its kind prepared by the Office of the Attorney General in the area mentioned above. We hope this report will be instrumental in improving the public procurement system and contract implementation in the country, and serve as a guidance to the procuring agencies.

Lungten Dubgyur
Attorney General

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EXECUTIVE SUMMARY

The investigation into the gaps in the procurement system, and government contracting in the country particularly on procurement of works above five millions covered under the Procurement Rules and Regulations 2019 (PRR), the related guideline and Standard Bidding Document can be categorized under three areas of firstly the procurement process, then contract implementation, and finally settlement of disputes. The report which is based on desk review of available reports and laws, and consultation with key personnel such as engineers, procurement officials, and lawyers from key agencies reveal that majority of the gaps pertain to ineffective implementation of the PRR and the contractual terms, perpetuated both by the contractors and procuring agencies. Lack of stringent accountability against officials from procuring agencies for negligence and omission of duties, and their lax behaviors to strictly monitor the works are the main reasons for project failure or otherwise early termination of contracts. Similarly, lack of competencies and know-how, motivation and integrity of personnel directly involved in the implementation too have contributed to the cause of project failures.

Certain provisions of the PRR and SBDs may need to clearly stipulate stringent enforcement of accountability against negligent officials from procuring agencies. This can be done through assessment and evaluation of the works based on project completion reports or through investigations of the failed projects, which are currently lacking. Further, the term "lowest evaluated bid" and related provisions under the PRR must be revisited in order for the works to be diligently awarded to the best evaluated bid. Selecting the right bid and the bidder ensures that works are completed timely with desired specifications. Other instruments such as handy guidelines and manuals especially for personnel directly involved in the works-implementation are much needed for effective monitoring of works from the very inception until end of the project. Additionally, the report also discusses whether the PRR needs to be legislated into Act which carries greater degree of authority and gumption.

This report was prepared by Deputy Chief Attorney Sangay and Sr. Attorney Namgay Om working under Finance and Corporate Division, Department of Legal Services.

I. INTRODUCTION

The procurement of works (above 5 millions) includes significant projects such as roads and bridges, which constitutes infrastructure development in the country, particularly significant for a developing nation like ours. In this line, when such a project fails, it leads not only to financial loss but also delays in making public facilities available to the public.

The budget for government procurement (works, goods and services) was Nu. 109 billion and Nu. 116 billion for the 11th and 12th Five Year Plan, respectively.[1] About 15 % of the GDP accounts for this spending. Hence, efficient and impactful utilization of this budget is important.

Although relevant laws governing government procurement, and contracts are in place, the efficacy is scant owing mostly to deficiencies in implementation. The procurement system lays the foundation based on which the intricate details of the contract is built upon and executed. Therefore, scrutiny of the procurement system must precede the identification of diverse issues under government contracts. Although losses arising out of compensation payment obligated under the arbitral awards may be widely identified as one of the main concerns, there are diverse primary or correlated causes generating a surge of issues ultimately resulting in contractual disputes. The loss is not only in monetary terms but also time, lost opportunity, inconvenience and delaying availability of infrastructure and facilities to the public when monasteries, water supply, bridges, roads or school buildings are not completed on time. The progress of the nation is diminished when numerous such nationally significant projects are affected. While some of the best practices from foreign jurisdictions have been assimilated into the Procurement Rules and Regulations 2019 (PPR), the deficiency of the procuring agencies in terms of project planning, evaluation of bids, and management or execution of contracts, among others, emerge starkly and distressingly. In addition, guidelines on various aspects of procurement such as conducting mandatory prerequisites studies, are currently not available which may have been hampering the effective implementation of the PRR. Ensuring accountability for a failed project, and the monitoring and reporting system also appears to be inadequate.

The government procuring agencies, other relevant government agencies, private contractors, Alternative Dispute Resolution Centre and the courts must work collaboratively in their respective roles of fulfilling its mandated duties profusely, reliably and with due diligence.

[1] Evaluation for Government Procurement of Works (Above 5 million).

Purpose

Deriving from the above background, the purposes of this report are to:

- identify the legal issues under the PRR, execution and implementation of works (above 5 millions) and related guidelines;
- conduct gap analysis between the PRR, related guidelines and instruments, and the practical implementation of those concerning works (above 5 millions); and
- recommend measures to address the issues and achieve efficacious accomplishment of government contracts concerning works (above 5 millions).

Methodology

The methodology adopted for this study is qualitative. Firstly, the PRR including the Standard Bidding Documents, and associated Guidelines has been studied to detect the legal issues. Secondly, existing reports and studies conducted by various organizations on the procurement system have been analyzed. Thirdly, consultation meetings were conducted with the relevant agencies such as the Ministry of Finance (MoF) including Government Procurement and Property Management Division (GPPMD), Ministry of Works and Human Settlement (MoWHS), Construction Development Board (CDB), Construction Association of Bhutan (CAB), Alternative Dispute Resolution Centre (ADRC), Anti-Corruption Commission (ACC), and Royal Audit Authority (RAA). Based on these approaches, the pressing issues under the procurement system and government contract implementation have been identified under this report.

II. PUBLIC PROCUREMENT SCENARIO IN THE COUNTRY

1. Legislative context

RELEVANT LAWS

- Public Finance Act of Bhutan 2007 (PFA)
- Procurement Rules and Regulations 2019 (PRR)
- Evaluation Guidelines for Procurement of Works 2019 Above 5 million (EGPW)
- Anti-Corruption Act 2011 (ACA)
- Audit Act of Bhutan 2018 (Audit Act)
- Alternative Dispute Resolution Act 2013 (ADR)
- Civil Service Act 2010 (CSA)
- Bhutan Civil Service Rules 2018 (BCSR)

Section 104 of the PFA provides the MoF with the power to issue delegated legislations, guidelines, directives, and notifications, as may be relevant, and under it, subsection (i) particularly relates to a "*procurement system which is equitable, transparent, competitive and cost-effective*". Accordingly, the procurement system in the country is governed through delegated legislation, the latest being the PRR 2019. In addition, the procurement of work in large categories, the subject-matter for the current study, is normally carried out according to Standard Bidding Document (SBD) Procurement of Works (Large) and is also governed by the Evaluation Guidelines for Procurement of Works, Above Nu. 5 Million (EGPW) issued in 2019.

Deducing from the legislative framework, although currently there is no specific legislation on the procurement; the PRR and the associated standard documents, and guidelines have captured the essentials, and the detail matters alike, to govern the government procurements. However, this report finds the need for more guidelines on some of the specific subjects under the PRR.

2. Practical situation

The practical implementation of the procurement process and the contract management is characterized by lack of due diligence, lax implementation of the relevant rules, and guidelines, and poor accountability on the part of most procuring agencies as well the bidders and contractors. Our discussion with the representatives of key agencies subtly reveals that it may have been due to systematic flaws which includes the lack of sufficient manpower as well as lack of training and experience in the field, questioning the competency and integrity of employees in the sector. It may also have been due to lack of motivation and rewards to the performing employees, or otherwise lack of strict reprisals against the neglectful employees.

III. PRE-AWARD ISSUES

1. Lack of market research, analysis and need assessment

- **Issue**

Market research, analysis and needs assessment are important steps during the procurement planning stage. This helps to understand the structure of the market, capability and capacity of economic operators, and price trends in the market. In turn, this will help in making informed decisions as to how procurement will be conducted, managed and ensure positive delivery of outcomes.

The lack of proper planning during the procurement of works by the procuring agencies have led to termination of most contracts. The upshot of untimely termination of contracts is multitude: compensation payment to the contractor; wastage of time; deferment of public facilities such as road and school buildings; and this also renders the government contracts uneconomical.

- **Law**

Clause 1.1.5 of the PRR requires the procuring agencies to mandatorily conduct market research and analysis to develop a thorough understanding of the nature of the market, how it works and how it impacts upon your approach to the market and overall procurement strategy. The extent of market research will depend on the nature and scope of the goods/ services, the degree of difficulty in specifying the requirements, the level of risk to the agency if there is failure in the delivery, and whether it is a one-off purchase or ongoing procurement.

Clause 1.1.5.3 provides some common methods that the procuring agency may choose to obtain information about the market such as internet research, request for information (RFI), previous experience, and industry bodies. The market research and analysis shall assess market-related risks and opportunities that will affect the preferred approach-to-market strategy. The market research and analysis shall be consolidated into a list of conclusions and implications that are used to select a fit-for purpose approach to market for the contracts in the project. Similarly, needs assessment has to be carried out (as per clause 1.1.6 in order) to find reasonable quality and quantity, and to avoid artificial creation to benefit certain individuals. Accordingly, the rule also entails a mandatory procurement planning for the fiscal year, in the form of annual procurement plans. Accordingly, specifications of the goods, services or works under the bid shall be provided in the bid documents. Non-conformity with the specifications would render the bid non-responsive.

Additionally, under clause 5.1.1.5 of the PRR "Procurement of works, goods and non-consulting services which exceed departmental threshold shall be subject to mandatory prerequisites studies such as pre-feasibility studies, detailed project reports, geopolitical investigation and detailed estimates".

- **Gap analysis**

It was transpired during consultations that most of the failure in contract implementation is due to improper and unrealistic planning. For instance, building roads in *Phuntsholing* or southern foothills during the peak summer would render the work difficult due to continuous and heavy rainfall. Likewise building of roads in the high altitude in winter would not be suitable due to extreme cold. Further it is also prevalent among government agencies to introduce *ad hoc* procurement that are largely not part of the annual procurement plan. These deviations from the norms have resulted in flaws in the project planning including time, quality and budgetary requirements. The time period prescribed for the construction works were found to be insufficient for the project which shows lack of proper and realistic planning. The consultation meeting with the relevant agencies indicated that the rules and regulations are not handy for the users to initiate market research and planning while they largely agree that market study and research such as preliminary study, especially for large works, are an important facet of procurement activities which must be adhered to.

Through the consultation meetings, it was found that mostly engineers are involved in the procurement process while the procurement officers are not. It is observed that, there is a disconnect between different stages of the procurement process such as market research, tendering process, and project implementation.

- **Recommendations**

a. The procuring agencies are recommended to: carry out proper planning on any works to be procured such as pre-feasibility studies and market research and analysis; prepare detailed project report; determine realistic project timeline; verify adequacy of budget; and to provide appropriate technical specifications.

   Strategy: A simple desk-based analysis that is used to clarify the market structure, identify active economic operators, and understand prices may be an appropriate approach for standard commoditized procurement.

   There are various tools available on the net. (see http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-32-200117.pdf and https://spb.sa.gov.au/sites/default/files/Market%20Analysis%20Guideline%20v2.0%20September%202016_0.pdf)

b. In order to render the above recommendation effective, the procurement officers along with technically qualified personnel should be acquainted or trained to carry out the activities mentioned under the (*recommendation a)* mandatorily and implement them effectively.

c. Engage external consultants to carry out pre-feasibility studies where in-house experts are lacking, to determine specifications including contract duration, time of implementation, machine and personnel requirements, maps and designs, et cetera.

d. Develop a national guideline or handy tools on market analysis and study to ensure mandatory use of market analysis and standardization of such procedures by procuring agencies depending upon category and nature of work.

e. Strictly impose administrative actions according to the BCSR 2018 on the procurement officer or the responsible personnel, where gross negligence or failure in performing their specific roles are shown.

2. Lowest evaluated bid

- **Issue**

Under the PRR 2019, for procurement of works beyond five million, a two-step process has been prescribed, the details of which are provided under the EGPW. This process involves evaluation of the technical aspect first, and then the financial aspect wherein the evaluation is done mostly on the price. Although the evaluation criteria are comprehensive and clear, most procuring agencies are still emphasizing on the lowest quoted price in the second stage. This is because once bidders are qualified in the technical aspect after scoring a minimum requirement of 75 % they are eligible for bidding. Then, the determination of award is purely based on price quotes of the bidders, except that 10 % is allocated for employment of domestic employees and for incorporated companies under the Companies Act.

As a result of emphasizing on the price in the second stage, usually the award is given only to the lowest quoted bid. This along with other factors such as lax monitoring of the contract implementation has caused termination of most contracts, resulting in arbitration and then compensation payments required to be made under the contract terms.

- **Law**

Under clause 5.4 of the PRR, the bid evaluation process is to access and select the lowest evaluated bid. The evaluation criteria stipulate that the price quoted is only one of the criteria

for evaluation. Clause 6.1.1.2 of the PRR specifies that the procuring agency shall award the contract to the lowest evaluated bidder but subject to relevant provisions under PRR. Lowest evaluated bid has been defined under Clause 1.1.3.1(32). Therefore, the lowest evaluated bid is the core basis on which the award of contract is made.

Delving into the details, a two-stage procurement process has been stipulated under clause 4.3.1.3 for procurement: involving large and complex contracts above the value of 5 million; where there are two or more acceptable technical solutions to the procuring agency; or where the procuring agency cannot set the required specifications in advance. As mentioned above, the two-stage process entails the evaluation of the technical aspects first, and in the second stage, the responsive bidders are asked to submit their technical proposals according to the amended technical specification (agreed between the procuring agency and the bidders) along with their financial proposals. Thereafter, the Tender Committee will verify and award the contract to the lowest evaluated bidder.

The details on the evaluation for works exceeding Nu. 5 million is provided under the EGPW. According to EGPW, in the first stage a detailed instruction of how the technical aspect is evaluated is provided wherein similar work experience, access to adequate equipment, availability of skilled man power, average performance score from previous work, bid capacity (determined based on the quoted price), and credit line (which looks at the project cash flow) available are considered. Those bidders who get 75% and above during the assessment under the first stage are qualified for the second stage. Then the qualified bidders will be assessed on a set of price preference parameters (such as status of the business, whether incorporated, sole proprietorship etc, and employment of Bhutanese) which will carry 10% weightage that will be combined with the financial bid which will carry 90% weightage to reach at the overall price-preference-financial score.

- **Gap analysis**

The reports[2] compiled by various working committees such as through the Green Public Procurement in Bhutan in 2015, and Good Governance Committee of the National Council in 2016, and consultation meeting with relevant persons in the public procurement area such as the PPD under MoF, ADR Centre, MoWHS, CDB have: already identified the lowest quoted price as a major cause for commotion and complications in the public procurement system resulting in substantial impact on the contract performance. In short, the difficulty in performance of a quality work of construction is also due to abnormally low price quoted by contractors for a work which is selected by the procuring agency.

2 GPP Bhutan (2015). *Legal Analysis of the Public Procurement Framework in Bhutan: Prospects for procuring green.* Thimphu; Good Governance Committee, NC Bhutan (2016). *Review report on the Public Procurement System*. Thimphu.

Limitation of the two-stage evaluation process under the EGPW

Although the award of contract to the lowest quoted price for contracts below 5 million may be resulting in the compromise of the quality, award of contract for works exceeding Nu. 5 million pursuant to the two-stage process provides a certain check on the quality. According to the two-stage process under the EGPW, a bidder is first accessed on the technical capacities and then the price is a factor during the second stage. Therefore, it may appear that bidders that are not technically sound may be sieved through the first process unless all the bidders for that particular work are equally bad, in which case the main issue is the competence of contractors rather than the lowest quoted price. However, in reality the fulfillment of the technical criterias by the successful bidders under the first stage may not be achieving the desired outcomes. For instance, skilled manpower or equipment required are only shown on papers to qualify under the first stage. Therefore, all bidders who qualify under the first stage may not be at an equal level of competency, with vast capability differences among the bidders. Yet, in the second stage despite variation in technical competencies among the bidders, the bidders are placed at an equal platform and are evaluated 90% on price, and 10 percent on other factors. Therefore, irrespective of the two-stage process involving evaluation of technical aspects and the financial aspect, emphasis on price in the second stage inevitably centre on the lowest quoted price.

This defeats the very purpose of the definition of lowest evaluated bid under the PRR which defines lowest evaluated bid to mean *"the bid which offers the best value for money, evaluated on the basis of various objective criteria set out in the bidding document. It does not necessarily mean the "lowest quoted price"*. In practice, mostly the lowest quoted price is the basis for awarding the contract unless the bids are rejected for circumstances falling under clause 5.4.7 such as non-responsiveness of the bids, bid prices are found substantially exceeding the departmental estimate, bids appearing to have been tampered with, and abnormally low bid. The following issues will shed more light on this argument.

- ***Departmental estimate not updated with prevailing market prices***

The procuring agencies must first work out a departmental estimate before tendering out any work. The departmental estimate serves various purposes including recognizing abnormally low bids, and abnormally high bids within the confines of which the bid is to be selected. According to clause 5.4.5.1 of the PRR *".....Before proceeding to further analysis, the procuring agency shall revisit their departmental estimate to ensure it is realistic compared to the prevailing market rates."* Therefore, in order to ensure quality work, the procuring agencies should make realistic estimates based on the prevailing prices in the market for quality materials, equipment and skilled manpower. This will also require a timely update

of the Bhutan Schedule of Rates (BSRs) according to the prevailing prices in the market. During the consultation with the Construction Association of Bhutan, it was highlighted that the BSRs are not updated in a timely manner. Realistic and updated BSR will ensure that low quoted bids that may compromise the quality of the work are filtered out in the first place. Once the departmental estimates are reasonable enough to procure quality work, the monitoring aspect of the project discussed in the subsequent parts under this report, must also be strengthened to warrant that the money does not go to waste, and the procuring agencies achieve its intended objectives.

- ***Abnormally low price***

It is observed that, numerous times as the bidder quoting the lowest price is awarded the work, consequently, the lowest quoted price also happens to be abnormally low price. In reality, the law, however, is adequate and equipped to deal with such issues. According to clause 5.4.5.1, if a bid is abnormally low, the procuring agency has the right to reject the bid which requires due diligence on the part of the procuring agency such as further analysis on the price, and justification from the bidder. The other alternative according to clause 5.4.5.5 is for the procuring agency to increase the performance security from the mandated 10% to 30%, or in addition to the 10%, the procuring agency can ask the bidder to deposit the difference between the departmental estimate and the contract amount in the form of cash warrant which shall not exceed 30 % of the initial contract price. Similarly, if the bid is unbalanced or front-loaded under clause 5.4.6, the same alternative prescribed for abnormally low price has been prescribed.

However, the clauses on abnormally low price do not provide the threshold below the departmental estimate on the basis of which the bid may be considered as abnormally low. In addition, the practice with most procuring agencies is, awarding the contract even to a bidder who has quoted abnormally low price to the extent of the bid being 40% lower than the departmental estimate, after asking for additional security or the price difference between departmental estimate and the contract amount. The experts from MoWHS states that any work given to any lowest quoted bidder who has quoted 20 % lower than the departmental estimate may be able to complete the work by forgoing profits and other overhead costs. However, quoting lower than 20 % of the departmental estimate will not be able to even complete the work, let alone, achieving a quality work.

The abnormally low-price leads to compromising the quality of the work, and disruption in the contract implementation such as repeated extension of time, and even premature termination of contracts.

- ***Reasons for abnormally low bid***

The reason for the abnormally low price can be attributable to followings:

- The general perception is that not awarding to the lowest bidder would invite corruption allegations of collusion which appears to sway the agencies towards the archaic practice that lowest evaluated bid to mean the lowest quoted price; this has led the tender evaluation committees to be risk-averse;
- The lack of specific threshold to determine an abnormally low bid that must be rejected;
- The lack of proper market research propels the tender evaluation committee to choose the lowest quoted price which may be easily justifiable;
- The departmental estimate is not consistent with the prevailing market price to ensure quality work; and
- The BSR which is the basis for working out the departmental estimate is not updated in a timely manner.

- ***Recommendation***

a. Revise the EGPW, to provide that different bidders who qualify under the first-stage are provided with scores, which shall be carried forward in the second stage of the evaluation process, and considered along with the price quoted in the second stage. This can aid in selecting a contractor that possesses both technical and financial competency, and a reasonable price quote for the work. Or, if the current process is retained, the evaluation of the technical aspects under the first stage process must be rigorously carried out not only through the system or paper alone but also through field or actual verification.

b. The procuring agencies must make realistic departmental estimates based on the prevailing market prices for quality material, equipment, and skilled manpower to avoid unreasonably low quotes, and attain quality work. For this purpose, the BSR must be updated and implemented in a timely manner.

c. Revise the clauses on abnormally low prices under the PRR to provide that if the price quoted by the bidder is lower than 20 % below the departmental estimate or any other appropriate threshold, the bid shall be rejected.

d. Strictly impose administrative sanctions according to the BCSR 2018 on the tender evaluation committee for gross negligence including accepting technical criteria without properly verifying the authenticity while at the same time, the competency of the committee must be strengthened, and incentives proportional to the responsibility must be provided.

e. Revise the phrase 'lowest evaluated bid' to 'best evaluated bid' or 'most advantageous bid' or any other appropriate phrase to avoid misinterpretation of the phrase "lowest evaluated bid".

f. Frame guidelines on evaluation criteria prescribed under the EGPW while evaluating availability of human resources and equipment such as the methodology for verifying the personnel employed and equipment owned. For verifying the employees working with the bidder, financial transactions of the bidder including trails of salary payments made to employees may be required.

3. Time for appeal

- **Issue**

The recourse to the courts given to the aggrieved parties from any decision or disputes related to the procurement, and the award of tender under the PRR, lacks the time period within which an appeal must be made.

- **Law**

The final administrative appeal board under the PRR is the Independent Review Body (IRB), whose decision may be subject to appeal to courts according to clause 8.1.9 *"If the decision of the Independent Review Body is not acceptable then an appeal may be made to the Court only on a question of law. In such a case, any concession granted by the Review Body shall stand withdrawn."*

- **Gap analysis**

The above rule, however, lacks the timeframe within which an appeal must be made to the court by aggrieved parties to appeal to courts within a reasonable timeframe and debar them from unnecessarily delaying an appeal. It is also indispensable for the IRB to have finality on

its decision to proceed further on the matter otherwise the aggrieved parties may choose to file an appeal to the courts after the contract has been awarded and even during the execution. This may lead to suspension of work, or in the worst-case scenario cancellation of a work that is already awarded or under execution.

- **Recommendation**

Prescribe a time-period within which an appeal must be made to the court if an aggrieved party decides to appeal against the decision of IRB. It is recommended that 10 days appeal period may be provided for. The time-frame could be provided under the PRR.

IV. POST-AWARD ISSUES

4. Contractual linkages between contract evaluation, contract documents and their implementation

- **Issue**

Lack of linkages between contract evaluation and contract implementation contribute to failure of projects. It needs to be seen how a connection between what has been proposed or disclosed in the bids by bidders and their actual implementation is built, to ensure display of contractors competency and effective execution of works. This raises a serious question of how effective the contract implementations under PRR vis-a-vis monitoring and implementation are.

- **Law**

Clause 6.4.1 of PRR provides, *"The contract management shall include all administrative, financial, managerial and technical tasks to be performed by the procuring agency from contract award until it is successfully concluded or terminated and payment is made and disputes or claims under it have been resolved."*

Clause 6.4.2 provides, *"The procuring agency shall apply professional ethics and due diligence in contract management to ensure proper implementation of the signed contracts in line with the agreed conditions of the contract. The procuring agency shall ensure that Goods, Works or Services to be procured conform to technical requirements set forth in the contract document."*

Clause 6.4.3 provides that *"the elements of contract management may include, review and* ***approval*** *of the work plan;* ***monitoring periodically progress in implementation*** *of the contract including determination of volume of works accomplished according to work plan, milestone achievement and inspection, and testing of* ***quality*** *aspects; and management of variation orders, contract suspension and termination, price revisions, contract remedies such as imposition of liquidated damages, and disputes or claims settlement procedures."*

Clause 6.4.4 provides that *"any other elements of contract management shall be covered by terms and conditions of the contract."*

- **Gap analysis**

The lowest evaluated bid refers to the best or most advantageous bid, both technically and financially. The contract must be awarded to the most advantageous contractor based on his/

her capacity and the price that he/she quotes. Award should not be solely based on pricing. The technical evaluation must consider the availability of competent human resource or manpower, financial soundness or credit worthiness, ownership of machineries and requisite equipment, past work experience and performance (especially in the relevant field), business and technical proposals for the considered project, and any other conditions that the procuring agency deem fit and proper. The technical evaluation of a bid forms a critical part of eligibility for a proposed work. This qualifies them to the second stage of assessment based on pricing.

From a practical point of view, in addition to quoting a reasonable price for the work, technical competency must be displayed based on scoring or technical criteria. These competencies must not be shown only on papers (in the bid documents), it must be executed during the actual implementation. Awarding a bid to the lowest quoted price may be seen as a complicit in compromising the quality or contributing to premature breach of contract by the employers from the outset. Therefore, the employer or procuring agency must ensure that the contractor implements the contract as per the competency, resources and time-frame detailed in contract documents.

According to Annual Audit Report 2020, out of six categories of irregularities, the highest is attributable to short fall, lapses and deficiencies amounting to Nu. 1,574. 244 millions followed by non-compliance to laws and rules at Nu. 408.062 millions. These figures indicate the shortcomings and negligence on the part of the procuring agencies including project managers and supervisors in monitoring and implementing works. The same report states *"Supervision and monitoring is vital aspect of ensuring desired quality of constructions. Most of the issues reported pertain to compromise of quality by way of acceptance of defective works, provision of inferior quality of materials, poor workmanship, deviations from designs and drawings etc. Such compromises undermine the very quality and sustainability of the infrastructures created and lead to waste of public resources."* Further, from the consultation meetings held with the relevant agencies, the procurement officers explain that they were over burdened with numerous works simultaneously such as having to monitor or supervise many projects at the same time. It also transpired that even though they were aware about the requirement to maintain the work dairies, they did not do so. The procurement officers also emphasized the lack of training programmes in addition to lack of experience as some of the factors impeding proper monitoring and implementation of the works.

- **Recommendations**

a. Clear and detailed responsibilities of site engineers/work supervisor/project manager for the government/employer must be incorporated in a Standard Operating Procedure

(SOP) or a work manual, and strictly implement them. Similarly, the responsibility of the head of the agency in monitoring the site engineers/work supervisor/project manager must be clearly provided in the SOP or the work manual.

b. Such specific roles and authority of the site engineer/work supervisor/project manager on behalf of the employer in relation to the contractors during implementation of works shall be specified, generally as well as specifically in the contract document.

c. The project manager/work supervisors shall also ensure all human as well as material resources disclosed during the procurement process are effectively and promptly employed. He/she shall also ensure the quality aspects of the work by continuously monitoring during construction as per work manuals.

d. This may also entail standardization of competencies of engineers, supervisors or employees including workload that may be handled at a given time.

e. It is also important to review the benefits and emoluments that are proportional to the experience and workload to retain efficient employees and to impose accountability for lapses.

f. Repetition of negligence and lapses by site engineers/work supervisor/project manager/ tender committee for the procuring agencies, depending upon the seriousness of loss suffered, stern appropriate administrative actions according to the BCSR 2018 must be taken. Similarly, if the head of the agency has repeatedly failed to monitor the works resulting in lapses by the site engineers/work supervisor/project managers, the head of the agency shall be held accountable according to the BCSR 2018, or where BCSR does not apply appropriate action can be taken through an administrative due process by the Government as per the gravity of lapses in the project completion report.

5. Mobilization advance

- **Issue**

According to the PRR, a mobilization advance of 20% (10 % previously) of the contract value is paid to the contractor after the contract is awarded to procure necessary materials or equipment for execution of the work. However, many times the contractors utilize the mobilization advance for purposes other than to procure necessary materials or equipment for the work.

- **Law**

The following rules of the PRR states about the mobilization advance:

"5.1.12.1. A Procuring Agency may provide for payment of interest free Mobilization Advance in respect of a works contract on submission of the required Performance Security and an unconditional bank guarantee for an equivalent amount of the Mobilization Advance by the Contractor.

5.1.12.2. The provision for Mobilization Advance shall be incorporated in the bidding documents along with the following conditions:

- *The amount of Mobilization advance shall be ten percent (10%) of the Contract Price;*

- *The contractor shall be required to furnish an unconditional guarantee issued by a reputed Financial Institution and acceptable to the Procuring Agency for an amount equal to the required advance payment. The guarantee shall remain valid till the advance is recovered in full;*

- *The advance payment shall be recoverable through percentage deduction from the interim progress payments. The percentage of deduction shall be fixed on pro-rata basis so that the full amount of Mobilization Advance is recovered prior to the time when eighty percent (80%) of the Contract Price is certified for Interim Progress payment;*

- *The amount of the guarantee against Mobilization Advance may be proportionately reduced with repayments made by the Contractor or with the progressive recovery of Mobilization Advance from the Interim Progress payments."*

- **Gap analysis**

The clauses on mobilization advance specify that the mobilization advance of 20 % of the Contract Price shall be paid to the contractor to mobilize necessary materials and equipment for the work. This mobilization advance is paid after the contractor provides an unconditional bank guarantee equal to the amount of mobilization amount. This mobilization advance is recovered by the employer through percentage deduction from the progress payment. Although the rationale for giving the mobilization advance is sound, the practical implementation of the same by the contractor is far from the intended rationale. During the consultation meetings with the government agencies, it was revealed that contractors tend

to utilize mobilization advance not for assembling the required equipment and materials but for personal purposes. Although the mobilization advance is deemed secured through bank guarantees, often it is reported that they are siphoned off for different purposes thereby affecting the work progress right from the beginning. Therefore, it is necessary to ensure that the contractors use the mobilization advance for the purpose it was given.

- **Recommendation**

a. Amend the clauses on mobilization advance under the PRR and the SBD, whereby the money is hereafter paid directly to the suppliers for the mobilized materials and equipment, or paid on the production of receipts from suppliers instead of paying the advance directly to the contractors (similar to that of supply chain financing or trade financing). Proper verification and checks must be ensured through system or procedures.

b. The contractor's requirement to furnish unconditional bank guarantee will not be required, if the money is paid directly to the suppliers.

6. Design and quality assurance

- **Issue**

Although the project manager is required to monitor the work, there is no dedicated division or standard procedure to ensure the quality of work by employing experts. Even on the monitoring aspects, gross negligence and lapse are commonly found as discussed in the preceding issues. Requirement of a designated unit for quality assurance is particularly relevant for MoWHS, and projects with huge financial stakes.

- **Law**

Under clause 6.4.3, the elements of contract management may include monitoring periodically progress in implementation of the contract, including determination of volume of works accomplished according to work plan and milestone agreement, and inspection and testing of quality aspects. According to the SBD, the project manager has the mandate to ensure the quality of work as a part of contract management.

- **Gap analysis**

The mode of ensuring the quality is provided under the SBD, according to which the project manager is identified as the appropriate person to ensure the quality. However, some of the project managers do not possess the expertise to inspect the quality or even if the

project manager has certain expertise, it may not be adequate. In addition, currently some project managers are shown to be negligent in monitoring the work, which has resulted in compromising the quality of the work. Therefore, in big ministries like MoWHS, or for instance projects with high value, having a *design and quality assurance* division or unit appears to be inevitable to achieve the desired quality works, and avoid wastage of government resources.

- **Recommendation**

a. In big ministries like MoWHS, a design and quality assurance division should be created to ensure the design and quality of the works.

b. In a project with a huge financial stake, a separate team apart from the project manager will be necessary to ensure the design and quality of the works, particularly in those organizations where there is no design and quality assurance division.

c. In order to implement recommendations a and b, it will be necessary to revise the PRR and the SBD to incorporate the requirement of design and quality assurance by the dedicated division or a separate team, as the case may be.

d. It should be the mandate and responsibility of the division/unit to ensure that quality of the goods and works are in line with the technical specifications in the contract as well as meeting the national standards for that particular works or services. Such oversight mechanisms within the agency, that will follow certain protocols, will ensure standard of quality at the time of construction or rectify inferior work or substandard work even during the contract period.

V. ISSUES ON SETTLEMENT OF DISPUTES

7. Payment upon termination (settlement)

- **Issue**

The clauses on payment upon termination under the PRR have provided for the details to be covered in the contract. However, the SDB does not appropriately cover the requirement to pay damages and compensation by either parties when the contract is terminated on the convenience of the employer or due to a contractor's fault, as the case may be.

- **Law**

Clause 61 of the General Clauses of Contract (GCC) under the SBD Procurement of Works (large) stipulates two clauses on payment upon termination due to fundamental breach of contract by the contractor, and termination of contract on the convenience of the employer as follows:

"61.1.If the Contract is terminated because of a fundamental breach of Contract by the Contractor, the Project Manager shall issue a certificate for the value of the work done and Materials ordered less advance payments received up to the date of the issue of the certificate and less the percentage to apply to the value of work not completed, as indicated in the SCC. If the total amount due to the Employer exceeds any payment due to the Contractor, the difference shall be a debt payable by the Contractor to the Employer.

61.2.If the Contract is terminated for the Employer's convenience or because of a fundamental breach of Contract by the Employer, the Project Manager shall issue a certificate for the value of the work done, Materials ordered, the reasonable cost of removal of Equipment, repatriation of the Contractor's personnel employed solely on the Works, and the Contractor's costs of protecting and securing the Works, and less advance payments received up to the date of the certificate."

- **Gap analysis**

Clause 61.1 above, specify payments for work done, and materials ordered, if a contract is terminated by the employer due to fundamental breach of contract by the contractor considering the advance received by the contractor, and the percentage to apply to the value of work not completed as prescribed in the Special Clauses of Contract (SCC).

Clause 61.2 similarly provides for payments for work done, materials ordered, the reasonable cost of removal of equipment, repatriation of the contractor's personnel employed solely

on the works, and the contractor's costs of protecting and securing the works, if a contract is terminated by the employer based on the employer's convenience, considering also the advance payments made to the contractor.

However, the above clauses do not contain any requirements to pay damages such as cost of opportunity lost, when a contract is terminated based on the convenience of the employer. Similarly, when a contract is terminated due to breach of contract by the contractor, even before the work has begun, the liquidated damages does not even apply. In such cases, the employer is not able to claim for damages. Further, some contractors abandon the work after completing about 90% of the work preferring for their retention money to be forfeited. Experience shows that in such cases the 10 % abandoned work constitutes activities that are quoted abnormally low. The employer has no other damages prescribed other than the retention money. Yet, the damage done by the contractor for not completing the work, sometimes, is not proportional to what the retention money can probably cover.

Most of the disputes between employer and employee pertains to settlement of payments due to early termination as parties are normally not satisfied with settlement payments: payments are contested as not proportional to the value of work done; or contractors ambitiously claim damages beyond the contract price. Currently, the PRR and the SBD for procurement of works (large) does not provide the process for the valuation of work done, and the compensation or damages to be paid or received, in detail. This lack of clarity in the contracts has led most of the termination cases to go for arbitration and to courts.

- **Recommendation**

a. Revise the clauses on payment upon termination under the SBD Procurement of Works (large) to include provisions for payment of damages in addition to other payments already stipulated under it. Such damages shall include cost of inflation, cost of re-tendering if the work is to be completed by a contractor, and cost for loss of opportunities or delays in rendering public services.

b. Provide in the contract document the procedure for valuation of works for settlement in the event of termination. The FIDIC (Fédération Internationale Des Ingénieurs-Conseils, which means the international federation of consulting engineers) contract samples provide procedures wherein the designated Engineer is required to consult each party to reach an agreement. If this fails the Engineer is required to make fair determination in accordance with the contract giving due regard to all relevant circumstances. The Engineer is required to give notice to both parties for each determination. Each parties

shall give effect to such determinations unless revised through an arbitral award, or court judgement or mutual settlement. Positioning the Engineer as an expert valuator shall render utmost fair and reasonable decision while avoiding unnecessary litigations. Moreover, designating such a valuator (similar to adjudicator) will be given due regards by oversight bodies such as RAA/ACC and the courts.

8. Termination of contracts upon allegation of corruption

- **Issue**

Suspension of works after allegations of corruption has impeded the infrastructure development in the country as the works are halted till the case is returned by the prosecuting agency, or if the case is sent to the court, until a final judgment is rendered by the court.

- **Law**

According to section 24 (1) (g) and (h) of the ACA 2011, Anti-Corruption Commission has the power to: *"(g) Upon finding of a prima facie case of corruption, suspend a license, or prohibit an individual or entity whether national or foreign from participating in contractual relations with public agencies till pending the outcome of the case; (h) Revoke work order, appointment, lease or contractual transaction that is obtained by corrupt means;*"

Clause 6.3.7.1 of the PRR provides that *"The conditions for early termination of the contract may be specified in the contract."* Accordingly the SBD for Procurement of Works (Above 5 millions) specify under Clause 60.1 of the General Conditions of Contract (GCC) that *"If the Employer determines that the Contractor has engaged in corrupt, fraudulent, collusive, coercive or obstructive practices in competing for or in executing the Contract then the Employer may, after giving 14 days notice to the Contractor, terminate the Contractor's employment under the Contract and expel him from the Site, and the provisions of GCC Sub-Clause 60.4 to 60.8 shall apply."*

- **Gap analysis**

The prevailing practice shows that whenever a contractor is alleged of corruption offences with investigation being carried out by the ACC, the work is immediately suspended by the ACC, thereby restraining any other activities on the concerned pending work until there is a final judgment rendered by the courts or until ACC promptly lifts its own suspension order. The impact, however, is that the suspended work is not re-tendered for years, and hence, public facilities are delayed inconveniencing the users. The SBD, nonetheless has provision for termination of a contract, if the employer determines that the contractor has

engaged in corrupt, fraudulent, collusive, coercive or obstructive practices in competing for or in executing the contract. However, there are no clear guidelines or procedures on how to determine whether the contractor has engaged in the above-mentioned corrupt acts. Does it mean determination upon finality through court judgment? It is feared that termination carried out invoking the terms of the agreement, i.e. determination solely by the employer may backfire later or contested later if the court in the end finds the contractor not guilty. The Contractor could easily sue the employer for illegal or unlawful termination. Again, if the work is suspended till the finality of settlement (which may take few years), whether the contractor is acquitted or convicted, there will be cost escalation and delay in service delivery or usage of schools and hospitals. Ultimately the government and general public will be at the losing end. The latter scenario is commonly prevalent currently.

- **Recommendations**

a. Incorporate the clause on termination of contract upon allegation of corruption or fraudulent practices by the contractor provided under clause 60 of the SBD Procurement of Works (Above 5 millions), directly under the PRR to strengthen the use of this clause by the procuring agencies.

b. Clear rules must be framed on factors and standards to be considered by the employer in determining whether the contractor has engaged in corrupt, fraudulent, collusive or obstructive practices in competing for or in executing the contract. This should ensure careful and prudent use of early termination and avoid misuse of the provision. Under such a scenario, the employer may seek written views of the OAG who normally review case investigation reports independently and on merit.

c. The GPPMD should coordinate with ACC in incorporating clause 60 of the SBD in the PRR in order to harmonize the power of suspension order or stop order of the ACC under ACA with the larger public interest in timely completion of the construction. If an early termination is feasible it will be beneficial for the infrastructure development, at least it is going to minimize larger damages and inconveniences. Moreover, such legal provisions will prevent contractors from suing the government even if the contractors are acquitted later.

9. Recoveries from contractors based on audit observations

- **Issue**

Due to audit observations or memos during or after the completion of construction the RAA issues performance and financial observations which indicates deviations from performance

of terms and conditions either by officials from the employer/government or the contractors or both. Observations that are directed towards private contractors are usually contested and become unreliable evidence before the court or arbitration.

- **Law**

Although RAA is a constitutional body carrying out statutory audits, it becomes increasingly difficult when audit observations are to be enforced against private individuals or contractors. The doctrine of *privity of contracts* prevents audit observations to be used to impose penalties or recoveries against contractors.

- **Gap analysis**

There have been cases where ministries and agencies file civil suits against contractors claiming huge recoveries based on audit reports. Similarly, even during arbitration proceedings there were concerns raised by arbitrators or the ADR Centre that the RAA or equivalent government agencies are following up on cases claiming that the audit reports have to be given due weightage and to ensure government claims are met as per audit reports.

Financial and performance evaluation of an agency must be carried out through auditing in order to prevent misuse of government resources. However, these audits are intended for employees of agencies and organizations only and not for private individuals. Any claims and counterclaims between the employer (procuring agency) and contractors shall be governed by contractual documents. If contractors have not caused any breach of contractual terms and conditions, any loss of funds or unaccounted monies as a result of lapses of procuring agencies and their employees cannot be easily passed on to contractors.

- **Recommendations**

Grave and unjustified lapses and negligence in contract implementation (such as excess payment) must be held accountable even to the extent of full recoveries of loss, or must be prosecuted for official misconduct depending upon the severity of negligence or *mala fide* modus operandi.

10. Application for setting aside arbitral awards if not in conformity with procedures laid down in the ADR Act

- **Issue**

It was transpired during discussion with MoWHS officials (MoWHS being the principal procuring agency for major construction works) that whatever the arbitration panel decides

in a dispute ultimately becomes final because appealing to the High Court for setting aside the award thus-far has not been successful. It is perceived that courts in Bhutan will only entertain challenges to setting aside arbitral awards on the ground of public policy, which has not been defined in the law. Further in the absence of proper regulations of the conducts of arbitrators including their competencies and code of conducts it has been doubted that arbitrators could be prone to unethical practices and misconducts in their performance as impartial arbitrators.

- **Law**

Section 150 of the ADR Act 2013 provide grounds for setting aside arbitration awards: *"An arbitral award may be set aside by the High Court if: (1) The party making the application alleges and proves that:*

(a) A party to the arbitration agreement was under some incapacity to enter the arbitration agreement;

(b) The arbitration agreement was not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Kingdom of Bhutan;

(c) A party making an application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise impeded from presenting his or her case;

(d) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decision on matters beyond the scope of the submission to arbitration;

(e) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or with this Act; or

(2) The court finds that,

(a) the subject-matter of the dispute is not capable of settlement by arbitration; or

(b) The award is manifestly contrary to the public policy of the Kingdom of Bhutan."

- **Gaps analysis**

The records showed that challenges to arbitration awards up until now have all been dismissed by the High Court citing reasons that the matter did not involve reasons that were contrary to public policy. Appellate courts have indicated that challenge to arbitration awards could

be maintainable only if it is contrary to the public policy of Bhutan. The ADR Act or no law in Bhutan however defined what constitutes public policy. However, setting aside an arbitral award on the ground of public policy is one of the six grounds explicitly mentioned under section 150 of the ADR Act. Arbitration by its design is intended for the courts to have limited intervention. Yet, if the award deals with a *"dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decision on matters beyond the scope of the submission to arbitration",* it could be a valid ground that may be invoked in certain exceptional cases if the matter requires for the court to intervene. Additionally, other grounds prescribed are: the arbitration agreement not being valid under the law, not giving proper notice to parties, and the composition of the arbitral tribunal not constituted in consonance with the arbitration agreement. Such grounds might be rare as the Centre normally ensures that any arbitration agreement in conflict with the existing laws including ADR Act are sieved before being admitted.

As for public interest, it is considered as one of the most elusive concepts rarely invoked in developed pro-arbitration jurisdictions such as the US and France (Ghodoosi 2015). Further, this subject does not have much literature, and intellectual discourse to rely on. Ghodoosi 2015, argues that public policy encompasses three separate constituents: public interest, public morality or public security based on how the concept evolved in the 18th century in common law. If an arbitral award inevitably touches on one of these components, the public policy ground may be invoked. He further explains, public interest is derived from economic calculation of costs and benefits of enforcing the arbitral award or contracts, while public morality should protect community values, and public security relates to protecting a state's survival interest. Hence, this could be a guiding parameter for the courts while seeking to invoke the public policy ground. It would definitely stir judicial activism but the manner in which it evolved, the courts were bestowed with this discretionary power when absolutely necessitated especially in cases involving above three constituents.

Therefore, an applicant wishing to set aside an arbitration award must overtly cite the particular of six grounds mentioned under section 150 of the ADR Act.

- **Recommendation**

a. Government lawyers or government representatives in an arbitration dispute need to properly cite reasons falling under Section 150 ADR Act while challenging arbitral awards before the High Court.

b. The Supreme Court and the High Court may be guided by one of following three elements of public policy derived from the existing literature, if the public policy ground is sought to be relied on in setting aside an arbitral award:

   1) public interest: determined based on the economic calculation of costs and benefits of enforcing the arbitral award or contracts;

   2) public morality: determined based on the need to protect community values; or

   3) public security: determined based on the need to protect a state's survival interest.

c. Review the existing code of conduct and procedures for disciplinary actions to be taken against arbitrators who fail to comply with professional codes or engage in professional misconduct.

d. Having rendered the above recommendation, a cautious approach towards setting aside arbitral awards is suggested to respect the arbitration system, its design and its initial policy rationale of limited court intervention except for enforcement. However, where absolutely necessary, the Supreme Court and the High Court may want to venture into invoking the grounds under section 150 of the ADR Act.

11. Confidentiality of the arbitral proceedings and arbitral awards

- **Issue**

The ADR Act contains provisions on the confidentiality of the arbitration, and protection of information coming to the knowledge of the arbitrators, parties and Centre, if applicable. However, the Centre's strict and constricted interpretation of these provisions have prevented the Centre from publishing even a single arbitral award including those where parties may not have any qualms about publishing.

- **Law**

Under the ADR Act, two provisions touch on the confidentiality of the arbitration. Section 79 states *"Upon appointment of arbitrators, the arbitration shall be registered with the Centre by the arbitral tribunal having due regard to confidentiality of arbitration."* And Section 90 provides that *"The arbitrators, parties and Centre,* ***if applicable****, shall maintain the confidentiality of information coming to their knowledge in the course of the arbitral proceedings, unless required to reveal such information before the court of law."*

While section 79 specifies on maintaining confidentiality of the arbitration proceedings once the arbitration is registered with the Centre; section 90 requires the parties to maintain confidentiality of that information coming to the knowledge of the arbitrators, parties or the Centre, only if applicable. This provision, therefore, does not mandatorily prohibit publishing the arbitral awards, which could be interpreted to mean that those awards that do not risk revealing protected information, may be published.

- **Gap analysis**

According to the above stated sections on confidentiality of the arbitration, the requirement for confidentiality is not absolute but only "if applicable" for instance for protecting business ideas, trade secrets or other matters vital to secure intellectual property rights or sensitive commercial information. Therefore, if both the parties consent or if information that may be prejudicial to the parties does not form part of the arbitration: the final arbitral awards may be published for transparency, information dissemination, accountability and to enable informed decision making by prospective users of the arbitration system in the country. If the awards contain sensitive information mandating protection by the law, those parts may be redacted. Further, the Centre and the arbitrators may also avoid unnecessary or speculated misgivings about the credibility of the Centre and arbitrators if the awards are made available to the public.

- **Recommendation**

The arbitral awards that do not prejudice the parties to the arbitration concerning protected information such as intellectual property rights or sensitive commercial information, may be published for: attaining transparency and accountability of the arbitrators and the Centre, too. The names of the parties or other detecting information may be redacted, if required.

12. Dispute settlement clause

- **Issue**

Options related to dispute settlement clauses concerning government contracts under the PRR.

- **Law**

According to the ADR Act the jurisdiction of any arbitral tribunal must be based on the consent of the parties whether specified in contracts or agreed mutually by the parties in written, in the absence of a contract.

Similarly, clause 6.3.8.1 (b) of the PRR provides that *"The governing law and forum of dispute resolution. For contracts to be performed in Bhutan, the governing law should be the law of Bhutan and the forum may be any mediation as designated by the parties by common agreement or National Arbitration Committee or the Courts of Bhutan"* This rule has given the concerned parties the option to select mediation, arbitration, or the courts to resolve any disputes without imposing any one of these modes mandatorily.

- **Gap analysis**

The practice, however, is for the procuring agencies to rely on the various Standard Bidding Documents issued by the MoF, which includes amongst others, standard contract terms, under which arbitration has been specified as the preferred forum to resolve the disputes.

- **Recommendation**

The SBD may be reviewed or updated so that parties may choose any forum of ADR or courts for settlement of disputes as the PRR provides options open for the parties through common agreement to choose the forum. In this regard, the MoWHS in consultation with the OAG has already taken initiatives that the clause for settlement of dispute will have the following options:

(a) mutually settled through negotiation/mediation;

(b) through arbitration, if both parties agree; or

(c) through courts.

VI. ACCOUNTABILITY

13. Project Completion Report

- **Issue**

Currently, after the procurement of works is carried out and the contract completed or terminated, there is no proper closure or accountability by submitting a report on the same.

- **Law**

The PRR covers the details of the procurement process of works, goods and services, and the contract management. But the PRR does not specify the need to submit a project completion report after the work is completed, nor the output of the procurement of work is evaluated even once after a year or so. The contract implementation ceases after the defect liability period is complete or if there arises a dispute then till the finality of decision on the dispute is rendered.

- **Gap analysis**

The important objective of government procurement of works is to attain the desired goals in the form of output. Although the process for procuring works, and managing the contract are provided in the PRR, it does not have provisions to determine whether the procurement of work has achieved its objective. Therefore, there is a need to first ensure that a *'project completion report'* is submitted after the project is completed clearly indicating whether the work has been completed or if the work has failed, a status on the same and the reasons for the failure. In addition, the output of procurement of works needs to be evaluated after one or more years to determine if the procurement of that particular work has been a success or not. Presently, out of numerous work procured each year by the government, some projects fail, some are terminated resulting in additional expenditure due to the need to re-tender, and some after their completion are in a state of repair within a few years of completion. The failure of a project including termination and substandard work is ample times due to weakness in the implementation as discussed in detail in the previous issues. Hence, the requirement to submit a report to the GPPMD will entail specific reasons for failure, which can be a basis for imposing accountability for negligence and dereliction of duties, on the part of the responsible officials. The present system portrays that even if a project has failed owing to gross negligence by project managers, among others, no accountability is imposed on the responsible persons which has continued to perpetuate the lax behaviour in the civil servants. The concerned procuring agencies are normally lenient on the negligent actions of its employees as transpired in present practice. Therefore, on the basis of the project completion

report, if made necessary, the GPPMD can make complaints against the responsible officials to the concerned agencies for administrative action according to the BCSR 2018, and if the head of the agency is shown to have been negligent in his or her supervisory capacity, the complaint may be made directly to RCSC or an appropriate authority where RCSC does not have authority over the person. Consequently, this may serve as a catalyst to improve civil servants performance and avoid lax behaviour.

- **Recommendation**

a. Revise the PRR to insert a clause stating that a procuring agency in the case of works is required to submit a project completion report containing information on whether the project is completed, terminated, re-tendered, or failed, et cetera and the reason for the same, to the GPPMD.

b. The GPPMD shall monitor and evaluate the completed projects, based on the project completion report, and for that purpose, develop competency and expertise to carry out the assessment.

c. The GPPMD, on the basis of the report, must file a complaint to the procuring agency for administrative actions on the responsible officials for negligence or other administrative offences according to the BCSR 2018.

d. If the head of the agency is liable for negligence or other administrative offences according to the BCSR 2018, the GPPMD must file a complaint to the RCSC for administrative action. Where RCSC does not have the authority to impose administrative action over the personnel, the GPPMD must liaise with the appropriate authority to implement the sanctions.

14. Investigation into failure of nationally significant project

- **Issue**

Although numerous procurement of works including nationally significant projects are carried out each year among which some result in failure, investigation into the failure of the project and imposing accountability on the responsible officials/management are rarely practiced, which is particularly significant to prevent similar happening in the future.

- **Law**

The PRR provides actions such as debarment or exclusion of a contractor for a future work in cases of defaults, and beyond that it does not contain any clause on what actions to be taken

in case of failures of a project. Further, in the case of projects based on bilateral agreements, projects funded by external assistance, or other nationally important projects, the PRR does not even apply.

- **Gap analysis**

The current practice shows that whenever a project completes including termination, the case is first attempted to be resolved through mediation in case of disputes for settling the accounts between the procuring agency and the contractor. If the meditation fails, the case goes for arbitration, and finally the courts. The procuring agency can also issue administrative sanctions such as debarment for future works. Thereafter, the Royal Audit Authority (RAA) conducts an audit on the project as a part of its yearly mandate. The RAA normally issues audit memos to fix accountability on the erring responsible officials. Beyond such accountability fixing methods, there is no practice of investigating the project failures to comprehend the reasons for failure, or to impose specific appropriate administrative actions on the management or the head of the agency.

Therefore, in case of failure of a nationally significant project with a huge stake such as a hydro power project, an independent committee may be formed to investigate the cause for failure of the project, to not only impose accountability on the responsible officials but also to prevent similar errors in future. In this same line, the Parliament (preferably National Council) may form a parliamentary committee of inquiry to detect the cause of the failure of the project through rigorous questioning on the functioning, supervision, monitoring, and other pertinent aspects of the project. Such a system is necessary for our future generations to learn from the past mistakes that will be documented through reports for research, and reference. It is a critical component of good governance.

- **Recommendation**

a. Revise the PRR to necessitate the government to form an independent committee to investigate failures of nationally significant projects with huge value, on the request of the MoF. OR

b. The National Council may constitute a special committee under chapter 9 of the National Council Act of Bhutan (NC Act) 2008 to carry out inquiry or investigation into the failed projects, especially if the project constitutes a nationally significant project. This can be done in exercise of NC's review function as per section 10 of the NC Act: review of issues of national importance.

VII. OTHER ISSUES

15. Lack of human resources and expertise in public procurement and contract management in the procuring agencies

- **Issue**

The lack of adequate human resources, and absence of expertise and experience in various government agencies for handling the procurement, and contract management activities has affected effective procurement of works, goods and services. Guidelines on procurement and contract management to guide the procurement personnel on the detailed aspects of its implementation are necessary but lacking.

- **Law**

Pursuant to the power given under the PFA the public procurement system in the country is governed by the PRR, which was last revised in 2019, and the Standard Bidding Documents for different levels of goods, works, and services procured. In addition, there is also an EGPW (above works of five million).

- **Gap analysis**

Despite having the procurement rules in place, the implementation of the same has been impeded by various factors such as:

a. lack of adequate manpower in the public procurement division or unit under most government agencies. It has been highlighted during the consultation meetings that an engineer has to supervise more than 20 works at hand;

b. lack of expertise or experience in the public procurement and contract management;

c. lack of trainings on public procurement to the procurement personnel in government agencies; and

d. lack of guidelines on the detailed facets of implementation of the PRR including but not limited to the conduct of mandatory prerequisite studies, and contract management.

However, there are Competency Based Frameworks for both procurement officers as well as civil engineers. These frameworks were developed only in the year 2020. These

documents which are developed based on experience, expertise, and data are useful tools to conduct training for the procurement and engineering professionals which will enhance professionalism, and quality work.

- **Recommendation**

a. Taking example of the World Bank [World Bank, Procurement Framework and Regulations for Projects After July 1, 2016], ADB [ADB, < ADB Procurement Policy>] and other procurement systems prevalent in the developed countries, framing of Guidelines (by GPPMD) on various aspects of following procurement cycle to guide the practitioners will be efficacious in improving the procurement system and contract management in the country:

   i. overview of Procurement;

   ii. mandatory perquisite studies;

   iii. market research and price analysis; and

   iv. contract management.

b. Implement the capacity development of procurement officers in all the agencies based on the Competency Based Framework for Procurement Officers wherein need analysis were thoroughly carried out in accordance with the existing competencies of the professionals involved in procurement and contract management.

c. Implement the capacity development of engineers in all the agencies based on the Competency Based Framework for Civil Engineers wherein need analysis were thoroughly carried out in accordance with the existing competencies of the professionals involved in infrastructure planner, infrastructure developer and infrastructure regulator.

d. Additional procuring officers or project managers may need to be deployed or recruited where quantity and complexity of the projects demand, so as to implement the works on time without deviations or compromise in quality.

16. Strengthening Government Procurement and Property Management Division

- **Issue**

The GPPMD under the Ministry of Finance is the competent authority to facilitate policy and professional development in the field of procurement. The GPPMD should possess

knowledge and experience required in the field for providing training to the government procuring agencies and evolving the procurement system in the country.

- **Law**

Clause 8.2 of the PRR designates GPPMD as the concerned authority to facilitate policy and professional development in the field of procurement. Clause 8.2.2 prescribes its functions in details among which monitoring implementation of the PRR, compiling annual report on procurement, carrying out research and studies on public procurement, developing national capacity building strategy and encouraging professionalization of the procurement function, liaising with relevant government organizations and developing human resources and professionalism in procurement, are included.

- **Gap analysis**

Although the PRR clearly stipulates the roles and mandates of the GPPMD, the lack of human resources and expertise in the GPPMD has restrained it from fully fulfilling its obligations. As a result, training in the field of procurement is lacking and professional development programmes are absent. Further, the GPPMD is also required to develop code of conduct to address measures to regulate matters concerning personnel responsible for procurement which is deficient. Personnel responsible for procurement includes procurement officers, different committees (tender opening, tender evaluation, etc) project management personnel, site engineers. Having the roles and functions of such personnel captured under a guideline can guide such personnel in their conduct which can augment their work output and enhance better management of procurement of works.

- **Recommendation**

It is recommended for GPPMD to:

a. strengthen its human resources capacity both in numbers, and expertise, specialization and experience;

b. conduct advocacy and training programmes to the procurement and related personnel on public procurement and contract management; and

c. frame guidelines on relevant aspects of procurement and contract management including those mentioned under (*Issue 15 recommendation a*).

17. Protection to civil servants who diligently carry out their functions in good faith

- **Issue**

While cases of severe negligence on the part of civil servants in the execution of their procurement related duties are commonly observed, there are also civil servants who diligently perform their responsibilities according to the law. Further, there are instances where such civil servants are coerced to complete a work within an unjustifiably short time under political or other pressures from their supervisors, thereby compromising the quality of work. If they do not adhere to such pressure from their supervisors, they are unfairly transferred or penalized in other similar manner.

- **Law**

Under the CSA 2010, and the BCSR, if a civil servant is dissatisfied with an administrative action taken by its own agency, the civil servant may appeal to the RCSC.

Further under section 45 (j) of the CSA 2010, a civil servant has the right to make complaints to the RCSC concerning one's superior.

Section 91 of Civil Service Act 2010 provides, *"No legal proceeding or suit shall lie against any member of the Commission and the Civil Servants in respect of official duties, which is done in good faith or intended to be done pursuant to the provisions of this Act. Such immunity shall not cover corrupt acts committed by any member of the Commission or civil servants in connection with the discharge of their duties or cover other valuables in consideration to act in a particular manner."*

Under rule 19.5.6 of the BCSR *"An accountable civil servant shall not be relieved from liability by reason of his having acting under the direction of a superior if he fails to notify the superior in writing on the illegality of such an act. The superior directing any illegal action shall be primarily responsible for any loss incurred thereby, while the accountable officer or civil servant who fails to serve the required duties to serve the required notice shall be secondarily responsible."*

- **Gap analysis**

There are instances of a project manager being asked to expedite completion of a building before the contract period. This requires the project manager to intervene and coerce the contractors to complete the works before the contract timeline, which might be unjustifiably short for the kind of work. The implication of such intervention will force the contractor

to compromise the quality, especially works related to concrete or the likes. If he does not obey his superiors order and adheres to the plan as per the project timeline, he could face disciplinary reprisals. On the other side, there are also instances where project managers are issued audit observations for not complying with project timeline and deviation procedures even though they have undertaken deviations under the strict instructions of their superiors. Such unusual situation raises questions such as what sort of protections are available to a project manager who acted as per the orders of the superiors or refused to follow?

- **Recommendation**

a. If a civil servant is unfairly transferred for not adhering to his or her supervisor's instruction even though he or she was executing his or her responsibilities diligently and in the best interest of the project in accordance with the project plan: such civil servants should appeal to the RCSC to review the actions taken against such officials

b. The RCSC should protect the hardworking, and diligent civil servants in the larger interest of the country.

VIII. CONCLUSION

The issues identified under this report concerns mostly the practical implementation of the PRR and the associated guidelines. Although the PRR was revised in 2019 and it may be hasty to accurately analyze the efficacy of the PRR, this report accentuates the core issues that urgently need to be tackled. The emphasis has been particularly on the implementation part as the revised PRR appears to adequately cover every aspect of the procurement. It is hoped that the recommendations provide the much-desired direction in procurement and contract management in the country to achieve the ultimate goal of successful qualitative procurement of works, and benefitting the citizens for whom the procurement mostly concerns.

While the PRR is comprehensive as to the different facets of procurement, the detail aspects of implementation requirement such as conduct of market research and analysis, and contract management, may need to be covered under separate guidelines and user-friendly manuals to properly guide both the novice procurement practitioners and strengthen the system for the experienced procurement practitioners. Additionally, utilizing online training programs such as those provided by the World Bank in procurement and contract management can benefit procurement practitioners. Understanding different stages of procurement till the completion of the procurement cycle, and the roles of different key actors beginning with the procurement officials, evaluation committees, project manager, contract implementation teams are necessary to achieve. It is also pertinent to deploy sufficient manpower to ensure effective implementation of works and projects. Human Resources Division competency frameworks shall be implemented in enhancing capacities of key professionals and narrowing down the current gaps in the human resource concerning contract implementation.

Together with the HR and business procedural streamlining, the integrity and dedication of each personnel must be strengthened. Fixing stringent accountability may be one way of boosting due diligence and good faith. There are other motivational factors such as incentivizing with reward and recognition. In doing so, protection of employees' good faith must also be ensured. Likewise, in order to bring change in public contract implementation which involves huge budgets, a new cultural perspective must be inculcated at par with corporate organizations, encompassing those mentioned above.

On the legislative front, although PRR is found to be sufficient for now, it remains to be seen whether PRR needs to be legislated into Act. Among the reasons that support a legislation on the public procurement, the following provisions can be effectively implemented if authority stems directly from the Act: the need to carry out independent investigation for failure of

nationally important projects, early termination based on the determination that contractor engages in corruption or unfair trade practices without having to wait for court judgment, and prescribing requisite administrative actions, and providing time limitation for appeal against IRB's decision. Similarly, the need to strengthen the arbitration procedures in Bhutan and its competency is imperative if contractual disputes are to be expedited and reduce case pendency with courts.

Although this report has attempted to uncover the issues related to the public procurement system concerning works in large categories, due to lack of hands-on experience by the researchers in contract management and related fields, the report may have limitations.

SCHEDULE 1

A. List of revisions recommended

SL. No.	Revisions recommended		Relevant Agency
1.	PRR		MoF
		Insert a new clause under clause 5.4.5 concerning Issue 2 recommendation (c)	
		Revise clause 1.1.3.1 (32) concerning Issue 2 recommendation (c)	
		Insert a new clause under clause 8.1 concerning Issue 3 recommendation	
		Insert a new clause under clause 5.1.12 concerning Issue 5 recommendation (a)	
		Insert new clause(s) under the PRR concerning Issue 6 recommendation (c)	
		Revise the SBD Procurement of Works (large) concerning Issue 7 recommendation (a) and (b)	
		Insert a new clause under the PRR concerning Issue 8 recommendation (a)	
		Insert new clause(s) under the PRR concerning Issue 8 recommendation (b)	
		Insert a new clause under the PRR concerning Issue 13 recommendation (a)	
		Insert a new clause under the PRR concerning Issue 14 recommendation (a)	
2	EGPW concerning Issue 2 recommendation (a)		MoF
3.	BSR concerning Issue 2 recommendation (b)		MoWHS

B. List of Guidelines/ Standard of Procedures recommended for adoption

SL. No.	Guidelines/ Standard of Procedures recommended for adoption
1.	Market research and price analysis
2.	Clear and detailed responsibilities of work supervisor/project manager
3.	Clear and detailed responsibilities of head of the agency in monitoring personnel or work
4.	Overview of the procurement
5.	Mandatory Prerequisite Studies
6.	Contract management
7.	Quality assurance during construction

SCHEDULE 2

List of agencies with whom consultation meetings were held

Sl. No	Date	Agency
1	November 4, 2020	GPPMD, MoF
2	November 5, 2020	MoWHS
3	November 13, 2020	ADRC
4	November 18, 2020	MoWHS
5	November 18, 2020	CDB
6	December 8, 2020	DoR, MoWHS
7	March 5, 2021	Gross National Happiness Commission Secretariat
8	July 13, 2021	RAA
9	July 21, 2021	CAB
10	August 3, 2021	GPPMD, MoF
11	October 13, 2021	MoWHS

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Office of the Attorney General
Post Box No. 1045
Thori Lam
Lower Motithang
Thimphu : Bhutan

PABX Tel: (+975-2) 326889/324604/336947/335774
Fax: (+975-2) 324606
Website: www.oag.gov.bt