



NAVAL POSTGRADUATE SCHOOL

MONTEREY, CALIFORNIA

THESIS

**VIABLE CIRCUMSTANCES FOR FINANCIAL
NEGOTIATIONS IN PAKISTAN CONTRACTING
PROCESS**

by

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June 2015

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**VIALE CIRCUMSTANCES FOR FINANCIAL NEGOTIATIONS IN
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ABSTRACT

In Pakistan, competitive forms of procurement include only two-step sealed bidding. In the United States, negotiated procurement falls under competitive forms of procurement. Pakistan established the Pakistan Procurement Regulatory Authority (PPRA) in 2002 on the recommendations of the World Bank and enacted PPRA rules in 2004 based on the 1994 UNCITRAL model procurement law. The purpose of PPRA rules in 2004 was twofold: First, it implemented uniform procurement regime in all federal and provincial procurement agencies. Second, it enhanced transparency and capacity of the procurement system. Since the enactment of PPRA rules in 2004, the model UNCITRAL was amended in 2011. The amended 2011 UNCITRAL law also allows negotiations, such as the competitive form of procurement.

The authors evaluate the Pakistan procurement system UNCITRAL model law and the U.S. acquisition system with an intention to find viable circumstances under which negotiated procurement can be initiated in Pakistan. The authors use the analogous Yoder's Three Integrated Pillars of Success (TIPS) and find room for improvements in three pillars of Pakistan procurement: personnel, platforms, and protocols. The authors recommend that negotiated procurement be implemented in Pakistan, provided that the three pillars of procurement system are strengthened, along with the broadening of the accountability loop.

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LIST OF ACRONYMS AND ABBREVIATIONS

AGP	Auditor General of Pakistan
ASPA	Armed Services Procurement Act
AT&L	Acquisition, Technology, and Logistics
BBP	Better Buying Power
BES	Budget Estimate Submission
BIW	Bath Iron Works
BPA	Blanket Purchase Agreement
CERP	Center for Economic Research in Pakistan
CICA	Competition in Contracting Act
CJCS	Chairman of the Joint Chiefs of Staff
CLIN	Contract Line Item Number
CONUS	Contiguous United States
CTA	Contractors Team Arrangements
DAU	Defense Acquisition University
DAWIA	Defense Acquisition Workforce Improvement Act
DCAA	Defense Contract Audit Agency
DCMA	Defense Contract Management Agency
DFARS	Defense Federal Acquisition Regulations
DLA	Defense Logistics Agency
DOD	Department of Defense
DPPG	Defense Planning Program Guidance
FAR	Federal Acquisition Regulations
FASA	Federal Acquisition Streamlining Act
FATA	Federally Administered Tribal Areas
FISC	Fleet and Industrial Supply Center
FMS	Foreign Military Sales
FOIA	Freedom of Information Act
FSS	Federal Supply Schedule
GAO	Government Accountability Office
GDP	Gross Domestic Product

GPE	Government-Wide Point of Entry
GPS	Global Positioning System
GSA	General Services Administration
HII	Huntington Ingalls Incorporated
IDIQ	Indefinite Delivery Indefinite Quality
IDP	Internally Displaced People
IED	Improvised Explosive Devices
IFB	Invitation for Bids
JCIDS	Joint Capabilities Integration and Development
JCS	Joint Chiefs of Staff
JROC	Joint Requirements Oversight Council
LRIP	Low-Rate Initial Production
MEO	Most Efficient Organization
NASA	National Aeronautics and Space Administration
NAVSUP	Naval Supply System Command
NDAA	National Defense Authorization Act
NDMA	National Disaster Management Agency
NMS	National Military Strategy
NPRP	National Procurement Reform Program
NPS	National Procurement Strategy
O&M	Operation and Maintenance
OCONUS	Outside Contiguous United States
OFPP	Office of Federal Procurement Policy
OMB	Office of Management and Budget
OSD	Office of Secretary of Defense
PAC	Pakistan Accountability Commission
PNM	Price Negotiation Memorandum
POM	Pre-Negotiations Objective Memorandum
PPBES	Planning, Programming, Budgeting, and Execution System
PPRA	Public Procurement Regulatory Authority
RDT&E	Research, Development, Test, and Evaluation
RFI	Request for Information

RFP	Request for Proposal
SAP	Simplified Acquisition Procedure
SBA	Small Business Administration
SOCOM	Special Operations Command
SOR	Schedule of Rates
TINA	Truth in Negotiations Act
TIPS	Three Integrative Pillars of Success
UN	United Nations
UNCITRAL	United Nations Commission for International Trade and Law
USAID	United States Agency for International Development
USD	Under Secretary of Defense
USMC	United States Marine Corps
WHAM	Winning Hearts and Minds
WIB	War Industries Board
WTO	World Trade Organization
WWII	World War II
WWW	World Wide Web

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I. INTRODUCTION

A. BACKGROUND

The major expenditure of the public exchequer is the procurement of goods and services for the public sector organizations. The procurement is governed by a set of rules and regulations directing the public office bearers to achieve optimum value for money through the execution of efficient and effective methods in undertaking procurement practices.

Every state has devised a general framework that governs procurement planning and execution. The public sector organizations, following these guidelines, devise their own methods to achieve best value of money spent on the procurement of goods and services for the organization.

Pakistan established a unified code of rules known as the Public Procurement Regulatory Authority of 2004 that provides the guidelines the public procurement. The Department of Defense (DOD) in Pakistan also draws its guidelines from the Public Procurement Regulatory Authority (PPRA) Rules 2004 to carry out public procurement to support its military operations and routine functions. However, due to the peculiar and sensitive nature of the activities it undertakes, the Pakistan military, like other militaries around the world, conducts operations in conditions that are often described as adverse and are further compounded by the compressed time frame available to undertake required tasks.

The procurement tasks range from routine purchases from local markets to items of supplies for warfare that are often complex to undertake. The nature and complexity of military requirements warrant a niche in the rules and regulations that is adaptable to its peculiar requirements.

The PPRA Rules 2004 lay down broad guidelines, covering the tendering, bidding, and arbitration process for procurement that does not cater to the military's specific requirements. Often, the procedure is lengthy and subject to delays due to the statutory framework that makes contracting a less potent tool to support the operations

and maintenance activities that the military undertakes. The case in point is Rule 40 of PPRA Rules 2004, which prohibits negotiations with vendors to secure the best deal.

B. RESEARCH QUESTION

The primary research question for the thesis seeks to understand the circumstances under which financial negotiations should be allowed in the public procurement statutory framework in Defense Procurement in Pakistan.

C. SUBSIDIARY QUESTIONS

The primary question raises a few other subsidiary questions, which may assist the audience to better comprehend the primary research question. Possible questions are listed below:

- What is the impact of limitation on negotiations in the procurement process?
- What are the implications of allowing financial negotiations on the defense acquisition process in Pakistan?
- Can the risks associated with financial negotiations be mitigated? If yes, how?
- Does the acquisition process help develop the operational strategy?
- Will the procurement system be more responsive to changes in strategy and operational preparedness after financial negotiations are permitted?
- Do negotiations help develop a healthy competition among the suppliers? If yes, how?
- Is the present domain sufficient for securing the best deal for the buyer, or does it require expansion?

D. METHODOLOGY

To address the primary research question, there is a need to analyze the statutory framework that governs the defense procurement practices in the country. Due to the peculiar nature of the military organization, a brief explanation of the operational strategy helps one understand the fluidity required in the administrative process for defense procurement. The thesis also includes a brief overview of the defense commercial market to comprehend the market dynamics that prevail in the defense commercial market.

In the next part of the monograph, three sets of rules and regulations are discussed, beginning with the first the procurement regulations in Pakistan. This includes

the background to the existing regulations, as well as the national procurement strategy to better grasp the future thrusts of statutory framework in Pakistan. A brief analysis of the existing framework concludes this part.

The second set of rules and regulations covers the United Nations Commission for International Trade and Law (UNCITRAL) model law for the procurement of goods and services. A broad overview of the model law provides the reader with a better understanding of the structure of model law. The next section briefly analyzes the relevant aspects of the model law.

The third set of rules and regulations comprise the U.S. laws pertaining to the acquisition of goods and services. It briefly covers the history of the procurement regulation and the circumstances in which the existing laws were formulated. The salient aspects of the Federal Acquisition Regulations (FAR) are also included in this part.

In the last segment, relevant conclusion are drawn from the discussion in the earlier part of the thesis. These conclusions form the basis for the recommendations. The recommendations focus on measures that can be incorporated into the existing statutory framework for the procurement in Pakistan to make way for negotiations as part of the procurement process to make the statutory framework more responsive to the defense requirements while ensuring that best procurement practices are followed.

E. THESIS OVERVIEW

A major portion of public money is spent on the procurement of goods and services for public sector organizations. Efficiency in public sector expenditure is key to better governance. The amount of effort and money spent in the acquisition of goods and services requires that the stakeholders establish methods and processes to ensure that the money spent throughout the process is justified by acquiring the best value for the money.

It is important to understand, from the outset, the terms that are used frequently in the monograph. These terms are described below:

1. Procurement

Major public sector expenditure in almost all states is through a system of procurement to acquire goods and services for the public at large or any public sector organization. The United Nations also declared that public expenditure through procurement is the single largest component of the public spending (United States Commission on International Law, 2014).

The term *procurement* is often used while dealing with the purchase of goods and services, but often this term overlaps with *acquisition*. The Defense Acquisition University (DAU) describes the *procurement* as the “act of buying goods and services for the government” (Hagan, 2009).

Procurement as defined by the UNCITRAL model law for goods, services, and works is “the acquisition of goods construction or services by a procuring entity” (UNCITRAL Secretariat, 2014). Here, the term *acquisition* is intended to encompass purchase, lease and rental, and hire with or without options to buy.

2. Acquisition

Acquisition is defined in the Federal Acquisition Regulations (FAR) of the United States of America as follows:

‘Acquisition’ means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract. (General Services Administration, Department of Defense [GSA DOD], 2005)

Acquisition is a comprehensive term describing every process to acquire any goods or services from its conception until its disposal or utility in the organization. It includes conception, product development, contractual modalities usage, and disposal.

Procurement, on the other hand, is limited to the purchasing of goods and services and does not include the issues related to performance and conclusion of the contract

Procurement is also restricted to buying goods and services, whereas acquisition involves all the stages of the product development. Acquisition includes conception, development, production, operation, maintenance, and disposal phases during the life cycle of the item (DAU, 2015). The acquisition process covers all aspects of the product; it is more relevant to the complex weapon systems that have clearly defined milestones and phases.

The acquisition process is elaborately explained in *System Engineering Fundamentals*, published by the DAU in 2001, as shown in Figure 1.

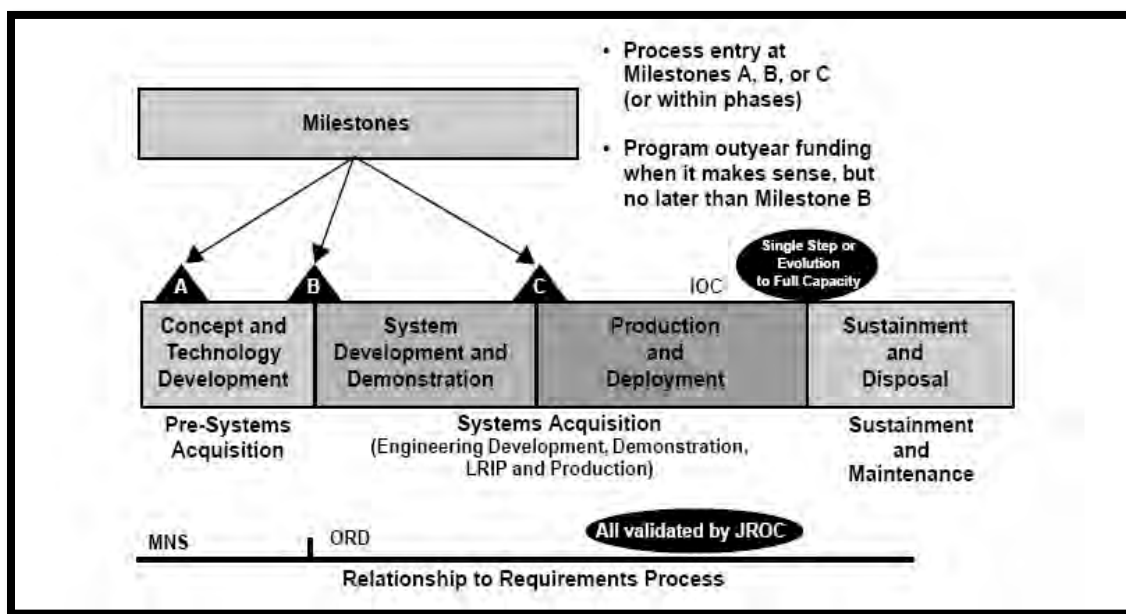


Figure 1. Defense Acquisition Process (from DAU, 2001, p. 12)

3. Acquisition Process

The formal acquisition process starts with Milestone B where the system acquisition and low-rate initial production (LRIP) starts.

a. *Production and Deployment Phase*

The production and deployment phase enters into the acquisition cycle once the successful LRIP test reports are received.

b. *Sustainment and Disposal*

The sustainment and disposal phase is the most cost-heavy stage where mass sale production is started and the weapon systems and equipment are deployed. The main objective of this phase is to maintain system and equipment in the most cost effective manner. This stage also sees the transition from contractor to organic maintenance support by the user organization. After outliving its utility, the system is then disposed of in accordance with federal laws and classified directives.

The important thing about this model is that programs can be started at any phase of the model, and it depends on user need and fiscal space available for the project. It is important for program managers to constantly get in touch with the contractor to achieve better quality of the product at the minimum cost.

It is important to note that procurement in many countries around the world is limited to the contracting, whereas all other issues necessary to concluding the successful contract are delegated to the organizations that actually require goods and services. The procurement process is limited to awarding the contract, leaving most of the issues related to the contract to consignee organizations.

F. *NATURE OF MILITARY PROCUREMENT*

The procurement constitutes a big portion of military expenditure and is complex due to the nature of requirements. The issue becomes more complex with a huge quantum of procurements spanned over multiple years. The nature of procurement, compressed time of materialization of contracts, and variation in required quantities due are three major factors that define the mechanisms adopted by the defense organization in public procurements to achieve the optimum outcome of the process.

1. Consideration Factors for Procurement

Often, the military requires critical equipment/weapon systems that are specific to the defense industry and that are not readily available in the commercial market. Because the equipment is not readily available in the commercial market, the suppliers of these critical equipment/weapon systems are few. In that case, price is not the principal factor; instead, the time in which it will become available is more critical. In other cases where items are generally available in the market and more suppliers are available, the value of money becomes a more critical factor.

2. Procurement as an Extension of Strategy

Procurement is also partially dependent on military and political strategy. The fluid nature of military strategy may abandon the requirement of items altogether, or it may reduce the quantity of items that are required to support a particular operation. These items may range from complex weapon systems to services required to support the military in any theatre of operation.

These factors, along with market forces, make procurement difficult to manage. The complexities of conflict dynamics and their impact on procurement systems warrant an analysis through which a procurement system can be made responsive to the changes in the strategy and simultaneously achieve the desired objective of the procurement.

G. IMPORTANCE OF PROCUREMENT FOR MILITARY ORGANIZATIONS

The military in any state holds a critical and pivotal position in the structure of the state. Unlike business organizations where the objectives are definitive and tangible, the objectives of military organizations are often intangible, making it difficult to specify the outcome. The fundamental issue with the military is used to achieve the policy objective of the state (Clausewitz, 1832) that is not as stationary and definitive as policies and objectives of business organizations. Often, military outfits are called for in mitigating the effects of disasters or a conventional war or, as in the recent past, for the sub-conventional warfare to flush out insurgents and non-state actors from their territories.

H. CATEGORIES OF PROCUREMENT

There are mainly three categories in which the procurements are carried out. These are goods, services, and construction (works); however, only two terms are defined explicitly in the UNCITRAL model law for the goods, services, and works (construction). The definition of *services* is embedded in the definition of *procurement*, as described in Article 2 of the model law.

1. Goods

In Pakistan, the defense organizations follow guidelines issued through PPRA Rules 2004. There are no specific definitions that describe these two major terms. As described in Article 2 of the UNCITRAL, goods are defined as

raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity. (United Nations, 2014)

Goods may also include the finished product or the raw material that may be used subsequently to manufacture the final product. This category is mostly procured in terms of quantity because it mostly relates to routine items that are used by the military.

2. Works (Construction)

United Nations defines construction as quoted below:

‘Construction’ means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as drilling, mapping, satellite photography, seismic investigations and similar activities incidental to such work if they are provided pursuant to the procurement contract. (United Nations, 2014, p. 3)

I. CASE FOR THE PAKISTAN MILITARY

In the recent past, Pakistan has experienced the deployment of its military on all three venues. These instances included the operations in the North Western Borders as part of sub-conventional warfare since 2004, and as a military standoff between India and Pakistan 2001–2002 and 2009–2010. The disastrous earthquake in 2005 was another

occasion where massive military deployment was undertaken to rescue people from remote areas and provide them shelter and medical facilities. In 2010, the Pakistan Army was again at the forefront to provide relief to the people affected due the floods in the two major provinces of the country (Punjab and Sindh). These instances provide an insight into the environment and circumstances in which the military has to operate in a time-congested environment to support the humanitarian and disaster relief operations.

Often, these military engagements are undertaken in an extremely time-compressed environment where requisite time for buildup may not be available. The disaster-relief operation is a classic example of relief operations that are undertaken immediately to kick start relief activities. Immediate provision of medical facilities, shelter, and food require a responsive backup support plan to achieve the objective. These operations are required to be efficient and responsive to mitigate the effects of the natural disasters. These disaster relief operations are often slapped with allegations of slow response. The military, even if it is able to quickly respond to the emergency with the available human and material resources, may not be able to fully achieve the objective to help people rebuild and reconstruct the affected areas. Part of the reason is the lack of statutory support to initiate the process of rehabilitation in these areas.

Over the past decade, the military has engaged in sub-conventional warfare on the northwestern part of the country (i.e., Federally Administered Tribal Areas [FATA]) where the mission is a more complex, multidimensional, and multi-pronged effort than conventional war. In addition to defeating the enemy, the objective is expanded to resettling the displaced population and rebuilding the infrastructure. These Winning Hearts and Minds (WHAM) measures require immediate resumption of the project with a definitive deadline to create a positive impact of political and military support to the affected community. These tangible objectives require not only the infrastructure but also the organizational support of other federal agencies and regulatory bodies.

J. OVERVIEW OF MILITARY MANAGEMENT IN PAKISTAN

Pakistan military management system is no different from the rest of the militaries around the world. The Pakistan military is generally not involved in vertical integration

and relies on the support from the contractors and vendors in achieving the organizational objectives. The military regularly enhances its capabilities against security threats by improving and replacing the equipment.

The huge structure of the organization cannot be supported through vertical integration, as it would be very expensive to sustain. The contracting support comes in handy as a viable option to support military operations. This management style provides the opportunity to the military to focus more on operational aspects, and the supporting roles are delegated to the vendors.

It is often a challenge to keep the supporting roles of vendors in pace with operational readiness and effectiveness. The management of the vendors becomes very important when operating environments are hostile, and contractor support becomes very critical to sustaining the operations in such an environment.

These difficult environments and situations warrant careful handling of this aspect to ensure that support elements are part of the operational campaign. Although the vendors do not form part of the regular military force, the role that they are assigned requires them to be part of the campaign to increase the chances of success of the mission.

K. LOGISTICS AND OPERATIONAL FUNCTIONS AS PART OF STRATEGY

Strategy and tactics provide the scheme for the conduct of military operations, logistics the means therefore. Lieutenant Colonel George C. Thorpe, USMC. (Naval Supply System Command [NAVSUP], 2014)

The criticality of operational and logistics amalgamation in any military system is of paramount importance. The translation of operational strategy into logistics functions is as important as strategy. Logistic and support functions provide the means to achieve the desired outcome of the strategy. Therefore, support functions are required to be carried out along with the operational strategy. The responsiveness of the logistic and support function is an indicator of how well the organization is cohesive for achieving the desired objective.

Because it is not feasible for the organization to integrate vertically during peace times and war, it is deemed appropriate to have a support base activated through contractors' support. Contractors' support forms part of the logistic functions of the military organization.

Additionally, the uncertainty of material requirement and the limited available resources at hand warrants a responsive system that can adapt to changes in the strategy and also fulfill the criteria laid down by national regulatory authorities.

L. PECULIARITIES OF DEFENSE PROCUREMENT

The demand variability, complexity of the product, development of threats, difficulty in cost estimation, and long lead times all add up to uncertainties in the defense procurement (Moore, 1964). These uncertainties are not limited to the demand side, but are also associated with the supplier side as well.

These uncertainties have a huge impact on the market and therefore require constant renegotiations to ensure that the market is not adversely impacted by uncertainties. It is imperative to note here that the sharp distinction between the seller and the buyer is obscured in the defense-related market. Often, the buyer, highlighting the mixed roles, takes management decisions that are normally taken by the supplier.

The complete procurement process is a complex issue with two major stakeholders (i.e., military and defense contractors/manufacturers). This complex process revolves around the idea of optimality desired by both players.

In fact, defense procurement should be seen in the context of a market structure. The prudent way of looking at defense procurement is to analyze the structure of the market and the role of the government and the buyer (i.e., military.) The defense market is structured by the interest of the two major players. The suppliers, on one extreme, want to maximize the profit whereas, the buyer wants the optimal benefit of getting the item at the lowest cost to achieve the best value of money (Adams & Adams, 1972).

The defense procurement market is characterized by only one buyer who has the monopsony, but at the same time, the number of suppliers in the market are also very

few. Hence, the structure of the market is balanced by oligopoly and monopsony powers. The buyer would try to get the lowest price, but the oligopolistic suppliers seldom provide the required information to carry out the procurement optimally. The defense market with only one buyer and few suppliers provides the suppliers with “shelter market,” where the barrier to entry, economies of scale, regulatory mechanisms, and government future needs makes it difficult for the procuring agency to consider the factor of price only to determine the lowest price (Adams & Adams, 1972, p. 283).

Because the market is not providing any benchmark for the cost structure of required goods, it is extremely difficult to be certain that goods are procured at the lowest cost. Although the buyer can hire experts to ascertain the costs, the true cost are difficult to identify unless the oligopolistic suppliers are eager to provide that information.

Despite the fact that there is only one buyer in the market, the oligopolistic suppliers mitigate the buyer’s power by collusion and collaborating with each other to protect their business interests. The other economic factors, like barriers to entry, high production costs, and economies of scale deter other suppliers from entering the market.

There is one factor of cost insensitivity. Cost insensitivity may arise from the change of strategy. Cost insensitivity of the buyer for various goods, including weapon systems, put the balance of market in favor of the suppliers who exploit the cost insensitivity to their advantage by extracting maximum profits from the buyer.

The market structure analysis of the defense market reveals that market is not perfect. Rather, the oligopolistic suppliers and monopolistic buyer dominate the market with divergent interests. The operational strategy and objective of the buyer (in) directly affects the market. Both stakeholders enjoy the market power and counterbalance each other.

M. FACTORS AFFECTING THE DEFENSE MARKET

Before diving deep into defense purchasing (Weidenbaum, 1960, p. 21), it is important to comprehend the dynamics of the military market. The four main considerations are as follows:

- Volatility
- Technological advancement
- Long run nature
- Budgetary controls

1. Volatility

The volatility of the military market depends on two major factors. The first deals with the civilian economy that has a direct linkage to the military budget. If the economy performs better, then there is more room for the military budget, and the situation reverses if the economy does not perform well. The second factor relates to the national and international security situation, which cannot be forecasted with precision and accuracy and hence gives rise to volatility (Weidenbaum, 1960, p. 21).

The volatility describes the special circumstances in which the military operates to undertake the task of national defense, especially in the asymmetric environment where the military is required to perform the tasks that do not constitute a full scale or limited scale war but rebuilding and reconstruction tasks.

2. Technological Advancements

The military is characterized by high performance weapon systems that are capable of taking on the enemy. This means that, in order to fully operationalize the force, the military has to engage itself constantly in research and development to acquire more sophisticated weapon systems (Weidenbaum, 1960, p. 21).

This operational readiness results in high obsolescence rates of weapon systems and requires capital outlays for the acquisition of the improved weapon systems.

3. Long-Run Nature

Due to the evolutionary nature of threats posed by both states and non-state actors, the up-gradation has become a permanent feature in contemporary militaries (Weidenbaum, 1960, p. 21). Often, the acquisition process continues for multiple years to fulfill the organizational requirements. Therefore, it does provide some stability to the supplier and generates a sort of healthy competition amongst the suppliers.

4. Budgetary Control

The budgetary allocations define the scale and composition of the military acquisition (Weidenbaum, 1960, p. 21) rather than of the organizational requirements in response to the security situations or the market trends.

Budgetary outlays often depend on annual economic performance of the country, whereas the strategic acquisition often continues for multiple years. This may lead to inconsistency in the acquisition program due to variance in the economic performance of the country.

N. CONFIGURATION OF THE DEFENSE MARKET

Although the configuration of defense procurement generally remains the same, there are some peculiar factors that are related only to the defense procurement. These are as follows:

1. Risk-Sharing

The requirement of defense organizations is often unique. This is due to the design and specifications that are relevant to the defense organization (Baron & Besanko, 1988), and there are therefore very few suppliers, and the market is generally oligopolistic. The factor of uniqueness and very few of suppliers suggest that the risk of the product that is procured should be distributed among stakeholders. This idea is to incentivize suppliers to ensure that the requirement of the organization is met in the stipulated time period.

2. Confidential Information

Military equipment, due to its confidentiality, there is a longer time period to develop the product. Therefore, there is a likelihood that the negotiations are conducted for ensuring that the requirement is fully understood, and that research conducted by the vendor is conducted in the right direction (Baron & Besanko, 1988).

3. Moral Hazard

Often, the production of the product is complex, owing to the nature and confidentiality of the equipment. Therefore, it is very difficult for government officials to track down the vendors' efforts to hold down the costs of production (Baron & Besanko, 1988). The procurement process needs to be responsive to these complexities and require an effective monitoring system to alleviate the effects of the moral hazards.

4. Cost Monitoring

The modalities and complexities involved in the entire procurement process, especially in the production and delivery of equipment, require effective monitoring (Baron & Besanko, 1988). The projects have an inherent problem of cost identification, and often the overheads are amalgamated with the special projects. The equipment in these projects is either imported or finalized in the special organizations supporting the defense services within the country. Therefore, the cost estimation of the contract may be different from the actual costs, and perfect monitoring may not be possible.

Vendors are at an advantageous position from where they can extract more profits with comparatively less input costs. Because the schedule of rates (SORs) are outdated and monitoring mechanisms in the procuring agencies are generally weak, it is likely that procurement agencies are not realizing the best value for money from the products that they are procuring and therefore need to be looked into much deeper to optimize the value for money.

O. DEFENSE PROCUREMENT IN PAKISTAN

Defense procurement is one of the major components of the defense budget. Pakistan spends almost 3.54% of the gross domestic product (GDP) as of 2014 (Defense Budget—Pakistan, 2014). Pakistan plans to expend almost 22% of the total defense budget outlay on procurement. The projected figures for the different areas of expenditures are shown in Table 1.

Table 1. Projected Defense Expenditure 2018—Pakistan (from Defense Budget—Pakistan, 2014)

Year	Procurement	RDT&E	O&M	Military Personnel	Other	Total
2011	2,304.10	254.93	1,632.15	3,989.75	525.31	8,706.24
2012	1,988.51	247.97	1,666.91	4,370.57	566.37	8,840.33
2013	1,939.54	250.34	1,750.33	4,299.58	642.88	8,882.67
2014	1,984.52	260.16	1,775.82	4,502.10	705.10	9,227.70
2015	1,945.73	264.34	1,858.51	4,601.51	715.13	9,385.22
2016	1,924.58	273.18	1,962.00	4,776.66	731.89	9,668.31
2017	1,915.97	281.40	2,041.22	4,985.73	758.51	9,982.83
2018	1,915.52	284.61	2,101.77	5,170.01	785.23	10,257.14

Table 1 gives a very well-defined view of the various expenditure heads. The trend of expenditure is likely to remain the same, with procurement as one of the major expenditures in the defense budget of Pakistan.

Major procurement of weapon systems and maintenance of existing equipment is often through a foreign country and therefore requires a lot of time, deliberations, and due diligence before the contract is finalized. Not only is the contract formulation difficult, but the successful completion of the contract is also one of the major milestones for the procurement agency and its officials. Figure 2 shows total defense budget activity for Pakistan including spending on all forces.

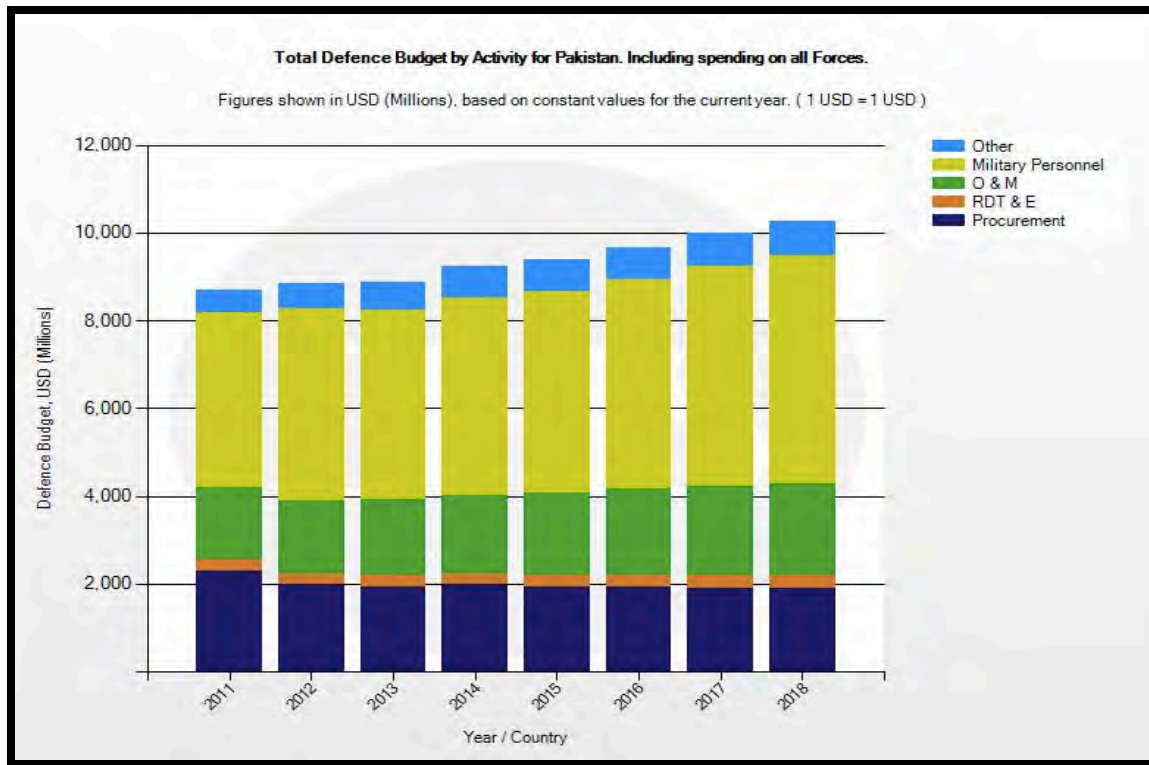


Figure 2. Total Defense Budget Activity for Pakistan Including Spending on All Forces (from Defense Budget—Pakistan, 2014)

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II. OVERVIEW OF PROCUREMENT RULES AND REGULATIONS IN PAKISTAN

In this chapter, the historical overview gives brief insight into the procurement rules and regulations that have been in place in Pakistan. The next section covers the background of the World Bank report that initiated the idea of a unified procurement regime. It will briefly cover the weak areas and gaps assessed by the World Bank report.

The next part covers the enacting of the Public Procurement Regularity Authority (PPRA) ordinance 2002 and the procurement rules of 2004. A brief overview of relevant procurement rules is discussed to provide an understanding of the procurement system in Pakistan. The next section covers the prevalent National Procurement Strategy (NPS) that provides the future guidelines for the PPRA. It also covers the weakness observed in the present procurement regime under PPRA Rules 2004. The last section of this chapter analyzes the current procurement system and covers only those topics that are relevant to the thesis.

A. HISTORICAL OVERVIEW

Since Pakistan's independence in 1947, public procurement has been governed by different rules and regulations. The main regulatory framework (PPRA, 2013) that was adopted for the public procurement includes the following:

- The Purchase Manual of the defunct Department of Supplies and Disposal, which generally covered the purchase of commodities.
- The West Pakistan Building & Roads Department Code that governs the construction of buildings and roads and the hiring of consultants for this purpose.
- The General Financial Rules of the Federal Government and the delegation of financial power rules. (PPRA, 2013, p. 1)

Since 1947, there has been no federal regulatory authority for oversight of the public procurement in the country. This deregulated practice led to a host of problems, and in 1987/1988, the World Bank carried out the first assessment of the public procurement system in Pakistan. It took almost 10 years after the first assessment of the

World Bank that the Federal Cabinet announced the establishment of Public Procurement Regularity Agency on April 16, 1997 (World Bank, 2000).

As Pakistan's infrastructure development was on the rise in the late 1990s, a need existed for a streamlined procurement regulatory framework that would better utilize the available funds and reduce malpractices.

The World Bank conducted its first assessment of the procurement system prevailing in Pakistan in 1987–1988. As the consequence of this report, the National Procurement Reform Program (NPRP) was initiated in 1995 (World Bank, 2000). As per the recommendations of phase I of NPRP, the Federal Cabinet of Pakistan approved the draft bill for the establishment of the PPRA in principle (World Bank, 2000).

The World Bank provided the requisite funds for the implementation of phase II of NPRP. Before the start of the phase III of the NPRP, the World Bank conducted a procurement assessment report in 1999 to assess the procurement regime in Pakistan (World Bank, 2000). The report pointed out certain gaps and weak areas that required deliberation for the improvement of the procurement system.

B. WEAKNESSES OBSERVED IN PUBLIC PROCUREMENT IN PAKISTAN

The background of the procurement rules in Pakistan provides insight into the problems associated with procurement practices in Pakistan (World Bank, 2000). The areas highlighted in the report (World Bank, 2000) are explained briefly:

1. Corruption

The World Bank viewed the lack of monitoring and oversight in public procurement practices. The corruption has deep roots in the procurement system of Pakistan, and there was not any visible mechanism to effectively monitor the incidents of corruption (World Bank, 2000).

2. Human Resource

The report declared lack of trained human resource as one of the weaknesses within the procurement agencies. This also translated into the lack of institutional capacity to establish the best procurement practices in the country (World Bank, 2000).

3. Cost Overruns

The lack of cohesive framework often delayed the contracts. The World Bank estimated that out of 4,500 contracts studied for the report, 3,700 contracts could not be concluded due to many shortfalls in the statutory framework, leading to cost overruns (World Bank, 2000).

4. Out of Date Schedule of Rates

One of the major issues that came under discussion in the report (World Bank, 2000) was the outdated SORs, which was one of the most critical factors leading to a large number of incomplete contracts. Often, the lowest successful bidder and the procurement official contested the SORs, and it was impossible to determine the prices of a contract, leading to a stalemate (World Bank, 2000). This also led to corrupt practices undermining the objective of effective oversight.

After the implementation of the initiative, the World Bank recommended a unified law keeping the UNCITRAL in focus (World Bank, 2000). The World Bank recommendations were aimed to reduce corruption, increase transparency, and regulate the procurement practices through highly qualified professionals. The report suggested that Pakistan adopt the UNCITRAL model.

One of the key recommendations of the report was the ban on price negotiations (World Bank, 2000) to promote transparency. This was done at a time when there was no federal regulatory authority to oversee the procurement process in the country. This will be discussed subsequently in the paper, as this was translated in the PPRA rules, which completely banned the negotiations in Pakistan (PPRA, 2004).

C. PUBLIC PROCUREMENT REGULATORY AUTHORITY ORDINANCE 2002

These major reasons, summarized in the World Bank report, provided the basis of the structure the new PPRA rules. In 2002, in line with the recommendations of the report (World Bank, 2000), PPRA Ordinance 2002 was issued, which authorized the establishment of a regulatory body to have oversight over the public procurement practices in Pakistan.

It was unprecedented in the history of Pakistan that a federal regulatory body be established to oversee public procurement in the country. The PPRA ordinance provided the regulatory body with legislative cover, and it started working to establish the rules and regulations for the public procurement oversight.

D. PUBLIC PROCUREMENT REGULATORY AUTHORITY RULES 2004

In 2004, PPRA rules were formulated, keeping in mind the contents and the recommendations of the World Bank Report. Subsequently, there were certain amendments to these rules to streamline the rules and regulations.

The PPRA is not involved in the procurement process but restricts itself to issuing policy directives. The procuring agencies carry out procurement independently under the policy guidelines of the PPRA. The PPRA performs its functions as a regulator rather than a participant in the procurement process and provides the check against any malpractice.

E. SALIENT FEATURES OF PUBLIC PROCUREMENT REGULATORY AUTHORITY ESTABLISHMENT AND RULES

1. Composition

The board was composed in the light of PPRA Rules 2004 (Government of Pakistan, 2004), and it governs the functioning of the PPRA as a federal regulatory body. The detailed composition of the board is quoted below:

- Secretary, Finance Division Chairperson
- Secretary, Ministry of Industries and Production Member
- Secretary, Defense Production Division Member

- Secretary, Ministry of Water and Power Member
- Secretary, Ministry of Housing and Works Member
- Secretary, Ministry of Communications Member
- Three Private Members Member
- (To be nominated by Federal Government)
- Managing Director (Government of Pakistan, 2002, p. 3)

The board is composed of stakeholders who carry out public procurement in their respective departments. The independence of the PPRA is undermined with this structure of the board and is discussed in the later part of this chapter.

2. Functions and Powers of Authority

The PPRA is empowered to ensure better governance, superior management, increased transparency and accountability, and better quality of public procurement goods, services, and works. These powers, when translated into tangible actions, drive the functional form of the authority. The functions of the authority are quoted below:

- Monitor applications of rules, laws, and regulations
- Evaluate rules, laws, and regulations procedures relating to inspection or quality of goods, and recommend reformulation
- Recommend to the federal government the formulation of new laws, rules, and policies
- Make regulations; lay down rules, codes of ethics, and procedures for public procurement; and inspection quality of goods, services, and works
- Monitor public procurement practices and make recommendations to improve governance, transparency, accountability, and quality of public procurement
- Monitor overall performance of procurement agencies and recommend improvements
- Provide and coordinate assistance to procurement agencies in developing and improving institutional framework (Government of Pakistan, 2002, p. 2)

F. SALIENT FEATURES OF PUBLIC PROCUREMENT REGULATORY AUTHORITY RULES

PPRA rules cover various administrative and technical aspects of the procurement process. Only the salient features of PPRA rules relevant to thesis are discussed below:

1. Procurement Planning

Rule 8 binds procuring agencies to develop a mechanism to plan the procurement by realistically determining the requirement of an agency and determining its future benefits. This aims to reduce the “ad hoc” or “urgent” procurement that may result in costly procurement and may not be achieving the best value for public money spent.

2. Approval Mechanism

Rule 11 requires the procuring agencies to authorize clearly and delegate powers of procurement to undertake various categories of procurement (Government of Pakistan, 2004). This is an administrative action that focuses on the agility and responsiveness of the organizations at different levels of procurement. It aims to enhance the efficiency of the organizations to speedily carry out the purchases.

3. Qualification of Suppliers and Contractors

Rule 17 provides procurement agencies with powers to get information from suppliers and contractors regarding the capacities of their financial, technical, professional, legal, or managerial expertise, irrespective of whether they have been pre-qualified (Government of Pakistan, 2004). But to do so, the agency should have credible reasons or evidence of defect in the above-mentioned capabilities of the suppliers and contractors.

4. Methods of Procurement

Rule 20 declares open competitive bidding as the principal method of procurement (Government of Pakistan, 2004). Further to this, Rule 36 lays down the procedure for the open competitive bidding, with single stage and two-stage processes.

5. Limitation on Negotiations

Rule 40 restricts any negotiations with bidders after the submission of the lowest evaluated bid or with any other bidder (Government of Pakistan, 2004).

6. Alternative Method of Procurement

Rule 42 does provide some alternatives to the principal method of procurement. It explains various methodologies that are applicable for different situations (Government of Pakistan, 2004). It briefly describes three alternative methods of procurement (e.g., petty purchases, request for tendering, direct contracting, and negotiated tendering).

7. Redress of Grievances and Settlement of Disputes

Rule 48 and 49 provides the policy for the redress of grievances and disputes that may arise during management of the contract or during the bidding process (Government of Pakistan, 2004). These provide an opportunity for bidders to lodge a complaint during the process of procurement to the committee to be formed by the procuring agency. The bidder has the option to approach the court of jurisdiction in case he or she is not satisfied with the committee's arbitration decision.

G. FUTURE DIRECTIONS FOR THE PUBLIC PROCUREMENT REGULATORY AUTHORITY

1. PPRA National Procurement Strategy

In 2013, the PPRA published a document regarding national procurement strategy that stated the fundamentals of the PPRA procurement strategy. The cornerstones of the procurement strategy are as follows:

2. Fairness

The PPRA requires that the procurement officials provide a level playing field to suppliers to ensure that equal chance is provided to minimize any discrimination. This is applicable to address the grievances where the stakeholders can present their cases to get justice.

3. Transparency

It requires the processes to be transparent so that all the stakeholders have equal access to the processes and documents. Procurement officials should provide equal

opportunity to stakeholders so that they have an access to all the processes of the procurement.

4. Efficiency

Efficiency requires the conclusion of the procurement process within a reasonable and stipulated time. One of the gray areas of the PPRA is that it cannot ensure timely completion of the procurement. PPRA rules do not specify any timeline for each step of the procurement that enhances inefficiency by the procurement agencies.

5. Accountability

Accountability of the procuring agencies and the procurement officials is one key area where there is a room for improvement. Accountability has an indirect effect on all cornerstones of the procurement strategy of the PPRA. The lack of effective mechanisms to carry out the accountability of the procurement agencies and its officials had adverse effects on the efficiency and the timely completion of the contracts.

The accountability mechanism is limited only to auditing the documents. The conduct of the agency and its officials that ensures that all the cardinal principles are followed is absent.

These principles do provide food for thought in establishing the procurement process that is more responsive for all the stakeholders (e.g., users and suppliers). The idea of efficiency and transparency provides the guidelines for getting the best value for money expended on procurement of goods and services, as well as the administration of contracts for procurement.

Although the objectives laid out in the National Procurement Strategy 2013–2016 are subjective to quantify, the concept of procurement efficiency (CERP, 2013) can be deduced from this strategy that can provide the overall framework for the procurement process. The procurement efficiency is difficult to measure, but it can help develop a framework where these principles can be used cohesively to improve both the process efficiencies and the outcome of the processes.

H. WEAKNESSES IN PUBLIC PROCUREMENT REGULATORY AUTHORITY RULES 2004

After the promulgation of the PPRA Rules 2004, certain areas were identified to improve the efficiency of the PPRA. As a result of discussions with independent donor agencies and feedback of the procurement agencies, a national procurement strategy was devised to fill the gaps observed during the implementation of these rules.

The National Procurement Strategy (NPS) provides insight into the weaknesses observed in the procurement mechanisms. It also suggests recommendations to improve public procurement. United States Agency for International Development (USAID) provided the requisite support to undertake the study for improving efficiency of the PPRA (PPRA, 2013). The focal points in NPS are as follows:

1. Legal Framework

Legal framework (PPRA, 2013) aims to improve transparency, efficiency, and accountability. It also highlights certain areas that require further reinforcements, like procurement law, policies, and procedures that form the backbone of the legal framework.

The NPS highlights the fact that existing sets of rules and regulations need elaboration to enhance efficiency of procurement entities. There is a requirement to provide detailed explanations to guide the procurement agencies for uniform comprehension.

One pertinent example is assessing the value for money (PPRA, 2013). No guidelines are provided to assess the value for money; therefore, there is difference of comprehension of this important aspect. Another important aspect is the imposition of penalties on the collusive practices undertaken by suppliers (PPRA, 2013). The rules do not specify methodologies for implementation of these penalties. The deficiency of guidelines results in inefficiencies in the procurement system and therefore requires legislative and institutional mechanisms for removing these inefficiencies.

The strategy document emphasized filling the gaps on priority so as to have a sound legal base to implement further reforms in the public procurement regime in Pakistan (PPRA, 2013).

2. Institutional Arrangements

The monograph focuses the institutional capacity of the PPRA and procurement agencies (PPRA, 2013) and opines that there is a need to improve the capacity of these institutions to effectively implement the procurement laws, rules, and regulations. The strategy document recommends enhancing the human resource capacity of the institutions involved in the public procurement, and also recommends that procurement professionals cadre to deal with public procurement (PPRA, 2013).

3. Monitoring and Oversight

The monograph acknowledges that effective monitoring and oversight is lacking and, therefore, effectiveness cannot be achieved. The procurement agencies, as well as the PPRA, lack the requisite data and information to monitor procurement activities effectively.

The monograph recommends establishment of mechanisms for provision of information to all stakeholders on procurement activities (PPRA, 2013). It also recommends improving the external and internal controls of procuring agencies through modified audit systems that take into account not only the financial aspects but also the performance and compliance aspects of the procuring agencies (PPRA, 2013).

4. Capacity Building of Procuring Agencies and Suppliers

One key area that has been identified in the strategy paper is enhancing the capacities of the two major stakeholders (i.e., human resource of the procuring agencies and suppliers).

I. ANALYSIS

1. Composition and Powers of the Public Procurement Regulatory Authority

The PPRA is a regulatory body that streamlines and monitors the public procurement activity within Pakistan. An apparent conflict of interest is visible in the composition of the board because the members of the board are also the principal accounting officers of respective ministries. There are 10 members, of which three are private members who are appointed by the federal government (Government of Pakistan, 2002), and the rest of the members are secretaries of the various ministries that undertake public procurement. They are simultaneously regulating the PPRA board and overseeing their ministries (PPRA, 2013). The problems are further aggravated due to the lack of particular criteria to appoint private members. Moreover, as per paragraph 4 of PPRA ordinance 2002, the federal government can issue policy directive that is binding on the PPRA.

The federal government has a strong influence over the PPRA that is supposed to be an independent regulatory body. The PPRA depends on the federal government for annual grants that further compromise its independence (Government of Pakistan, 2002).

2. Value for Money

PPRA rules (PPRA, 2004, p. 2) define value for money incorporating different aspects of procurement. The following aspects take part in evaluating the value of money:

- Quality
- Timeliness reliability
- After sales service
- Upgradeability
- Price source
- The combination of whole life cost and quality to meet the procuring agency's requirement

This is an important explanation with regards to ascertaining the best return for the money spent, which defines what the best return of the value will be.

In this context, it is important to highlight two relevant issues. As highlighted Penny Jackson in his 2012 article, it is of prime importance that value for money is comprehended in a complete spectrum. The three cardinal principles to understand the value for money concepts are economy, efficiency and effectiveness. These are defined below:

Economy: Reducing cost of resources used for an activity, with a regard for maintaining quality; **Efficiency:** Increasing output for a given input, or minimizing input for a given output, with a regard for maintaining quality; **Effectiveness:** Successfully achieving the intended outcomes from an activity. (Jackson, 2012, p. 1)

These three elements combine to form a perfect balance to achieve the best return for money. But it is extremely difficult to assess the value for money because there is lack of reliable data available with the procuring agency and the PPRA, which can accurately assess the value for money in a particular case and time.

But an equally important question arises regarding the assessment of the value of money: for whom is it assessed (Jackson, 2012)? Is it the procuring agency or the PPRA? If this question were analyzed by the agency, it would provide a different answer and may not be congruent with what the PPRA assumes is correct. Therefore, it is difficult for these agencies to agree on one correct answer. The same question has been raised in the national procurement strategies that emphasize the need to provide guidance on the issues of assessing the value for money (PPRA, 2013).

It is pertinent to mention here that the procuring agency has to look after not only the procurement aspect but also the operational aspects to optimize the output of the organization. The PPRA, however, restricts itself to the procurement domain and may not grasp the complete spectrum as conceived by the procurement agency.

There are two important questions that need to be asked to streamline the direction of the procurement activity. The comprehension of value for money that is acceptable at all levels and methodology adopted to evaluate the value for money in a specific situation.

Because PPRA rules generically cover the bidding and tendering aspects of the procurement process, every public sector procurement agency uses different methodologies and procedures to carry out public procurement.

To accrue the benefits of harmonized procurement regulatory framework, it would be necessary to address the policy issues for each sector individually to provide them with a guideline to carry out procurement in the respective agencies.

3. Transparency

Transparency has been one of the cornerstones of the PPRA rules whereby the procuring agencies are required to perform all the tasks in a transparent manner. This transparency leads to efficiency and effectiveness, as discussed above. As explained in the NPS, transparency translates into open access to public documents, including information regarding procurement planning.

The results, however, are not encouraging. The U.S. Department of State report on investment climate in 2012 identified key issues:

Inadequate bidding documents, inadequate response time for bidders, prequalification as a means of restricting competition, flaws in price negotiations, lack of an independent complaints' handling process, and irregularities in inspections and measurements.

The Government of Pakistan, in collaboration with partners like World Bank and Asian Development Bank, prepared a report (Government of Pakistan, 2009) on the procurement assessment and transparency index was at the lowest with score of 1.52 in the public procurement system (Government of Pakistan, 2009).

Transparency is a functional requirement that needs to be applied to all stakeholders so that an overall objective of economy and efficiency is achieved simultaneously. But because PPRA rules focus on one stakeholder (i.e., procuring agencies and the suppliers), another major stakeholder has remained out of focus of PPRA regulations.

PPRA regulations have greatly emphasized the aspect of transparency through rules that are binding on the procurement agency but which do not put any binding

regulations for the suppliers who provide them greater maneuverability in the procurement process.

Moreover, the procuring agencies do not have the institutional capacity to investigate any wrongdoing or collusive behavior of suppliers during the procurement process. Although collusive behavior, once identified, can be brought under scrutiny, it is time consuming and may hinder the procurement process.

PPRA regulations do not cover the aspects of contract management and have left the discretion to procuring agencies to administer the contract under their own administrative arrangements.

J. GOVERNANCE AS A FUNCTION OF THE PUBLIC PROCUREMENT REGULATORY AUTHORITY

Although greatly influenced by UNCITRAL model law on procurement, PPRA rules, unlike the UNCITRAL model law, have included improving governance as one of the main objectives of authority. The governance, however, is a broad term that has come into the domain of public procurement due to the increased complexity in the procurement sector. For easy and better comprehension, the term *governance* has been restricted to *public governance*. As described by Shakya (2012), practices of public procurement are constructed on some cardinal principles that include accountability, ethics, impartiality, professionalism, service, and transparency.

These fundamental principles form part of the governance framework in the public procurement sector. These principles develop linkages with rules and regulations that are in place for better procurement practices. All stakeholders are made accountable for their actions so that the processes, procedures, and legal framework all lead to an optimum outcome.

Estimated public procurement accounts for 15% spending of the world's GDP (PPRA, 2013), and developing countries like Pakistan have even more chunk dedicated to the public procurement sector. The effective regulatory framework will definitely have an impact on overall governance in the country. PPRA rules (Government of Pakistan,

2004), however, restrict them strictly to the tendering and bidding and arbitration domain and do not establish it into ensuring that stakeholders follow the best practices.

It is appropriate to take into account the fact that stakeholders in public procurement are not only the buyers and the public, but the seller as well. Because the supplier is one of the beneficiaries of the outcome of the public procurement process, the supplier also needs to be taken into the loop of governance to ensure that equality transparency ethics are applied equally to all the stakeholders to achieve optimum results.

K. MONITORING MECHANISM PUBLIC PROCUREMENT REGULATORY AUTHORITY

The envisaged functions of the PPRA (Government of Pakistan, 2002) include the monitoring of procurement practices conducted by procuring agencies. The existing capacity of the PPRA has not moved beyond the advisory role that the PPRA has played over the years since its inception. The advisory role is also limited, mostly to tendering documents.

The PPRA has allowed procurement agencies to use their discretion in developing their own procurement manuals to undertake public procurement. This is in line with the recommendation of World Bank (2000); however, the institutional capacity does not match with objectives that were set forth for the PPRA (Government of Pakistan, 2002).

The concept of decentralization was applied in light of the recommendations of the World Bank (2000). The procuring agency is kept independent to carry out the procurement within the domain provided by law, but an overarching organizational instrument is absent in observing deviations during all the phases of contract administration. The World Bank (2000) in its report recommended that new procurement laws should deal only with the policy making and law, not the line function; however, PPRA ordinance envisages the authority to monitor the procurement practices.

The PPRA does not have appropriate institutional capacity to have an oversight over procurement agencies (PPRA, 2013). This lack of capacity translates its effect into every sphere of the public procurement process.

In addition to monitoring and oversight by the PPRA, procuring agencies do undergo audits of the procurement financials, but they do not go under scrutiny if they achieved the optimum results by application of the procurement law during the procurement of goods, services, and works. The Auditor General of Pakistan, who is responsible for auditing the public expenditure in the country, only audits the financial aspect of procurements. Therefore, the PPRA is unable to have an effective oversight over the procurement agencies to implement the procurement law in its true letter and spirit.

The NPS document also envisages an enhanced role for auditors to conduct the audit of the procurements and of the performance of procuring agencies, and also to assess the validity of value for money assessments (PPRA, 2013).

L. NEGOTIATIONS UNDER PUBLIC PROCUREMENT REGULATORY AUTHORITY RULES

PPRA Rule 40 (Government of Pakistan, 2004) explicitly limits the negotiations with the lowest evaluated bidder or any other bidder after submission of bid. Before going into the merits and demerits of the allowing negotiation in a procurement framework, it is appropriate to understand the context under which PPRA rules (Government of Pakistan, 2004) were formulated.

The World Bank (2003) in its procurement assessment report pointed out the tendency by procurement officials to negotiate the price after bid opening that invites more corruption. However, another important aspect of the procurement process is to achieve best value for money, and it may conflict with the limitation on the negotiations described in Rule 40.

The problem of corruption highlighted in the report (World Bank, 2000) was primarily due to lack of oversight by any central regulatory authority that can have a check on the procurement agency and provide an alternative forum where grievances against malpractice can be addressed.

The central regularity authority is in place after the establishment of the PPRA for oversight over the procurement practices in the public sector and therefore can curb the tendency of corruption through effective management techniques and procedures.

The idea of value for money pushes public sector procurement agencies to use every means available to them to ensure that the money spent produces optimum results. The optimum outcome, as described in the PPRA rules (Government of Pakistan, 2004), includes a complete spectrum, including quality, timeliness after sales, service upgradability, price, and combination of whole life cost.

Price is just one factor that is linked directly or indirectly to all other aspects of assessing the value for money. Because financial negotiations are not allowed in PPRA rules, the value for money concept loses its utility. The value for money concept gives an idea of how to regulate different aspects of public procurement so that not only can one achieve transparency, but also uphold the efficiency and effectiveness of system.

In developed countries like the United States and United Kingdom, robust oversight mechanisms are placed to ensure that all stakeholders work within their domains and achieve optimum results through efficiency and effectiveness.

M. CONCLUSION

In this chapter, the historical overview of the procurement regulatory framework gave the requisite background of the procurement regime in Pakistan. It also discussed the establishment, function, and composition of the PPRA. It also highlighted certain rules and regulations that are relevant to the thesis research question. The NPS covers the future direction that PPRA envisages. Analysis of PPRA rules comprises the final section of the chapter, highlighting issues that are relevant to improve the procurement regime in Pakistan.

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III. UNITED NATIONS COMMISSION FOR INTERNATIONAL TRADE AND LAW MODEL LAW ON PROCUREMENT

In this chapter, the evolution of the United Nations Commission for International Trade and Law (UNCITRAL) model law on procurement is discussed. In the initial part of the chapter, the historical evolution of the model law is discussed. The mandate, composition, and working methodology of UNCITRAL constitute the next part of the chapter.

A brief summary of each chapter of model law is included in addition to the analysis which covers only the relevant aspects of model law that relate to the thesis research question.

A. HISTORY AND ESTABLISHMENT OF UNCITRAL

The UNCITRAL finds its origin in the UN general assembly resolution 2205 (XXI) of December 17, 1966 (UNCITRAL, 2011). Increasing problems in international trade paved the way for a unified global regulatory framework to streamline the trade issues within different states (UNCITRAL, 2011).

The United Nations, in pursuance of Article 13 of United Nations Charter (United Nations, 2015) assigned the responsibility to the Secretary General of the United Nations for formulating a paper to devise a mechanism for the unified legal framework for procurement (UNCITRAL, 2011).

This paper was presented in the 20th session of the General Assembly, and a proposal was initiated to form a commission to harmonize issues affecting international trade. The secretary general of the United Nations was requested to highlight key areas that were required to be focused. The report was submitted in 1965 (Cohen, 2011) and is referred to as the Schmitt Hoff report.

In the aftermath of the report, a commission was established with its primary focus to further harmonize and modernize international trade by adopting the legislative and non-legislative instruments in different areas of commercial law. The associated

areas with the international trade were identified as dispute resolution, international contract practices, insolvency, transport, international payments, procurement, and sale of goods (UNCITRAL, 2011).

B. MANDATE

The commission was entrusted to provide the mechanism for progressive harmonization of international trade (UNCITRAL, 2004). The commission provided a forum to harmonize the technical and administrative issues that may arise in international trade due to adoption of different systems by different states. Therefore, the mandate generally focuses on the issues that promote international trade. The mandate of the UNCITRAL is as follows:

Coordinating the work of organizations active in this field and encouraging cooperation among them

Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws

Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field

Promoting ways and means of ensuring a uniform interpretation and of international conventions and uniform laws in the field of the law of international trade

Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade

Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development

Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade

Taking any other action it may deem useful to fulfill its functions. (UNCITRAL Secretariat, 2013)

C. COMPOSITION

The commission is headed by a chairperson, who is aided by three vice chairpersons, a rapporteur, and a bureau of commission for the plenary annual session. The member states elect the bureau of commission, and there are currently 60 member states elected for a period of six years (UNCITRAL, 2007).

The UNCITRAL has been composed in a manner to represent all geographic regions, and economic and legal systems for its enhanced output. It is composed of 60 member states that include 14 states from Africa, 14 states from Asia, eight states from Eastern Europe, 10 states from Latin America and the Caribbean, and 14 states from Western Europe (UNCITRAL Secretariat, 2013). The UNCITRAL operates through working groups (United Nations, 1969) who present their works in the annual plenary session held once a year.

D. UNCITRAL SECRETARIAT

The International Trade Law division of the office of Legal Affairs of the United Nations Secretariat performs the duties as the secretariat for the commission. Initially, the division was located in New York, but it moved to Vienna in 1979. It includes lawyers from various countries and legal traditions. The director of the division serves as the secretary of the commission.

E. WORKING METHODOLOGY

UNCITRAL secretariat takes a variety of different tasks, which include the following:

- Preparations of study
- Reports and drafts of texts on topics that are being considered for future inclusion in working programme
- Legal research
- Drafting and revision of working papers
- Reporting on working groups and commission meetings
- Administrative services to the working groups (UNCITRAL Secretariat, 2013, p. 9)

In addition, the secretariat assists the commission in coordinating the work of other organizations in the broader United Nations framework (UNCITRAL Secretariat, 2013).

F. WORK PROGRAM

In 1968, after due deliberations, the commission adopted nine work areas, which included international trade of goods, commercial arbitrations, transportation, insurance, international payments, intellectual property, elimination of discrimination in laws affecting international trade, and legalization of documents (UNCITRAL Secretariat, 2013).

However, this is not the final list of subjects that the commission considers. The work program changes according to the needs of the time. Likewise, there are some issues that the commission has not addressed, such as insurance (UNCITRAL Secretariat, 2013). On the other hand, there are certain subjects, like procurement, electronic commerce, security interests, online dispute resolution, and microfinance that has been added subsequently (UNCITRAL Secretariat, 2013).

G. TASK REGULATION OF THE UNCITRAL

The UNCITRAL regulates its tasks through working groups. There are six working groups who work on the assigned projects for a specific time period. Working group I dealt with the procurement laws for the period between 2004 and 2012; working group VI is dealing with security interests since 2002. The recommendations of the working groups are discussed in the annual session of the commission, and recommendations are discussed at length before being put into the document (UNCITRAL Secretariat, 2013).

H. UNCITRAL OUTCOMES

The commission uses three different techniques that describe its outcome of the discussions and research work. They are as follows:

- Legislative technique
- Contractual technique

- Explanatory technique (UNCITRAL Secretariat, 2013)

The model law, which will be discussed in detail, forms part of the legislative technique that provides guidelines to the member states for adoption in their respective states and is not binding.

I. UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION, AND SERVICES, 1994

Keeping mandate as the focal point, the UNCITRAL worked for establishing a global law that is able to harmonize the public procurement in different states around the world promoting the international trade. The UNCITRAL, since its inception, has formed laws as a guide for member states. The rules formulated by the UNCITRAL are not binding on the member states. These include model law on international arbitration (1985), model law for the international credit transfers (1992), and the model law for procurement of goods, construction, and services (1994) (UNCITRAL, 2007).

The UNCITRAL adopted the model law for procurement of goods, construction, and services (hereinafter referred to as the “model law”) in the 26th session held in Vienna (International Legal Materials, 1994).

The model law was aimed at serving as a model for the states with outdated procurement regulations in order to have streamlined international trade. Another objective was to obtain better value in return for the expenditure of public funds (International Legal Materials, 1994).

The model law set forth guidelines for the countries to adopt a regulatory framework that is supplemented though the regulations specific to each country. Unlike the convention, the model law provides a guideline, and the option to adopt the model law provisions rests with the state. The model law provides the option and mechanism that can be used by any member state to regulate the procurement system in the country.

Its inherent flexibility provides an opportunity for the states to handle the increasingly complex issues of private commercial trade in the highly competitive global market (Cohen, 2011). The model law provides the stable platform for smooth processing of commercial trade. The UNCITRAL not only provides the model law for the states to

follow, keeping their environment in focus, but also supports the legal issues that may arise from the trade. One glaring example is of the arbitration law of 1985 that provides the guidelines to solve the contentious issues amongst the stakeholders in any commercial trade.

The increasing complexity and advancement in technology persuaded member states to pursue the case for the updating the model law in 1994. In the 36th session of the commission, the discussions started to add in new regulations in the 1994 model law (UNCITRAL, 2007). The progressions in the technology and emerging procurement practices led the commission to focus on the following:

- Publication of contract opportunities
- Publication of the laws and regulations governing procurement contracts
- Publication of solicitation documents and related information
- Publication of contract awards
- Use of electronic communications in the procurement process
- Electronic (reverse) auctions
- Electronic catalogues (UNCITRAL, 2007, pp. 1109)

After deliberate discussions, the model law was revised in 2011 with some addition to the framework agreements and electronic reverse auctions.

J. UPDATING THE MODEL LAW OF 1994

The advancement in technology and new practices envisaged in public procurement led to review of 1994 model law. The cost effective and efficient methods were introduced in the revised model law which was released in year 2011.

The two major inclusions, other than the minor additions, were the electronic reverse auctions and the framework agreements (UNCITRAL Secretariat, 2014) that are discussed in the subsequent section.

K. BRIEF OVERVIEW OF MODEL LAW 2011

The model law is composed of eight chapters. The following text briefly summarizes the contents of the various chapters of the model law.

1. Chapter I

This chapter includes 26 articles. The provisions in this chapter recognize how the objectives given in the preamble are implemented by regulating procurement. It includes the requirement of the institutional and administrative necessities, such as the issue of regulations and the maintenance of documentary records, which are essential for regulating the procurement regime as intended. (UNCITRAL Secretariat, 2014).

2. Chapter II

This chapter contains two sections and includes articles 27–35. Section I is composed of the regulations concerning the selection/award phase of the procurement process (i.e., the procurement method). The two notable additions are the inclusions of conditions for use in electronic reverse auctions, and the framework agreement as described in articles 31 and 32. Section II covers provisions related to manner of solicitation for each procurement method. This section constitute articles 32–35 (UNCITRAL Secretariat, 2014).

The next portions until Chapter VII provide the details of the procedures to be adopted in carrying out procurement. These regulations provide a broad framework for conducting the procurement to ensure that best practices are followed during the procurement process (UNCITRAL, Secretariat 2014).

3. Chapter III

This chapter constitute articles 36–44 and is composed of three sections. The chapter lays out the procedure for the most widely used methods of tendering (i.e., open tendering). This chapter includes the methods and conditions applicable in open tendering. It covers the modalities of solicitation of the tenders, method of opening these tenders, and the issues related to open tendering (UNCITRAL, Secretariat 2014).

In section I, articles 36–39 provide the guidelines for the procuring entity to adopt a uniform method of inviting a tender and describe the methodology for its adoption. Section II, which constitutes articles 40–41, provides the methodology for submitting the tender to the procuring entity. It also provides the methodology and conditions under

which a supplier can withdraw his or her tender that has been submitted earlier (UNCITRAL Secretariat, 2014).

Section III consists of articles 42–44 and provides the guidelines for the evaluation of the tenders that have been submitted by suppliers. It sets out the conditions under which the tenders should be opened and the methodologies to be adopted in making the process more transparent. It also requires the proceedings to be recorded in vide article 25 of the law (UNCITRAL Secretariat, 2014).

4. Chapter IV

This chapter consists of articles 45–47 and sets out the procedure for the methods of restricted tendering. It provides the detailed methodology to be adopted in case of restricted tendering (UNCITRAL Secretariat, 2014).

5. Chapter V

The chapter consists of articles 48–52 and provides the framework for a more complex two-stage tendering process with the inclusion of competitive negotiations. The framework for conducting the competitive negotiations and the consecutive negotiations are also provided to streamline the issue during the process of procurement. The chapter covers in detail the methods that must be adopted while conducting alternative methods (UNCITRAL Secretariat, 2014) of procurement (other than open tendering), which are as follows:

- Request for proposal with dialogue
- Request for proposal with consecutive negotiations
- Single-source procurement

Article 48 deals with two-stage tendering, whereas article 49 deals with a request for a proposal with dialogue. Articles 50 and 51 provide the methods for request for a proposal with consecutive negotiations (UNCITRAL Secretariat, 2014). It is pertinent to mention here that article 51 prohibits any further negotiations after receiving the final or best offer from the suppliers (UNCITRAL Secretariat, 2014).

Article 52 lays down the methodology for the single-source procurement with a cross-reference to article 34, and it requires the procuring agency to continuously engage

in negotiations with the suppliers unless it becomes unfeasible to continue negotiations (UNCITRAL Secretariat, 2014).

6. Chapter VI

This chapter consists of the new provisions, articles 53–57, which were previously not included in the first version of the model law in 1994. The electronic reverse auction is aimed at providing the methodology for maximum participation by the suppliers and also as an economical method in relation to the cost and time of the procuring entity (UNCITRAL Secretariat, 2014).

Article 53 provides the provision for the electronic reverse auction as a method for procurement. It lays down the procedure that is required to be adopted; procurement is based solely on this method. Because the method is electronic, the provisions require the buyer to provide the requisite forum to communicate with suppliers for clarifications (UNCITRAL Secretariat, 2014).

Article 54 deals with provisions when electronic reverse auction is used as a phase prior to contract award. Articles 55 and 56 deal with the timings and the evaluation criteria (i.e., price and other related aspects) that are kept as baseline for awarding the contract in articles 53 and 54. Article 57 provides the procedural safeguard to ensure that the extremely low or unresponsive bidders do not subvert proceedings (UNCITRAL Secretariat, 2014).

7. Chapter VII

This chapter consists of articles 58–63 and deals with the framework agreements that provide a hedge against any future requirement with no definite quantity and time. These procedures and practices are followed around the globe with generally the same mechanisms with different names like indefinite delivery indefinite quantity (IDIQ), task order contracts, catalogue contracts, and umbrella contracts. This component of the law provides the mechanism to undertake these agreements (UNCITRAL Secretariat, 2014).

This method is a new inclusion in the model law. It is more suited for the contracts that are required on a repetitive or urgent basis and are not complex in

execution (UNCITRAL, 2011). Articles 58 and 59 deal with the close framework agreement. Articles 60 and 61 specify provisions for establishment and methodologies to adopt open framework agreement. Article 63 explicitly prohibits any changes to the framework agreement after it has been awarded (UNCITRAL Secretariat, 2014).

8. Chapter VIII

This chapter provides the guidelines for suppliers to challenge any decision of the procuring agency. This chapter provides for all possible methods for challenge and appeals (UNCITRAL Secretariat, 2014).

The chapter comprises articles 64–69. Article 64 provides the right to suppliers and contractors to file an appeal or to challenge any proceedings during the procurement process. Article 65 specifies the effects a challenge can have on the procurement process and provides the procedural safeguard in case of any appeal that it may consider to be not in the public interest (UNCITRAL Secretariat, 2014).

Article 66 explains the methodology for filing an appeal or a challenge before the procuring entity, whereas article 67 specifies the process in case the matter is referred to an independent body. Article 68 provides the rights to the stakeholders (i.e., the procuring entity), as well as the suppliers, to be part of the proceedings and contest their case (UNCITRAL Secretariat, 2014).

L. ANALYSIS

The model law is comprehensive and requires an exhaustive study to analyze its various aspects; the paucity of space has restricted the analysis to some important facets that are more pertinent to thesis.

1. Objectives

The six objectives, as adopted by the UNCITRAL (UNCITRAL Secretariat, 2014), explicitly highlights the fundamental concepts that the commission focuses on for better harmonization and streamlining international trade in a globalized and shrinking world. All the objectives support an overall objective.

The idea of economy and efficiency (UNCITRAL Secretariat, 2013) lays down the principal foundation for developing the model law. As described in article 12 of model law (UNCITRAL Secretariat, 2014), efficiency is translated into the administrative costs of the procurement and the value of the commodity, item, or framework agreement that is being procured. The model law, however, provides the flexibility for the enacting states to define the term *efficiency*.

2. Flexibility

The UNCITRAL model law provides a greater degree of flexibility to the enacting states in following the law. The flexibility can, however, distract from the primary reason of developing the commission: to harmonize the international trade. As indicated by Arrowsmith (2004), it is up to the enacting state how much weight it attaches to the objectives of the model law because it is not a binding agreement on the member state.

If integrity and transparency were more desirable, then the idea would be to limit the discretion of the procurement officials by enacting the law. The same outcome will also prevail when the skills of the procurement officials require augmentation. The flexibility is generally used where the cost of undertaking procurement requires substantial reduction, and discretion is desirable to speed up the process of procurement. The socioeconomic policies of the enacting state can also play a role where the policy may require supporting the domestic player rather than the international player.

3. Procurement Planning

Article 6 of the model law emphasizes the prior planning of the procurement activity. This step would promote participation by suppliers and enhance transparency in the procurement system (UNCITRAL Secretariat, 2013). However, the provision provides the flexibility to the procuring agency for any subsequent change in the plan that may occur due to any circumstances.

The idea of prior information is based on two fundamentals cornerstones: open competition and economy of resources. It also ensures that procurement entities do not

indulge themselves in “ad hoc” or “emergency” procurements that incur huge additional costs. The gray area that needs to be focused on is that there is a likelihood of collusion (UNCITRAL Secretariat, 2013) in case of prior publicity of the procurement action.

It is not always advisable to publish the procurement plans, and a delicate balance needs to be maintained to achieve the overall objectives of economy, efficiency, and open competition.

4. Maximum Competition

The model law promotes competition among suppliers so that the value of money spent is maximized (UNCITRAL Secretariat, 2013). The suppliers will have an opportunity to participate objectively to benefit from open and fair competition, and the procurement entities will have better option to choose among a host of suppliers best suited to their requirement. Articles 28, 31, 34, and 49 (UNCITRAL Secretariat 2014, pp. 29, 32, 33, 48) deal with various aspects of the competition to provide equal grounds to the suppliers to achieve the optimum outcome for the process of procurement. However, in case of more complex contracts, the procurement entities can limit the participation, as mentioned in Chapters IV and V (UNCITRAL Secretariat, 2014) of the suppliers to promote effective competition and concrete outcomes.

5. Security of Information

Defense procurement is a key and a critical component of public procurement in most of the countries around the globe. On average, approximately 2% of the total GDP (World Bank, 2014) is spent on the military, of which procurement is one of the major components.

The sensitivity of the defense procurement is understandable and has been acknowledged in the UNCITRAL model law. Defense procurement may require the enacting states to strike a balance between the protection of information and transparency obligations (UNCITRAL Secretariat, 2013). Article 2 of the model law (UNCITRAL Secretariat, 2014) provides a flexible definition of the classified information that may be encountered in procurement related to national defense and security.

Article 7 and Article 25 (UNCITRAL Secretariat, 2014) impose some limitations with a view to protecting the classified information. Some special provisions are enacted to facilitate the states to adopt such measures to address the sensitivity of the issue. In addition, the model law does provide the enacting state with the option to expand definition of classified information according to its own priority and convenience.

6. Transparency

The transparency in the public procurement is one of the key issues that have tremendous implications on the international trade. The provisions of the model law converge the issues on the transparency of the procurement system so that international trade can be promoted.

The idea of transparency according to the model law revolves around five elements:

- Public disclosure of the applicable rules in procurement process
- Publication of procurement opportunities
- Prior planning of the procurement activity
- Conduct of procurement activities as per the rules and regulations
- Monitoring mechanism of procurement system (UNCITRAL Secretariat, 2013, p. 34).

Transparency measures are discussed throughout the model law from different perspectives to ensure that the system provides equal opportunities to all the stakeholders that are part of the system. The model law has attempted to strike a balance between the two major stakeholders: procurement entities and suppliers. A number of articles included in the model law—namely, articles 5, 7, 8–11, 13, 14, 22, 23, 25, 33–35, 39, 42, and 47–49—provide the statutory framework in an attempt to make the procurement system as transparent as possible (UNCITRAL Secretariat, 2014).

The inherent flexibility in adoption provides the enacting state with the leverage to inject its own provision to promote transparency in the procurement system. These inclusions may rest on the circumstances that the state finds itself in; and the socioeconomic policies of the state nudges the state to adopt the model law according to its convenience.

The transparency capstone in the model law aims to provide a level playing field for all the stakeholders so that discretion at any stage is minimized and transparency is promoted. It provides inbuilt checks and balances so that not one stakeholder enjoys discretionary powers to skew the system's outcome in its favor.

The concept translates into recommendations of a monitoring system, as described in Chapter VIII (UNCITRAL Secretariat, 2014), to ensure that the discretion is not misused.

The model law recommends administrative and institutional support for the implementation of a legal framework for the procurement process. The legal framework requires detailed instruction and methodologies to streamline the process of procurement.

Institutional support is desirable in many avenues that can harmonize procurement system. These include the following:

- Ensuring effective implementation of the existing rules and regulations
- Standardization of the procurement system
- Monitoring mechanisms to implement government policies
- Capacity building of the procurement officials to maximize the economy and efficiency (UNCITRAL Secretariat, 2013, p. 16)

7. Socioeconomic Policies

The socioeconomic aspect of the procurement system is one of the major considerations by the states. It can have a great impact on the overall direction of the government to promote economic activity and the social wellbeing of its citizens. Article 2 (UNCITRAL Secretariat, 2014) provides the definition of the socioeconomic policies that can be expanded by the enacting state, specific to its requirements.

There are some limitations to implementation of socioeconomic policy within the procurement system. The model law puts the caveat of “no overlapping” with the international agreements as the baseline for the implementation of such policies.

The effect of such a policy may impact the procurement system as a whole. The equal opportunity to the stakeholder, economy, and efficiency are not achieved as conceived by the model law. Because a major portion of the annual fund is funneled through the public procurement system, UNCITRAL model law (UNCITRAL

Secretariat, 2014) provides the flexibility to the states that may require only domestic contractors.

Article 8 does provide leverage to the state to define the conditions that limit the participation on the basis of environmental and ethical standards (UNCITRAL Secretariat, 2013). However, the transparency requirements suggest that these actions be recorded and that procuring entities objectively justify these actions.

M. CONCLUSION

In this chapter, the historical evolution of UNCITRAL model law was discussed. A brief overview of the objectives, composition, and working methodology of UNCITRAL was covered. A brief summary of UNCITRAL model law provided an overview of various aspects of the law.

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IV. OVERVIEW OF THE UNITED STATES PROCUREMENT

In Pakistan, negotiated procurement is considered a non-competitive form of contracting, whereas in the United States it is considered competitive. Negotiations in the United States have roots in technological development that was necessitated during World Wars I and II. The work in this chapter will lead the readers to understand the acquisition system, its structure, and the participants involved in the process. The reflection on Yoder's (2006) Three Integrative Pillars of Success (TIPS) model will help the readers understand the importance of personnel, platforms, and protocols involved in the acquisition process. The analysis of the Federal Acquisition Regulation (FAR) will enable readers to assess strengths of the FAR related to the empowerment of the contracting officer, powers entrusted to them, and public expectations. Reflections on different forms of contracting and the Truth in Negotiations Act (TINA) will give readers a view of the foundations of the negotiations process placed on a 360-degree accountability loop that encompasses government vendors as well. The TINA provides access to government auditors and binds vendors to submitting certified cost and price data that is complete, correct, and current.

A. TECHNOLOGICAL DEVELOPMENT

The pace of technological development is so fast that it has taken only 100 years from the first manned aircraft to the first unmanned aircraft. Since the end of World War II (WWII), technological development has progressed at an unprecedented pace to meet the needs of warfighters at different land, air, and sea theaters (Humily, Taylor, & Roller, 1999). To catch up with technological advancements, DOD facilities innovated dramatic modern-day advancements, like the World Wide Web (www), global positioning systems (GPS), and drones; however, historically, the U.S. government relies considerably on the private sector for the development of complex weapon systems. Over time, not only have weapons become sophisticated, precise, expensive, and complex, but also the government rules and regulations. The development of these weapons requires billions of dollars, and

the U.S. government has been spending that amount over the years. Figure 3 shows Defense budget breakdowns in the 2015 President's Budget Request:

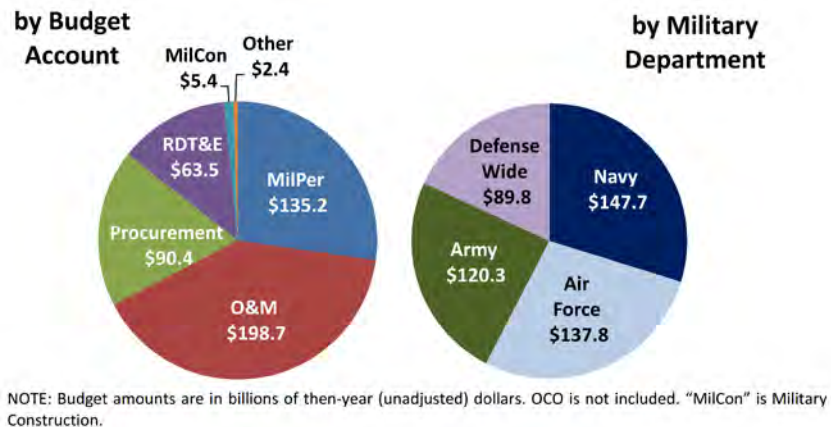


Figure 3. Defense Budget Breakdowns in the 2015 President's Budget Request (from Office of the Secretary Defense [OSD], 2014, p. 2)

When the quantum of funding is huge dollar appropriations, accounting and auditing (Straight, n.d.) require handling by professionals to avoid misappropriation and waste. A unique acquisition process is available in the DOD to manage procurement dollars. Before proceeding to procurement contracting, however, it is necessary to give a broad overview of the acquisition process, its participants, and structure.

B. ACQUISITION AS DEFINED AND UNDERSTOOD IN THE UNITED STATES

As defined in FAR 2.101, *acquisition* is defined as

the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the federal government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract. (Federal Acquisition Regulation [FAR] 2.101, 2015)

The DOD acquisition of major weapon systems emanates from a perception of military threat. When a perceived threat is assessed, utilizing in-house, available resources is always considered an economical and wise solution. Likewise, the DOD contemplates future threats and makes all endeavors to meet the threat from available resources. This process saves billions of taxpayers' dollars allocated not only for acquisition of new weapon systems, but also expended throughout the life cycle of the acquired systems. The DOD requests the development of new weapon systems only when no existing weapon system can be upgraded or modified to meet the future threat assessment. In their research, Humily et al. (1999) mentioned that when military services perceive shortfalls in existing strengths, its first preference is to materialize deficiencies through soft modifications (i.e., change in doctrine, training, or tactics). Hard-material changes or new acquisitions are resorted to only if soft non-material upgrades do not bridge the gap between supply and demand (Humily et al., 1999).

C. GENERAL SERVICES ADMINISTRATION SCHEDULE

The FAR part 8 defines another methodology for obtaining supplies and services by eligible federal, state, and local government agencies other than procurement through FAR part 13, 14, and 15. The FAR subpart 8.002 prescribes following a chain of command for acquisition of supplies and services:

8.002 Priorities for Use of Mandatory Government Sources.

(a) Except as required by 8.003, or as otherwise provided by law, agencies shall satisfy requirements for supplies and services from or through the sources and publications listed below in descending order of priority:

(1) Supplies.

(i) Inventories of the requiring agency.

(ii) Excess from other agencies (see subpart 8.1).

(iii) Federal Prison Industries, Inc. (see subpart 8.6).

(iv) Supplies which are on the Procurement List maintained by the Committee for purchase from people who are blind or severely disabled (see subpart 8.7).

(v) Wholesale supply sources, such as stock programs of the General Services Administration (GSA) (see 41CFR 101-26.3), the Defense Logistics Agency (see 41 CFR 101-26.6), the Department of Veterans Affairs (see 41 CFR 101-26.704), and military inventory control points.

(2) *Services*. Services that are on the procurement list maintained by the committee for purchase from people who are blind or severely disabled (see subpart 8.7).

(b) Sources other than those listed in paragraph (a) of this section may be used as prescribed in 41 CFR 101-26.301 and in an unusual and compelling urgency as prescribed in 6.302-2 and in 41 CFR 101-25.101-5.

(c) The statutory obligation for Government agencies to satisfy their requirements for supplies or services available from the committee for purchase from people who are blind or severely disabled also applies when contractors purchase the supplies or services for Government use.

The Federal Supply Schedule (FSS), also known as the GSA schedule program, is another form of government procurement where the GSA enters into long-term contracts with vendors for easy, fast, and economical purchases. The GSA enters into IDIQ contracts, blanket purchase agreements (BPAs), and contractors team arrangements (CTAs) by fulfilling all pre-requisites of government procurement. Therefore, eligible agencies of federal, state, and local governments can obtain volume quantities of supplies and services at pre-defined rates and for a pre-define time period without undergoing complex procurement processes repeatedly. The FAR subpart 8.4 governs the rules and regulations related to the establishment of contracts by ordering agencies and methodologies to be followed by requiring agencies.

The eligible government buyers can order goods and services through the GSA e-library or GSA advantage where all participating vendors have to publish their current price catalog. The GSA purchases offers following benefits to the customers:

- Additional price discounts for ordering activities
- Expanded opportunities for contractors
- Elimination of redundant effort, with a single contracting vehicle fulfilling complex or ongoing needs
- Reductions in administrative time and paperwork
- Expanded business opportunities for socioeconomic groups
- Help for ordering activities wishing to reach socioeconomic goals (GSA, 2015)

D. ACQUISITION SUPPORT STRUCTURE IN THE DEPARTMENT OF DEFENSE

Before 1947, the United States had only the Department of War for management of military affairs besides the Army, Navy, and Marine Corps. However, the deficiencies, such as command and control over resource allocations, identified in World War II (WWII), led to establishment of the DOD in 1947. Presently, the DoD consists of two elements: the Combatant Commands, and the acquisition and logistics support elements. Appendix A shows the organizational command structure of the DOD.

For acquisition of new capabilities and weapon systems, an effective organizational structure is available at the DOD, as well as individual service components. According to Fox (2011), the acquisition structure at the DOD level has three interrelated and interdependent participants (p. 5). These are Joint Capabilities Integration and Development (JCIDS), Planning, Programming, Budgeting, and Execution System (PPBES) and Acquisition or Procurement System. Jointly, these three are called Big “A” of the acquisition process. Diagrammatically, their interdependence and integration can be represented, as shown in Figure 4.

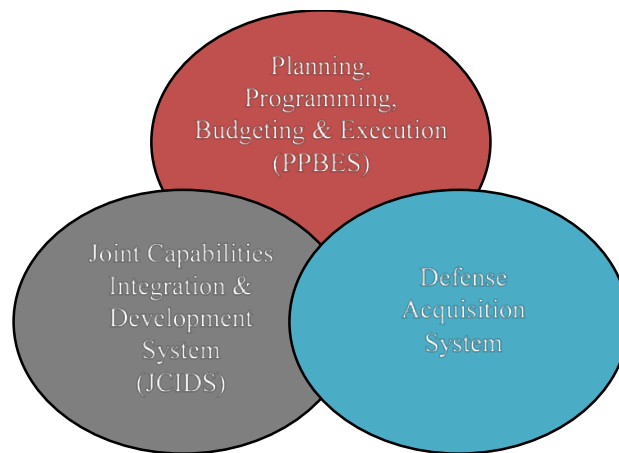


Figure 4. Interdependence and Integration of Big “A” (from Spainhower, 2015)

Taking a deep dive into the JCIDS and PPBES is beyond the scope of this work; however, future researchers may like to compare the United States' PPBES with Pakistan's budgeting system. It is, however, deemed appropriate to give a brief overview of the JCIDS and PPBES for the reader not familiar with these systems. The knowledge-hungry reader may dig deep into each of them separately.

1. Joint Capabilities Integration and Development System

Prescription of military requirements is the cornerstone of the procurement desired capability/weapon system. Sound definition of military requirements not only conserve individual efforts but also ensure timely completion of a program. In the United States, the organization for issuance of policy directives on requirements generation is the Joint Chiefs of Staff (JCS). Component services prepare the acquisition requirements and forward them to the JCIDS. The purpose of the JCIDS is to assist the Joint Requirements Oversight Council (JROC) and Chairman of the Joint Chiefs of Staff (CJCS) in identification, assessment, validation, and prioritization of joint military capabilities of all four component services (Spainhower, 2015). The JCIDS receives requirements from each service for the acquisition of new capabilities, assessing requirements, and processing them after evaluation through the sieve of joint capabilities' gaps and shortfalls. The JCIDS subsequently gives an affirmative or negative decision to individual services to pursue the case further with PPBES for funding appropriation and development of the capability.

2. Planning, Programming, Budgeting, and Execution System

PPBES is a process of allocation and appropriation of budgetary requirements. Before 1962, each military service component programmed, planned, and budgeted a year at a time. In 1962, Secretary of Defense Robert McNamara and Charles J. Fitch, Office of Secretary Defense Comptroller, envisioned the government's way of working on corporate lines (Humily et al., 1999). They centralized the military services budget and provided a process based on a five-year strategic planning. PPBES connects future threats with resource allocation and military capacity building to maintain national

security and peace around the globe. Appendix B shows the DOD PPBES cycle, including its different stages:

a. Planning

Translated from the president's national security strategy, the OSD and JCS collaborate and develop Defense Planning and Program Guidance (DPPG) and National Military Strategy and (NMS), respectively, in coordination with component services. The planning phase blends national threats into resource-informed policy guidelines to the military services for evolution of respective capabilities in the due course of the budgetary cycle. DPPG and NMS link the planning phase with programming and subsequently serve component services in continuing national policy guidelines. The planning phase focuses on requirements first, affordability second.

b. Programming

The outcome of the programming phase is a program objective memorandum (POM). Military services components drive their POMs from DPPG. In POM, the military services state their program wise, hard, and soft requirements, along with justifications. These requirements are prepared based on available financial resources. Programming translates strategic planning priorities in the order of affordability.

c. Budgeting

Programs from POM are set for budget estimation. During the budgeting phase, each service prepares and submits specific yearly financial requirements in the form of a budget estimate submission (BES) to OSD. OSD scrutinizes and resolves issues in BES and submits the DOD budget to the Office of Management and Budget (OMB). The OMB subsequently includes the DOD budget in the president's budget, which is presented to Congress in February of each year.

d. Execution

All services components obligate and outlay appropriated resources in the execution phase. The execution review helps senior leaders measure effectiveness of the

appropriated resources. It also helps in measuring actual productivity with a planned course of action. The execution phase runs parallel with planning and programming phases.

3. Acquisition or Procurement System

The U.S. government has the maximum procurement in the world. Humily et al. (1999, pp. 5–43) mentions USD \$128 billion U.S. procurement spending in 1998. Lately, the figure has slightly reduced; however, the quantum is still around one tenth of a trillion dollars. Figure 5 gives a historical and President’s Budget 2015 (PB15) (fiscal year (FY) 1962–2019) overview of Defense budget accounts.

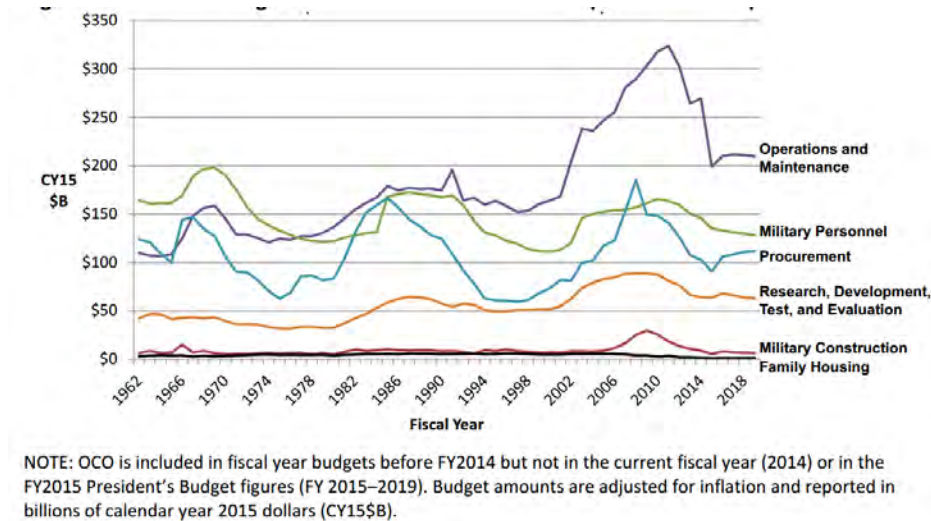


Figure 5. Historical View of DOD Budget Accounts (from OSD, 2014, p. 2)

E. YODER’S THREE INTEGRATIVE PILLARS OF SUCCESS MODEL—PERSONNEL, PLATFORMS, AND PROTOCOLS

Yoder, Long, and Nix (2013), in their research “Phase Zero Contracting Operations,” identified personnel, platforms, and protocols as three integrated pillars of success (TIPS) in an organization. According to the Yoder et al. (2013), the three pillars work in harmony with each other. Without any one of them remaining, two pillars cannot work efficiently. They also consider budget allocation and appropriation as foundations for these pillars working seamlessly. Likewise, Yoder et al. (2013) are of the view that

these three pillars need to work in harmony for efficient working of the acquisition process of an organization or a country. To carry out negotiations in the contract process, these pillars are to be put in place effectively for transparent, informed, and valuable decision-making. The subsequent work in this section analyzes each of these pillars in detail to help readers understand the importance of each of the pillars in the procurement process.

1. Personnel

According to Yoder et al. (2012), personnel is the critical link between rank, position, credentials, and capability. A most efficient organization (MEO) has to have the right combination of the right people with the right skill set and at the right place with balanced workload and performance measurement. Yoder et al. (2012) further divided this pillar into three tiers in their Three Tier Model. According to three tier model, personnel work in different capacities of workers, mid-level managers, and strategists. The authors are of the view that all of the personnel need to be equipped with right set of skills and powers for an organization to work efficiently (Yoder et al., 2012).

The strength of the current U.S. military has not been gained overnight. It has evolved over a period of decades. In the late 1980s, the DOD faced public criticism for wasting taxpayers' dollars, primarily due to the inefficient buying practices of DOD professionals. Humily et al. (1999) wrote that the expensive procurements created an impression in the minds of the American public that the system was out of control (Humily et al., 1999). To build the capacity of contracting personnel, not only the DOD contributes, but also the U.S. government and legislature oversee and take a keen interest in the measures necessary for improvement of acquisition workforce. In 1986, realizing the need of the hour, President Ronald Reagan, under Executive Order 12526, established a Blue Ribbon Commission. Mr. David Packard was the chairman of the commission. At that time, the DOD was plagued with inefficient management of taxpayers' dollars. The purpose for establishment of the commission, as stated in the Packard commission final report, was as follows:

The President established the Blue Ribbon Commission on Defense Management in part because public confidence in the effectiveness of the defense acquisition system has been shaken by a spate of ‘horror stories’ – overpriced spare parts, test deficiencies and cost and schedule overruns. Unwelcome at any time, such stories are particularly unsettling when the Administration and Congress are seeking ways to deal with record budget deficits. A major task of this Commission has been to evaluate the defense acquisition, to determine how it might be improved, and to recommend changes that can lead to the acquisition of military equipment with equal or greater performance but at lower cost and with less delay. For this purpose, the commission formed an Acquisition Task Force. (Packard 1986, 41)

In its report, besides other findings, the commission found room for improvement in civilian and military acquisition workforce of the DOD. The commission recommended the establishment of an undersecretary of acquisition under the OSD, with a mandate to act as a senior executive of acquisition workforce and make independent decisions and policy-making in light of the president’s strategic guidelines. The post of undersecretary of acquisition was subsequently created in 1986, as a result of the Goldwater-Nickels Bill, which has now evolved into the undersecretary of acquisition, technology, and logistics (AT&L). The organization chart of office of undersecretary of AT&L is placed in Appendix C. In this regard, the board recommended the following:

For these reasons, it is fundamental that we establish unambiguous authority for overall acquisition policy, clear accountability for acquisition execution, plain lines of command for those with program management responsibilities. It is also imperative that we streamline acquisition procedures. This can be facilitated by five related actions:

1. We strongly recommend creation by statute of the new position of Under Secretary of Defense (USD Acquisition) and authorization of an additional Level II appointment in the Office of the Secretary of Defense (OSD). (Packard, 1986, 53)

a. Training of Personnel

In 1985, perceiving the technological pace in the United States, the DOD convened a review of the entire education and training systems under the DOD. The findings of the investigation, coincidentally, were more or less the same as those of the Packard Commission. Both studies found the acquisition workforce undertrained,

underpaid, and inexperienced. In 1990, based on both the investigations, Congress enacted the Defense Acquisition Workforce Improvement Act (DAWIA). The DAWIA was subsequently amended and incorporated into U.S.C. Title 10 Chapter 87. The DAWIA stipulates that all DOD agency heads take measures for training and capacity building of respective civilian and military acquisition workforces. According to Section 1701A, Parts (b) (4) and (5), the USD (AT&L) is to develop career paths and sustained ways for capacity building through training.

The DAWIA was further augmented by DOD Instruction 5000.66, demonstrating the DOD's resolution to train and develop a professional, agile, and motivated workforce that should be able to make credible decisions. The policy excerpt from DOD Instruction 5000.66(4) is given below:

Policy: It is DoD policy that the primary objective of the AT&L Workforce Education, Training and Career Development Program is to create a professional, agile and motivated workforce that consistently makes smart business decisions, acts in an ethical manner, and delivers timely and affordable capabilities to the warfighter. The AT&L Workforce Education, Training and Career Development Program improves the capabilities and management of the AT&L Workforce by: developing a highly qualified, diverse workforce capable of performing current and future DoD acquisition, technology and logistics functions; preparing future key leaders; providing career guidance and opportunities for broadening experiences and progression; managing Key Leadership Positions (KLPs) to enhance program stability and accountability; and ensuring effective use of training and education resources. (DOD Instruction 5000.66 (4))

Para 5.1.2 of DoD Instruction 5000.66 binds the USD (AT&L) to seeking funding for education, training, and career development of the AT&L workforce. According to Para. 5.1.6 of said instructions, the USD (AT&L) is also to make policies for the AT&L workforce education, training, and development.

The training of the workforce becomes easier because funds for each service is part of the legal framework. Under FAR 1.102-4(c), the government has shown its commitment to train, develop, and provide other resources necessary for professional development and knowledge improvement of the AT&L workforce. The legislation provides consistency and longevity to policies derived for training purposes. No single

individual services chief can alter or reduce the scope of capacity building at his or her whims in contravention to legislated demands.

b. Capacity Building of Personnel

The legal framework serves as a foundation for the creation and capacity development of the acquisition/contracting workforce. Consequently, the DOD at central and each service at individual level take measures for development of their acquisition workforce. In October 1991, establishment of the Defense Acquisition University (DAU) was a part of such efforts. The DAU offers Levels I, II, and III certification in acquisition. The detail of the courses offered by the DAU is available on its website (see DAU, n.d.). The contracting workforce has to undergo these certification courses, at different stages of their professional career, to qualify to work in various capacities. Similarly, individual services institutes like the Naval Postgraduate School offer a variety of short as well as graduate courses.

According to the *Defense Acquisition Structures and Capabilities Review* report (2007), prepared pursuant to section 814 of National Defense Authorization Act (NDAA) FY06, the educational, training, and experience status of the acquisition workforce has improved since Packard's recommendations. According to the report, the 74% of civilian AT&L workforce has bachelors or advanced degrees, which is higher than its DOD civilian white-collar colleagues. The report also mentioned that 66% of the AT&L civilian workforce is DAWIA certified, and 50% had a higher certification level than required by work position. The certification percentage increases to 76% for critical acquisition positions.

2. Platforms

Platforms is the second pillar of the Yoder TIPS model. According to Yoder (2006), the second pillar is the combination of hardware and software that helps in analysis, decision-making, production, management, and communication. These tools examine qualitative and quantitative mixture and appropriateness for the mission of an organization. The authors of this work build on the platforms of Yoder and take it one step forward. The authors are of the view that platforms also encompass organizations

and institutions that help build the capacity of the personnel—the first pillar of the TIPS model. These institutions make the first pillar efficient and effective.

According to Dr. Daniel Goure (2013), the DOD acquisition and sustainment focus swings like a pendulum between effectiveness on one side and efficiency on the other. Effectiveness is required in war time when the right item is required at the right place and at the right time. On the other hand, efficiency is the best value of money usually attempted to be achieved at lowest cost. The effectiveness and efficiency reside at two opposite ends of the pendulum. Since 9/11, the U.S. military has been fighting a war against terror. The acquisition organization has to support its forces both at home and in combat zones abroad. The peace and wartime requirements is forwarded by the contiguous U.S. (CONUS) and outside the contiguous U.S. (OCONUS) by finding a balance between effectiveness and efficiency for sustainment of peace in the long run.

To sustain both CONUS and OCONUS forces, the DOD and component services have established different acquisition organizations to uphold the needs of the U.S. military operations. These organizations perform different pre- and post-acquisition roles like supplies, contracts management, and audit. Subsequent paragraphs brief readers about DOD acquisition organizations.

a. Defense Logistics Agency

The Defense Logistics Agency (DLA) is the central combat logistics support agency that provides support to all the U.S. component services and armed forces of allied nations. The DLA was established in 1961 as the Defense Supply Agency. It has evolved over time from a supply to logistics to a management agency of eight supply chains: energy, subsistence, clothing and textiles, medical, construction and equipment, aviation, land, and maritime. According to the DLA's fact sheet, it processes more than 10,000 contract lines per day, meets 100% requirements of consumable items and 80% spare support of non-consumables of common weapon systems. In 2014, the DLA claimed to generate USD \$38 billion in sales and revenue, thereby giving it bargaining power to leverage efficiency in its procurement (DLA, 2015).

b. Defense Contract Management Agency

The roots of the Defense Contract Management Agency (DCMA) reside in the DLA. In 1990, Defense Contract Management Command was established in the DLA for contract management and administration purposes. Due to the magnitude and complex nature of the work, it evolved into a single independent federal agency in March 2000. The DCMA manages around 300,000 active contracts with a face value of USD \$1.773 billion (DAU, 2006). The DCMA guides government agencies throughout the contracting process. Before award of a contract, the DCMA helps in effective negotiating, selecting contractors, and writing contracts. After the award of the contract, the DCMA monitors contract performance and delivery schedules for timely completion of the projects and materialization of the contract (DCMA, 2014), as per prescribed terms and conditions of the formal contract.

c. Defense Contract Audit Agency

The Defense Contract Audit Agency (DCAA) provides audit and financial advisory services to the DOD and other federal entities responsible for acquisition and contract administration (DCAA, n.d.). The DCAA provides these services for negotiations, administration, and settlement of contracts and subcontracts (Humily et al., 1999).

3. Protocols

The third pillar of the Yoder TIPS model is protocols. Yoder (2006) view the third pillar as a set of rules, framework, policies, and business model required for achieving the end state. The protocols describe what needs to be achieved and how to achieve it. The best approach to achieve the end objective is to define the protocols and map every step with an end objective. The mapping keeps the remaining two pillars aligned with organizational objectives.

The U.S. Small Business Administration (n.d.) website cites U.S. procurement regulations as a substantial and complex set of rules governing the federal acquisition process. In numerous ways, students and the acquisition workforce have to be mindful of

fulfilling requirements prescribed under the FAR, DFARS, Title 10 U.S.C., and different policy directives issued by respective military component services. The fact was also acknowledged by Senator David Packard to President Ronald Reagan in his final report of Blue Ribbon Commission:

Federal law governing procurement has become overwhelmingly complex. Each new Statute adopted by Congress has spawned more administrative regulation. As law and regulation have proliferated, defense acquisition has become ever more bureaucratic and encumbered by unproductive layers of management and overstaffing. (Packard, 1986, p. xxii).

A question arises: why are the policies and regulations so complex? A private firm procures the same item in much less time, thereby acting more efficiently; whereas, it takes longer in the public sector to purchase the same item. According to Sandy Keeney (2007), a private firm looks after its own interests; whereas a government has to look after public interest (p. 18). Moreover, when the quantum of procurement in government is huge, history has witnessed that the kickbacks and personal gain have raised the need to enact conflict-of-interest regulations. Therefore, to protect public interest, government has to enact rules and regulations to avoid misappropriation of public money. In Pakistan, PPRA Rules 2004 are the federal regulations for procurement of goods and services for the federal government. The counterpart of the PPRA rules in the United States is the FAR. Readers need to understand that there are other regulations, like the DFARS, Army regulations that guide purchases. The following section enlightens readers about strengths of the FAR.

F. FEDERAL ACQUISITION REGULATIONS

Although the FAR serves as the current acquisition regulations for U.S. federal agencies, its roots are traceable to the Public Affairs Act of 1795, the Armed Services Procurement Act of 1947, and the Federal Procurement Regulations of 1949. Finally, on April 1, 1984, all of them were brought under a uniform regulation through the Competition in Contracting Act. This act is updated and maintained by three agencies: the GSA, the DOD, and the National Aeronautics and Space Administration (NASA).

Organizationally, the FAR comprises 53 parts. Each part is divided into a subpart, section, and subsection, and focuses on different subjects. To make use of the FAR easier and more understandable, each part, subpart, section, and subsection is numbered as shown in Table 2.

Table 2. Organization of the Federal Acquisition Regulations

16.205-1(a)	
16	Part
20	Subpart
5	Section
1	Subsection
(d)	Paragraph

G. STRENGTHS OF THE FEDERAL ACQUISITION REGULATIONS

1. Empowerment and Responsibility

The FAR vests contracting authority in the agency head; however, its conventions also include delegation of authority. It empowers contracting officers to enter into contracts on behalf of the U.S. government. With empowerment the FAR, as referred to earlier, also binds contracting officers to fulfil requirements of law, executive orders, regulations, and procedures, besides user requirements, lest their reputation and career be harmed. According to FAR 1.601(a):

Unless specifically prohibited by another provision of law, authority and responsibility to contract for authorized supplies and services are vested in the agency head. The agency head may establish contracting activities and delegate broad authority to manage the agency's contracting functions to heads of such contracting activities. Contracts may be entered into and signed on behalf of the Government only by contracting officers. In some agencies, a relatively small number of high level officials are designated contracting officers solely by virtue of their positions.

2. Supplier: A Teammate

In contemporary business practices, a supplier is considered a partner instead of a vendor. According to a white paper of Sales Performance International, there are five levels of customer supplier relationship. At levels 4 and 5, the supplier acts as strategic

contributor and trusted partner, respectively (Sales Performance International, n.d., p. 2). The U.S. government has given its suppliers a status of trusted partner and strategic contributor towards national objectives by incorporating contractors in the definition of acquisition team under FAR 1.102(c):

The Acquisition Team consists of all participants in Government acquisition including not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services.

3. Honesty

The FAR 1.102 provides guiding principles for the federal acquisition system. It envisions the federal acquisition workforce as upright, honest, well trained, and customer-oriented. Customer orientation may disorientate an uprightness of a contracting officer due to any conflict of interest. Keeping the conflict of interest in view, Dr. Schooner commented in his 2002 research that customer satisfaction may generate inefficiency in the procurement process, especially when contracting personnel buy for whom they serve, and when the procurement personnel endeavor to please their customers (p. 11). Subpart 3.1 augments the FAR 1.102 by forbidding any government official from accepting any tangible or intangible favors, from anyone who has direct or indirect gains with performance or non-performance of the official.

4. 360° Checks and Balances

The FAR provides 360-degree checks and balances on the acquisition team, including contracting officer, contractor, and contractor's employees. The contracting officers have to oversee the behavior of government contractors during the tenure of the business with the government. A contracting officer can process a case for debarment, suspension, and ineligibility under FAR Part 9 for any suspected violations of ethical business practices given in FAR Part 3. Any aggrieved supplier can raise protest under FAR Part 33, if aggrieved by actions of a contracting officer. The regulations also provide protection to whistleblowers under FAR 52.203-15 and under section 1553 of American Recovery and Reinvestment Act of 2009 to contractor's employees. The FAR 52.203-17 provides whistle blowing rights to contractor employees, binding a contractor

to inform employees about their rights. The cycle completes with a check on the employee's behavior under FAR 52.203-16(b)(6) that binds a contractor to report any personal conflict of interest on the part of contractor employee to a contracting officer. This checks and balances cycle helps keep every individual in an acquisition team on the track and minimize, if not eliminate, chances of malpractice and kickbacks.

5. Efficiency through Reduction of Overheads

Private organizations always strive to achieve efficiency in their work process through reduction, if not elimination, of overheads. Lately, McDonald's has outsourced handling of its drive-through orders. With outsourcing, McDonalds aims to reduce order-taking time, increase accuracy, and maximize profits by saving in-house employment costs at each McDonald's outlet (Anish, 2008). Although it is in the testing phase, McDonald's endeavors to achieve an efficient work process by cutting overhead costs. FAR 1.102-2 (b), in like manner, envisages an acquisition team that brings best valued products and services efficiently and in a timely manner to the customer by reducing overhead in the acquisition process. In May 2010, Secretary of Defense Robert M. Gates announced department-wide measures to assess DOD staff, organization, and operations with an aim to reduce overhead costs and achieve efficient force structure (Government Accountability Office [GAO], 2014). Pursuant to the directive of the OSD, military departments and Special Operations Command (SOCOM) instituted measures to save USD \$100 billion from 2012 to 2016 through short- and long-term measures. As part of the overhead reduction measures, the DOD cancelled around 20 programs that would have cost more than USD \$0.3 trillion if pursued (DOD, 2010). As a consequence of the secretary of defense's directives, the DOD conceptualized and implemented a Better Buying Power (BBP) program as one of its other initiatives. The program aimed to directly or indirectly help the acquisition community get more by spending less for warfighters. The BBP helped the U.S. Army save taxpayers a considerable amount of money in FY12 by merging contracts of 292 double V-Hulls and 100 nuclear biochemical reconnaissance vehicles. Similarly, the U.S. Air Force saved around \$32 million in should-cost analysis of the F-22 system. In like manner, BBP helped the U.S. Navy realize \$298 million in savings in FY11 and FY12 by resorting to competitive allocation

strategy for construction of DDG51 ships at Bath Iron Works (BIW) and Huntington Ingalls Incorporated (HII).

6. Transparency

According to Merriam-Webster (2015), *transparency* is something honest and open: not secretive. Because government procurement involves public money, every procurement action has to be open to the public and transparent for all stakeholders. This means that any stakeholder has free access to information. The U.S. procurement rules and regulations employ the procurement system to work in an open manner. The U.S. government maintains transparency in public procurement through

- publication of requirements
- clear definitions about how bids will be evaluated
- notification and public information of the winner and loser
- the public information of contract award amount
- protest opportunities
- oversight mechanism
- audit by inspector generals and the GAO
- the Freedom of Information Act (FOIA)

H. CONTRACT METHODS

Procurement is a complex process that varies from organization to organization based on industry experience, and from government to government based on public policies. Often, the buyer remains in a dilemma between competitive and negotiated procurement. Bajari, McMillan, and Taelis (2009) are of the view that procurement methodology depends on the structured nature of the item under procurement. The competitive process may not be a suitable procurement option when projects are complex, require contractual designs, involve construction, require deliberations, require ex-post adaptations, and when few bidders are available in the market. The authors, however, opine that competition is suitable for manufactured goods, like computers, washing machines, and so forth.

The FAR also contains provisions for both competitive and non-competitive procurement. Competitive procurement was included in FAR Part 6 through the Competition in Contracting Act (CICA) of 1984. The purpose of the CICA was to

- enhance the number of competitors,
- increase savings by reduction of prices through better competition,
- increase transparency,
- maintain a true economy and accountability, and
- produce best overall interest of the taxpayers.

The policy definition of Part 6 binds the contracting officer to promoting full and open competition instead of maximum competition. According to the policy given in FAR Part 6.101 (2015),

(a) 10 U.S.C 2304 and 41 U.S.C. 3301 require with certain exceptions, (given in subpart 6.2 and 6.3), that Contracting officer shall promote and provide for full and open competition in soliciting offers and awarding contracts.

(b) Contracting officers shall provide for full and open competition through use of the competitive procedure(s) that are best suited to the circumstances of the contract action and consistent with the need to fulfil the Government's requirements efficiently.

The foundations to avoid maximum competition reside in the CICA. The CICA authors are of the view that competition has a point of diminishing returns, beyond which the government's cost of competition surpasses savings (Manuel, 2011). Hence, to save public money, the contracting officer has to weigh the costs and benefits of competition. U.S. regulations give flexibility to the contracting officer to exercise judgement by satisfying himself or herself about the price through market research, especially in the procurement of commercially available items.

Out of the following three, competitive contracts include the first two categories, whereas the last category falls under non-competitive contracts:

- Full and open competition
- Full and open competition after exclusion of sources
- Other than full and open competition

The incorporation of negotiated contracts under competitive forms of contracting has increased the proportion of the U.S. spending on competitive forms of contracting, whereas the funds spent on non-competitive forms of contracting proportionately amounts to only percentages. Figures 6 and 7 show the relative proportion of DOD competitive versus non-competitive contracts for 2015 and 2014, respectively.

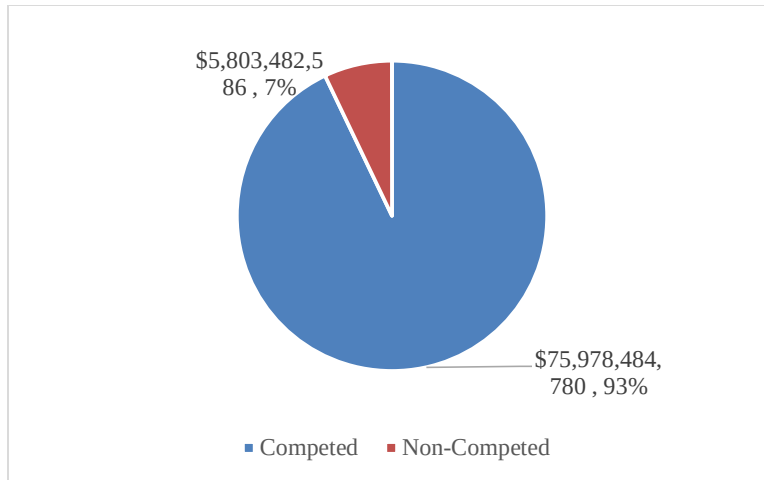


Figure 6. Type of Contracts vs. Funds Awarded (2015)
(from U.S.A. Spending, 2015)

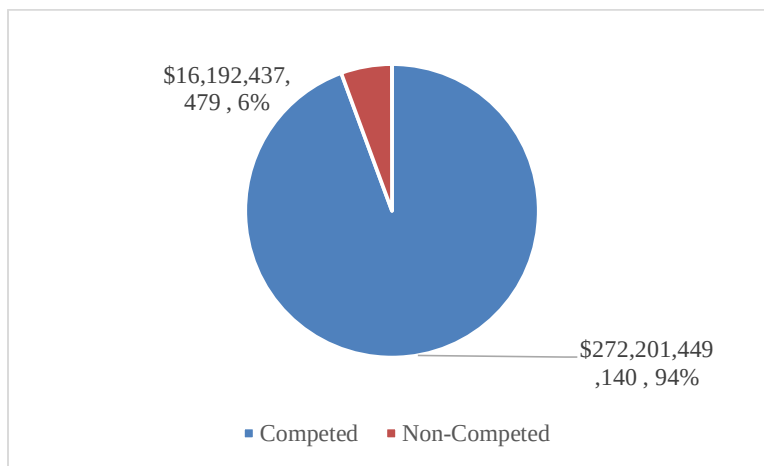


Figure 7. Type of Contracts vs. Funds Awarded (2014)
(from U.S.A. Spending, 2014)

1. Full and Open Competition

As given in FAR Part 6.101, full and open competition is a preferred mode of government contracting. The competitive procedures, given in FAR Part 6.102, that satisfy full and open competition requirements include sealed bids, negotiations, and other procedures. Full and open competition is achieved when requests for proposal

(RFPs) or invitation for bids (IFBs) include all responsible sources. A responsible source is a potential seller who

- (a) is financially solvent,
- (b) is capable to meet delivery schedule,
- (c) has satisfactory past performance track record,
- (d) has satisfactory past ethical business track record,
- (e) has organizational infrastructure to obtain promised goods/ services, and
- (f) is otherwise qualified and eligible for award of contract under laws and regulations (41 U.S.C. 403(7)).

The details of full and open competition procedures are given in Appendix D. Generally, it is perceived that sealed bidding is the only way to achieve full and open competition. The U.S. regulations given in FAR Part 15 treat competitive negotiations and sealed bidding equally. The negotiations details are looked into later in this chapter.

2. Full and Open Competition after Exclusion of Sources

Full and open competition after exclusion of sources occurs when certain sources are excluded from consideration of a contract. This usually occurs on two occasions:

- (a) When agencies resort to dual sourcing in order to maintain alternative sources of supply. This practice is commonly observed in the DOD while distributing acquisition contracts among different vendors. The contractual distribution helps the DOD maintain competition and its buying power over suppliers. Congress supports dual sourcing is, for example, in the procurement of the propulsion system for F-22 Joint Strike Fighter aircraft (Gertler, 2011, p. 3).
- (b) When money is set aside for small businesses or local firms in case of natural calamities under the Small Business Act or Stafford Act, respectively.

3. Other Than Full and Open Competition

A contract is considered non-competitive if it is entered into without full and open competition. The FAR Part 6 provides circumstances under which measures other than full and open competition are permitted; however, the regulations prohibit the head of the procurement agency to delegate the power to determine whether the viability of other than full and open competition is in the public interest. The details of circumstances, under which methods other than full and open competition can be opted to, are given in Appendix E.

The regulations also bind agency heads to providing justification and seeking approval from Congress no less than 30 days prior to the award of the contract for non-competitive award of contracts. The requirement of justification and approval is the biggest hurdle in exercising discretion to avoid full and open competition. The justification process is not even exempted in unusual emergent cases. 10 U.S.C. section 2304(f)(2) allows agency heads to provide justification after the award of the contract under said circumstances but does not exempt justification and approval.

I. SIMPLIFIED ACQUISITION PROCEDURES

Flexibility in government regulations helps contracting personnel adapt to new situations and provide combat support to warfighters quickly, efficiently, and effectively. The FAR provides flexibility to contracting officers on two fronts:

- (a) Commercial/non-commercial items purchase
- (b) Declared/non declared contingency environment

In accordance with FAR 2.101, a declared contingency operation (10 U.S.C 101(a)(13)) means a military operation that

(1) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the U.S. or against an opposing military force; or

(2) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304(a), 12305, or 12406 of title 10 of the U.S.C., Chapter 15 of title 10

of the U.S.C., or any other provision of law during a war or during a national emergency declared by the president or congress.

In 1994, congress enacted the Federal Acquisition Streamlining Act (FASA). The FASA replaced procedures of small purchases with simplified acquisition procedures (SAPs) and is now part of FAR part 13 as “Simplified Acquisition Procedures.” According to the policy given in FAR Part 13.003(a), the contracting officers are encouraged to use SAP to the maximum practicable extent:

(a) Agencies shall use SAP to the maximum extent practicable for all purchases of supplies or services not exceeding the simplified acquisition threshold (including purchases at or below the micro-purchase threshold). This policy does not apply if an agency can meet its requirement using:

(1) Required sources of supply under FAR part 8 (e.g., Federal Prison Industries, Committee for Purchase from people who are blind or severely disabled, and Federal supply schedule contracts);

(2) Existing indefinite delivery/indefinite quantity contracts; or

(3) Other established contracts.

As referenced earlier, the objective of the FAR is to introduce efficiency in the procurement process. The SAP is also a step towards efficient procurement. The purpose of SAP is to procure required items efficiently, at lower cost, and without burdening buyer and supplier. As given in FAR Part 13.002, the purpose of the SAP is to

(a) reduce administrative costs;

(b) improve opportunities for small, small disadvantaged, women-owned, HUBZone, and services disabled veteran-owned, small business concerns to obtain a fair proportion of Government contracts;

(c) promote efficiency and economy in contracting; and

(d) avoid unnecessary burdens for agencies and contractors.

SAP provides flexibility in purchase methods, payment procedures, and documentation. These flexibilities help reduce administrative costs of government and contractor. The FAR Subpart 13.3 prescribes the following five purchase methods under SAP:

1. Government-wide commercial purchase card (FAR 13.301)
2. Purchase orders (FAR 13.302)
3. Blanket purchase agreements (BPAs; FAR13.303)
4. Imprest fund and third-party drafts (FAR 13.305)
5. SF 44, purchase order invoice voucher (FAR 13.306)

The monetary flexibility given in SAP for commercial and non-commercial items is given in Table 3, and a summary of other contingency process requirements is given in Appendix F.

Table 3. Simplified Acquisition Procedure Thresholds for Non-Commercial and Commercial Items (from FAR 13.5)

Environment	Non-Commercial Item USD (\$)	Commercial Item USD (\$)
Non-Declared Contingency	150,000.00	6,500,000.00
Declared Contingency	300,000.00	12,000,000.00

A commercial item means an item that is generally available in the market and accessible to general public. Commercial items can be purchased by any individual or a business entity from a commercial source who has either already sold the item in the market or offered it for sale. The detailed definition of the commercial item is given in FAR Part 2.1. The use of commercial items is preferred because of less market research involved compared to a unique item developed for government use (Straight, 2005).

The FAR Subpart 13.2 treats purchases between the values of column (c) of Table 4 and the SAP threshold, given above, as micro purchases (FAR 13.201). The FAR Para. 13.201(g)(1) increases the micro-purchase threshold when an agency head determines that the purchased items will be used to support a contingency.

Table 4. Micro-Purchase Thresholds in Non-Contingency and Contingency Environment (from FAR 13.201)

(A)	(B)	(C)	(D)
Environment	Type	Non-Contingency Contracting USD (\$)	Contingency Contracting USD (\$)
United States	Supply	3,000.00	15,000.00
	Services	2,500.00	
	Construction	2,000.00	-
Overseas	Supply/Services		30,000.00

The increase in monetary thresholds of micro-purchases in a contingency environment provides flexibility and enhances efficiency in combat theater. It helps swiftly provide less costly items to warfighters. The spared time and resources can be diverted to other complicated acquisition cases. Yoder (2006), while comparing and contrasting SAP versus large contracting, is of the view that the SAP process from receipt of requirement until award of contract takes about 45 days at the Fleet and Industrial Supply Center (FISC) in San Diego, whereas it takes around 204 days under the large contracting process for the same activities. Yoder (2006) summarizes all the steps involved in both procurement processes in Figure 8.

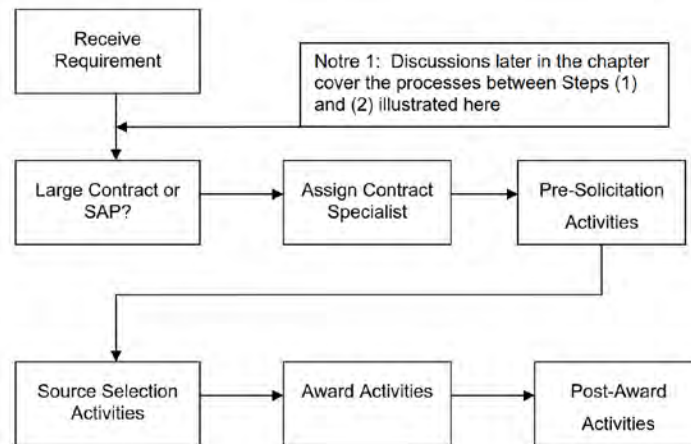


Figure 8. Requisition Flow Overview (from Yoder, 2006, p. 80)

In the light of FAR Part 1.603-3(a), contracting officers are appointed to writing on SF1402. FAR Part 13.201(a) encourages agency heads to delegate micro-purchase authority. The FAR Part 1.603-3(b) permits micro-purchases by military members not appointed on SF1402. The members are, however, employed through written orders. These members can purchase items falling at or below the micro-purchase threshold by any of the above five purchase methods.

The vendor bills, for items acquired through SAP, are processed faster than normal procedures. The payment, under SAP, is processed prior to the government's verification of receipt and acceptance of acquired items. The payments are, however, subject to submission of shipment proof by the vendor. The rules bind the vendor to replace, repair, or correct the items not received at consignee end, damaged in-transit, or not in conformity with purchase orders (FAR 13.401(b)).

FAR section 13.104 promotes competition to the maximum possible extent to purchase goods and services under SAP. It asks for best value purchase for the public money considering tradeoff between government cost and benefit. However, the contracting officer is forbidden to

- solicit proposals based on personal favoritism (FAR 13.104(a)(1)), or
- restrict solicitation of proposal to renowned vendors (FAR 13.104(a)(2)).

The FAR section 5.003 envisages contracting officers to publish a notice on government-wide point of entry (GPE), an online resource to access information of the U.S. government opportunities beyond USD \$25,000.00. However, the FAR section 13.104 allows purchases by obtaining three quotations from sources within the local market. The FAR subsection 13.104-1 also stipulates that contracting officers consider the following while soliciting the competition:

- The competitive nature of the good/service to be purchased
- The non-availability of the online resource for widespread publication of the requirement
- The urgency of the proposed purchase
- The past market purchase experience.

As discussed earlier, the SAP encourages contracting officers to obtain the best value for public money. The FAR paragraph 13.106-1(2) binds contracting officers to let

the potential bidders know the evaluation criteria for the award of the contract. The weight of relative importance, however, is not to be disclosed to the potential sellers.

The FAR paragraph 13.106-1(b) permits solicitation of proposals from a single source brand name vendor for purchases within SAP threshold. Because this type of purchase practice restrict maximum practicable competition, the contracting officer has to determine and document the circumstances necessitating such a purchase. For purchases beyond the SAP threshold, the contracting officer must justify the needs and circumstances, besides getting approval. The contracting officer has to make justifications, prepared under Subpart 13.5, publicly available within 14 days of the award of the contract (FAR 13.501(a)(iii)).

FAR paragraph 13.106-1(c) encourages a contracting officer to solicit oral proposals, to the maximum extent practicable, from potential sellers remaining within the SAP financial threshold beyond which oral solicitations are not allowed. The regulation desires that a contracting officer use discretion in opting for oral solicitations if electronic dissemination of information becomes cost ineffective. For oral solicitation, FAR paragraph 13.106-1(2) exempts publication of the notice on GPE. The regulation requires that written solicitations be issued only when obtaining oral or electronic proposals become inefficient or impracticable.

The previous discussion about SAP demonstrates that SAP is an efficient, fast, and cost-effective procurement process. In his 2006 research, Yoder supports his argument with a USD(AT&L) memorandum, placed as Appendix G, in which the USD(AT&L) directs the acquisition workforce to increase the practice of commercial acquisition in order to swiftly meet the user requirements and reap the benefits of the efficiency of the SAP. Yoder (2006), concluding about the efficiency of the SAP, recommended that the USD(AT&L) make it mandatory for the acquisition workforce to utilize FAR 13.5 for items meeting the criteria of a commercial item, unless there is a compelling reason to believe that the requested good/service does not meet the criteria (p. 99).

From the previous reflection on SAP, the reader can determine that the SAP simplifies the procurement process compared to large procurements. It enhances efficiency, conserves efforts, and increases support to warfighters in complex military environments where the gap between survival and death is marginal. The SAP also addresses procurement of commercial items used in a majority of complex military weapon systems. However, development of new military weapons or modification of existing military systems may at times be complex and different from commercial items. Such developments may be confidential so that advertisement at public forums may not be a viable option. In other cases, new development may require consultation/negotiation rounds with potential vendors for customized development. The United States has eased out of its procurement process by making negotiated contracts fall into the category of competitive contracts. The purpose of the later part of this study is to analyze negotiations under U.S. regulations and make the reader aware of how negotiations can be conducted in a corruption-free environment.

J. NEGOTIATED PROCUREMENT

Negotiated procurement is the award of a contract after reaching mutually agreed upon terms and conditions prior to the formal award of the contract. In the process of negotiations, the offerors are given fair chance to review and revise their proposal before final submission. FAR section 15.306(d) defines negotiations as follows:

Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.

1. Historical Perspective

Sealed bidding was a primary form of procurement until 1947. The 1860 Congress, through legislation, restricted military procurement to formal advertising only

and contract award to the lowest responsible and responsive bidder (Bates, 1960), with few exceptions as stated in Section 3709 of the revised statutes:

Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed \$25,000, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis. Except (1) as authorized by section 29 of the Surplus Property Act of 1944 (50 U.S.C. App. 1638), (2) when otherwise authorized by law, or (3) when the reasonable value involved in any one case does not exceed \$500, sales and contracts of sale by the Government shall be governed by the requirements of this section for advertising. In the case of wholly owned Government corporations, this section shall apply to their administrative transactions only. (41 U.S.C. § 3709)

World Wars I and II played pivotal roles in transition from formal advertisement to negotiations as part of war preparedness. Both wars required massive production by local U.S. industry in support of warfighters. On July 28, 1917, the U.S. government established a War Industries Board (WIB) as part of preparations for WWI. The WIB was established to coordinate and control local industry for materialization of military requirements (Beede, 2014). Beede (2014) is of the view that the board often negotiated with local industry instead of giving directions. Thus, the beginning of negotiations, in government contracting, can be traced to WIB.

In 1930, the War Policies Commission recommended replacement of formal advertisement with negotiated procurement in government contracting (Manuel, 2011, p. 4). In 1940, Congress enacted Public Law 671, also known as the Speed-Up Law, to match the pace of industrial development with government acquisition. The Speed-Up Law allowed negotiated procurement with 17 exceptions and was subject to review and approval by a services secretary.

Until 1947, the mix and match of formal advertisement continued when Congress formally enacted the Armed Services Procurement Act (ASPA). The ASPA was

administered with 17 exceptions. Since the enacting of the ASPA, the quantum of negotiated contracts has continuously increased. According to Cibinic, Nash, and Yukins (2011), presently only 10% of federal spending involves sealed bidding, whereas the remaining budget is spent on negotiated procurement.

2. Advantages and Disadvantages of Negotiated Procurement

The negotiated procurement has advantages and disadvantages. The negotiations may be helpful when

- Procurement of goods/services is not structured or is less structured. It may involve development of new weapon systems, construction, or architectural designs.
- A contract is to be awarded on an emergent basis in the wake of natural calamity where time to publicize may result in loss of lives.
- Modification of existing resources is required to save lives of personnel involved in armed conflict. This may include conversion of military vehicles from non-armor to armor-protected vehicles required to save military personnel from improvised explosive devices (IEDs) splinters.
- Technical specifications are to be kept confidential due to national security importance.

The disadvantages of negotiated procurement may involve but may not be limited to

- conflict of interest of any person involved in the contracting process,
- lessening of transparency in contract award process, or
- exorbitant costs due to faulty negotiations or lack of legal framework to audit supplier's cost and price methodology.

3. Best Value Quantum

As discussed earlier, the U.S. government places a great deal of importance on best value quantum in government procurement. The negotiated procurement is based on the tradeoff between cost and other factors that may result in savings of taxpayers' dollars. FAR subpart 15.101 describes the best value continuum as follows:

An agency can obtain best value in negotiated acquisitions by using any one or a combination of source selection approaches. In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may

play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.

4. Negotiations Process

Currently, U.S. regulations allow procurement of goods and services through an IFB, previously known as formal advertising, and RFPs. The primary difference between sealed bidding and negotiated procurement are the oral and written discussions with the offerors prior to award of the contract. The statutory procedures for sealed bidding are available in 10 U.S.C. Section 2305 and 41 U.S.C. Section 3702. In view of FAR Subpart 14.101, the sealed bidding process involves

- (a) preparation of IFBs,
- (b) publication of IFBs,
- (c) submission of bids,
- (d) evaluation of bids, and
- (e) contract award.

Upon receipt of the procurement requirement, the contracting officer has to study the requirement and select the procurement methodology between sealed bidding and negotiations. The selection of procurement methodology is based on the technical nature of an item, and the past purchase experience and availability of the item in the market. The contracting officer prepares the bidding document specifying each evaluation criteria and publicizes the requirement on the GPE. The received bids are opened publicly at a specified time and venue, evaluated on prescribed evaluation criteria, and the contract is awarded on the basis of price to the responsible bidder without any discussion prior to the award of the formal contract. Due to process clarity, the sealed bidding contract award is the most transparent mechanism that minimizes chances of fraud, collusion, and conflict of interest.

When the contracting officer decides to purchase goods/services through RFPs, the contracting officer has to be diligent in every procurement step. The different steps involved in negotiated procurement process are detailed below.

a. Preparation for Requests for Proposal

Pursuant to 41 U.S.C. section 253(a), FAR Parts 11.002 and 15.2, the contracting officer is to plan the procurement, before invitation of proposal, in a manner that maximizes full and open competition. The advance preparation involves back-and-forth exchanges of information with technical users, as well as potential vendors. The exchange of information helps increase understanding of all stakeholders about government needs, purchase of quality goods, and best offers.

As mentioned in the FAR paragraph 15.201(c), these exchanges of information can be held in pre-RFPs conferences, public meetings, market research, one-on-one meetings, pre-solicitation notices, draft RFPs, RFIs, and site visits. The FAR, however, desires that a fair competitive environment is to be provided to all potential vendors. Any information provided to a vendor needs to be shared with the general public in a manner that does not disclose proprietary/private information of a vendor (FAR 15.201(f)).

The primary difference between IFBs and RFPs is the show of intent by the contracting officer as to whether the contract will be awarded on the basis of negotiated price or otherwise.

In the light of FAR 15.203(a), an RFP needs to contain

- (a) the government's requirement;
- (b) anticipated contract terms and conditions;
- (c) authority to propose alternative terms and conditions, including the contract line item number (CLIN); when CLIN is permitted, effects on other terms and conditions are also required to be assessed;
- (d) information mandatorily required in the offer; and
- (e) significant evaluation factors/sub factor, like performance capacity, past experience and past performance, along with their relative weightage points.

41 U.S.C. section 3306 (c)(1)(C) and 10 U.S.C. section 2305(a) require RFPs to contain the following requirements for easy decision-making.

The RFPs shall disclose to offerors whether all evaluation factors other than cost or price, when combined are:

- (a) significantly more important than cost or price;
- (b) approximately equal in importance to cost or price; or
- (c) significantly less important than cost or price.

b. Publication on Government-Wide Point of Entry

The Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. section 416, 15 U.S.C. section 637(e) of the Small Businesses Act, and FAR subpart 5.003 and 5.102(a)(1) require a contracting community to prepare a synopsis of government requirements and publicize all requirements on a single online GPE source for all procurements exceeding USD \$25,000. In light of FAR Subpart 15.203(a), the synopsis must be published at least 15 days prior to issuance of solicitations, though there are some exceptions prescribed in the same subpart that reduces the number of days. The number of days are counted from the date of publication of synopsis on GPE.

c. Solicitation

After issuance of solicitations, all potential vendors are given a reasonable timeframe to submit their best bids. FAR paragraph 5.203(b) permits contracting officers to use discretion in solicitation response time, depending upon complexity, commercial availability, urgency, and circumstances of each acquisition case. The FAR asks for provisions of reasonable response timeframe for commercial items exceeding USD \$25,000. Other than commercial items, the law requires at least 30 days response time from the date of issuance of solicitations, making a total of 45 days from the date of publication of notice on GPE. However, under the World Trade Organization (WTO), the submission time cannot be less than 40 days for WTO GPA covered cases. Since release of the solicitation, the contracting officer acts as a focal point for any kind of communication between technical users and potential suppliers.

d. Source Selection

FAR Subpart 15.3 deals with the source selection process. FAR Subsection 15.303 assigns source selection responsibility to an agency head. It designates the

contracting officer as the source selection authority unless anyone else is designated by an agency head. Said subpart envisages an evaluation team tailored for the particular acquisition case. The team may consist of legal, logistics, technical, and other experts for all-inclusive evaluation of the received proposals. The contracting officer is to ensure evaluation of the proposals on the basis of factors/sub-factors prescribed in the RFPs. He or she is also responsible for award of the contract to the source whose proposal brings best value to the government.

The proposal evaluation process shortlists the potential offeror, based on capability to perform the contract successfully. The source selection authority assesses strengths, weaknesses, and risks of each offeror based on the evaluation factors/sub factors. The evaluation parameters are to be documented for subsequent debriefing of the unsuccessful offerors and for future reference purposes. In past examples exists where rejected offerors registered post-award protests to the GAO, as witnessed in *Halloway vs. the U.S. government*, where rejected offerors protested with the GAO, as well as with the U.S. Court of Claims. In said case, the contracting officer defended himself on the basis of his notes, which were documented at the time of award of the contract.

In negotiated procurement, the source selection authority has to provide fair chance for resubmission of proposals based on discussions, clarifications, and significant weaknesses found during the evaluation process. However, after closure of the discussion, the contracting officer decides on a cut-off date for submission of the final proposals. During these exchanges of information, the government team has to remain impartial as envisaged in Procurement Integrity Act.

FAR Subpart 15.5 deals with pre-award, award, and post-award formalities of government-negotiated procurement. According to FAR section 15.505, before formal award of the contract to the successful offeror, the contracting officer has to notify all offerors excluded from competition. The excluded offerors have a right to request pre-award debriefing within three days of the receipt of the notice of exclusion from competition. The pre-award briefings have to contain at least the following:

- (a) Assessment of the offer on the basis of significant factors
- (b) Reasons for rejection from competition

- (c) Reasonable answers to offeror's questions. (FAR 15.505(e))

e. Award

Final proposals are evaluated on the basis of factors/sub factors, and the contract is awarded to the offeror with best value to the government. The contract award rationale is to be documented for reasons discussed earlier.

f. Post Award

The unsuccessful offerors can request a debrief within three days of receipt of notification from the contracting officer. The debriefing is to be held within five days of the receipt of the request. The contracting officer is to chair the debriefing of the offeror and the rest of the evaluation team is to support him. Debriefing is to contain at least the following:

- (a) Assessment of the offer on the basis of significant factors
- (b) The overall evaluated cost and price gap between successful offeror and debriefed offeror
- (c) The overall grading of all of the offerors
- (d) The reasons for the award to successful offeror
- (e) The make and model of the commercial item to be delivered by successful offeror
- (f) Reasonable answers to offeror's questions (FAR 15.506(d))

g. Documentation

FAR Part 15.406 pertains to documentation involved in the negotiation process. According to FAR paragraph 15.406-1, the contracting officer has to set pre-negotiation objectives regarding reasonableness of price inconsideration of market research, audit reports, and government-based independent cost estimates. FAR Part 15.406-1(b) envisages the contracting officer to pre-determine the negotiation issues to be discussed during negotiation process, the cost, and the price objectives.

FAR Part 15.406-2 refers to a written certificate to be submitted by contractors for correctness of the cost and pricing data. The FAR also provides an exact format of the certificate (see Appendix H) to be submitted by the vendor.

FAR paragraph 15.406-3 guides documenting principal elements of the negotiations, for example, a price negotiation memorandum (PNM). It envisages documentation to include the purpose of the negotiation, description of the item being purchased, particulars of the representatives of government and contractor, the exception used for not excluding cost and price data, and so forth. U.S. military services have developed different procedures and guidelines to document pre-negotiation objectives and price negotiations memoranda. As an example, different checklists of the U.S. Army are attached in Appendix I (OSD, 2004).

Negotiations are uncertain processes. Negotiators on both sides remain apprehensive of not achieving their desired objectives. The parties do not have any knowledge of the bottom line of the other party. However, Hegarty and Sims (1978), are of the view that the negotiation situation improves with repeated interaction as trust increases with sharing of information.

K. TRUTH IN NEGOTIATIONS ACT

The U.S. government has protected itself and its acquisition community from negotiations' insecurities by enacting the Truth in Negotiations Act (TINA) in September 1962, with an objective to ascertain reasonable cost and price of an item, and to avoid procurement at inflated prices. Prior to enacting of TINA, contractors were not required to disclose the cost and price data while submitting the proposals. Maddox (2013) is of the view that the roots of TINA lie in the Korean War when President Harry S. Truman, through a proclamation, relaxed formal advertisement requirements by allowing negotiated procurement to meet the warfighters' requirements on an emergency basis. The resultant increase in dollar value of DOD contracts raised concerns in Congress and paved the way for an amendment of the ASPA that permitted comptroller to audit contractors' records. According to Maddox (2013), the TINA became a source to provide the same level of pricing knowledge to a government negotiator as to a contractor's negotiator.

10 U.S.C Section 2306(a) authorizes contracting officers to obtain cost and pricing data from potential offerors by specifying the need for the data in procurements

rather than sealed bidding. The vendors have to certify that the provided data is accurate, complete, and current, lest the government, entitled to reduce the contract price, recover any over-payment made during the performance of the contract.

Initially, the government recovered only the excess payment; however, in 1985, Congress added two provisions to ensure larger compliance from vendors. These included recovery of interest from the date of overpayment until repayment, and assessment of penalty if the contractor is found in knowledge of defective pricing (Cooper, 1993).

Submission and certification is required for a contract, subcontract, or modification of an existing contract beyond USD \$650,000, as well as beyond SAP thresholds, unless an exception applies. FAR paragraph 15.403-1(b) provides the following exceptions, which forbid a contracting officer from obtaining cost and price data when

- prices are based on adequate competition;
- prices are set by law or regulation;
- purchase involves commercial item;
- waiver has been granted; and
- the existing contract is being modified.

FAR 15.403-2 provides the following additional circumstances when certified cost and pricing data is not required:

- when solicitation does not require submission of cost and price data; and
- when overrun funding or interim billing price is being adjusted.

When any of the above exceptions exist, FAR section 15.402 authorizes contracting officers to obtain data other than cost and price to ascertain price reasonability. However, the FAR forbids contracting officers from obtaining information that is beyond “necessary.” A question arises: what kind of information can be obtained from a vendor under the ambit of cost/price that is necessary to assess price/cost reasonableness? FAR Part 2.101 provides an answer while defining *cost or pricing data*, as follows:

Cost or pricing data” (10 U.S.C. 2306a(h)(1) and 41 U.S.C. chapter 35) means all facts that, as of the date of price agreement, or, if applicable, an

earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include, but are not limited to, such factors as—

1. Vendor quotations;
2. Nonrecurring costs;
3. Information on changes in production methods and in production or purchasing volume;
4. Data supporting projections of business prospects and objectives and related opinions costs;
5. Unit-cost trends such as those associated with labor efficiency;
6. Make-or-buy decisions;
7. Estimated resources to attain business goals; and
8. Information on management decisions that could have a significant bearing on costs.

In the views of Maddox (2013), the TINA is unique in a sense that, during negotiations between two private parties, none discloses cost and pricing data; thus, the negotiations environment lacks trust, whereas, in negotiations of a government purchase, both parties have the same level of knowledge, and the contractor is held accountable for any willful deception of cost and pricing data.

L. SUMMARY OF THE COMPARISON BETWEEN THE UNITED STATES AND PAKISTAN ACQUISITION PROCESSES

There are similarities as well as differences in the acquisition process of the United States and Pakistan. The roots of negotiated contracting are traceable to WWI and WWII and it has been in practice ever since then. Over time, the United States has evolved checks and balances that keep the negotiations process transparent. The competitive negotiated form of contracting can be initiated in Pakistan; however, there is a need to embed checks and balances in the accountability loop to avoid corrupt

practices. The comparison of the processes is summarily tabulated in Appendix J for easy understanding of the readers.

V. FINDINGS AND RECOMMENDATIONS

This chapter builds on previous chapters to identify focal areas of the Pakistan procurement system for enhancement in the efficacy of the procurement system. We draw analogies from the U.S. procurement system to address the weaknesses in the public procurement system in Pakistan. An important relevant fact of this chapter is that Pakistan is an importing country, whereas the United States thrives on material exports, including military equipment, to various countries, including Pakistan.

The procurement agencies of both countries interact with each other on different forums, like Foreign Military Sales (FMS) and various other programs. These interactions are held at an unlevelled playing field because there exist many gaps between the two countries. Primarily, these gaps revolve around three procurement tiers: personnel, platform, and protocol, as discussed later in this chapter.

Chapter IV, an overview of the U.S acquisition system, enlightened readers that in the United States, negotiated contracts are an integral part of competitive procurement process, which has been practiced since WWII. The competition concept in negotiated procurement revolves around procurement methodology selected by a contracting officer. The regulations encourage the contracting community to use judgement at all procurement stages while optimizing the value of taxpayers' dollars during procurement of goods and services for the U.S. government. Judgement begins from the show of intent while soliciting RFPs, flows through the source selection process, and culminates with contract award.

The transparency in legal protocols serves as a balancing deterrent force that minimizes inefficiencies and increases outputs in negotiated procurement. For example, according to the U.S. regulations, the contracting officers have to debrief rejected bidders after exclusion from the competitive source selection process and before formal award of the contract. Based on the debriefing, the unsatisfied offerors have the right to lodge a protest with the procurement agency, the GAO, and the U.S. Court of Claims.

The TINA closes the balancing deterrence loop by encompassing suppliers in the accountability loop of government procurement. Under the rules and regulations, discussed in Chapter IV, suppliers involved in business with the government have to submit cost and price data to a contracting officer if solicited in RFPs. The vendors have to certify the correctness, completeness, and currency of their data.

The law gives authority to contracting officers to seek data other than cost and price to ascertain price reasonableness. The regulations also provide rights to comptroller to audit vendors' records and ascertain the authenticity and correctness of their records.

The above discussion supports that negotiated procurement, because a competitive procurement methodology is a doable option provided weaknesses, discussed subsequently, in three procurement pillars (personnel, platforms, and protocols) are addressed to safeguard government interests in public procurement. This enhances efficiency in public procurement and effectiveness in the implementation of legal framework.

A. ROOM FOR IMPROVEMENTS—PERSONNEL

In the United States, the AT&L community is recognized as a specialist stream within the military supply corps of services. The law requires AT&L works to undergo different qualifications before appointment against some vacancies. The legal binding, in place, helps the DOD request regular funding from Congress for training and capacity building of the workforce. In fulfillment of legal discourse, superior officers are also bound to spare their subordinates for training and certification courses. Due to sustained training, the AT&L community has been recognized as the most qualified professional workforce in the DOD. The educational qualifications provide the requisite skills necessary for added advantage in professional handling of contract negotiations, administration, monitoring, and oversight of suppliers.

In Pakistan, the contracting workforce is not recognized as a specialist professional stream. Instead, non-contracting professionals are appointed for contracting duties. The non-recognition as a specialist workforce adversely effects sustained training and professional capacity building of contracting personnel. As a result, such personnel

are at a disadvantage when they carry out contracting duties at a local and international level.

B. ROOM FOR IMPROVEMENTS—PLATFORMS

In the United States, the acquisition platform improved due to combined efforts of government, Congress, and military services. From the preceding work, it is evident that Congress actively kept itself relevant to the development of legal framework of government procurement in the United States. Likewise, the president of the United States has convened different boards, like the Blue Ribbon Commission. These boards questioned the early methodology of DOD procurement; their recommendations were subsequently enacted as regulations that helped improved government procurement process. Similarly, armed services contributed to the growth of the acquisition platform by establishing organizations like the DLA, DCMA, DAU, and NPS. These organizations help shape the future of the acquisition community, in particular by imparting education and skill development, and in general by enhancing support to their warfighters.

Pakistan lacks such activism on the part of government pillars. Parliament rarely involves itself in the capacity building of contracting personnel. The only active organization in Pakistan that raises questions on procurement actions is the Pakistan Accountability Commission (PAC), a counterpart of the GAO; however, the PAC has never raised any question related to capacity building of the acquisition community. The responsibility for training of the procurement community rests solely with armed services chiefs who meet the training requirement from scarce organizational funding. Because there is no legal framework that mandates that superior officers complete certifications levels like those of the DAWIA, the training funding varies from time to time. As a result, the capacity building of the contracting community remains below the desired level. Although the Pakistan National Procurement Strategy envisages interaction with a local university for the promotion of studies in the contracting field, credible measures are yet to be put in place.

C. ROOM FOR IMPROVEMENTS—PROTOCOLS

From Chapter IV, it is evident that the U.S. acquisition regulations evolved primarily to accommodate wartime requirements during WWI and WWII. Before these wars, the U.S. government procured goods/services through sealed bidding. However, to accommodate new developments and modification of customized unprecedented wartime requirements, Congress amended regulations and enacted new laws to streamline negotiated procurement. As evident from the preceding work, the TINA incorporated vendors involved in business with the U.S. government into the legal framework. This expansion placed a 360-degree check and balance on all stakeholders involved in government procurement. The incorporation of vendors in the accountability loop and the protection of whistleblower's rights significantly reduced malpractices associated with negotiated procurement.

During the process of evolution, the acquisition regulations may have become complex for some contracting professionals; however, it should be appreciated that the FAR regulations delve in depth into policies and procurement procedures. The advantages are numerous. Firstly, the detailed guidelines available in the FAR enhance the confidence of contracting personnel because the FAR provides the requisite guidelines. Secondly, the detailed guidelines help contracting officers avoid any unintentional mistakes that may cause individual, organizational, or national embarrassment.

Since September 11, 2001, establishment of the PPRA in 2002, and enacting of PPRA Rules 2004, the situation in Pakistan has significantly changed. Primarily, UNCITRAL model law was amended in 2011. The modified UNCITRAL law allows negotiated procurement, but PPRA rules still follow the 1994 UNCITRAL law. Secondly, Pakistan has been participating in the Global War on Terror for almost a decade. During the last decade, Pakistan also faced natural disasters, like the 2005 earthquake and the 2010 and 2011 floods. Pakistan armed services were called to aid civil government in restoring peace, Internally Displaced Peoples (IDPs), and rehabilitation efforts. These unprecedented events generated a number of demands that required customized developments on a case-to-case basis. Because the PPRA regulations allow government

procurement through sealed bidding, considerable time was required for publicizing and submitting proposals in a reasonable timeframe. As a result, a number of requirements were processed through waiver certifications on the pretext of national contingencies. Such procurements essentially reduced the essence of fair and transparent government procurement and raised the chances of malpractices and kickbacks.

D. RECOMMENDATIONS

Based on the above findings, it is recommended that PPRA rules may be modified to incorporate negotiated procurement as a competitive form of government procurement, as is in practice in the United States. However, the following credible actions are to be taken by government of Pakistan before sanctioning negotiated procurement:

1. Short-Run Actions

a. Personnel

- Recognize contracting as a specialist professional stream in all federal government departments through concrete legislative measures approved by the Parliament of Pakistan.
- Enhance the skill level of contracting professionals through special financial allocations for the next five years for master's and PhD programs from U.S. institutes like the Naval Postgraduate School (NPS) in the field of contracting/acquisition.

b. Platforms

- Mandate that federal government departments develop a career progression pyramid of contracting personnel. A minimum certification level may also be formulated as qualification for appointments at different echelons of the pyramid.
- Establish contracting/acquisition departments in existing universities in Pakistan for capacity building of existing contracting personnel.
- Initiate certification/short-term diploma courses from existing universities for immediate capacity building of personnel deployed on contracting desk jobs.

c. Protocols

- Provide protection to whistleblowers, as is available in the U.S. regulations. A share in recovered government money will incentivize and protect government interest in at least two manners. Firstly, it will serve as

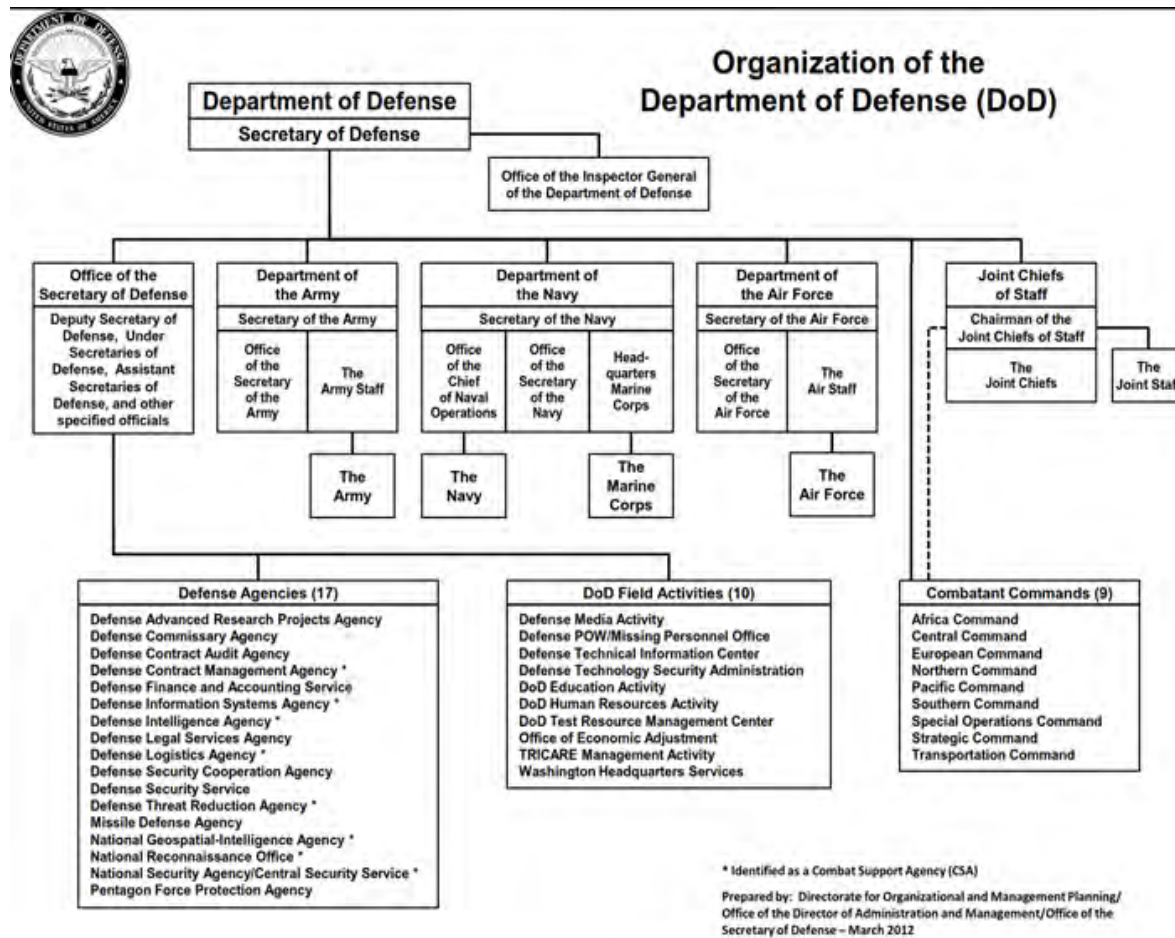
a deterrent to corrupt practices because government officials/vendors will be afraid of whistle blows by colleagues/employees of vendors. Secondly, the incentive will help recover public money that was misappropriated in past.

- Authorize audit authorities to audit records of government contractors by bringing government suppliers into the accountability loop.
- Authorize contracting personnel to seek cost/pricing data to ascertain price reasonableness.
- Authorize negotiated procurement in the Ministry of Defense and National Disaster Management Agency (NDMA) as a pilot project for next five years.
- Give the PPRA a mandate to carry out audit of contracts awarded by federal government agencies to ascertain adherence of the regulations.

2. Long-Run Measures

- Plan, establish, and open an independent acquisition university in the next five years. Personnel trained through short-term measures may be utilized to further groom future generations of contracting professionals.
- Develop rules and regulations customized/trimmed to government acquisition in the peculiar environment of Pakistan through legislature.
- Provide flexibility in procurement thresholds under contingent/emergency situation, as seen in the shape of SAP thresholds.
- Assess viability for adoption of the FAR and TINA in Pakistan.
- Develop a methodology to review and update Pakistan procurement regulations on a regular basis, preferably through an online mechanism.

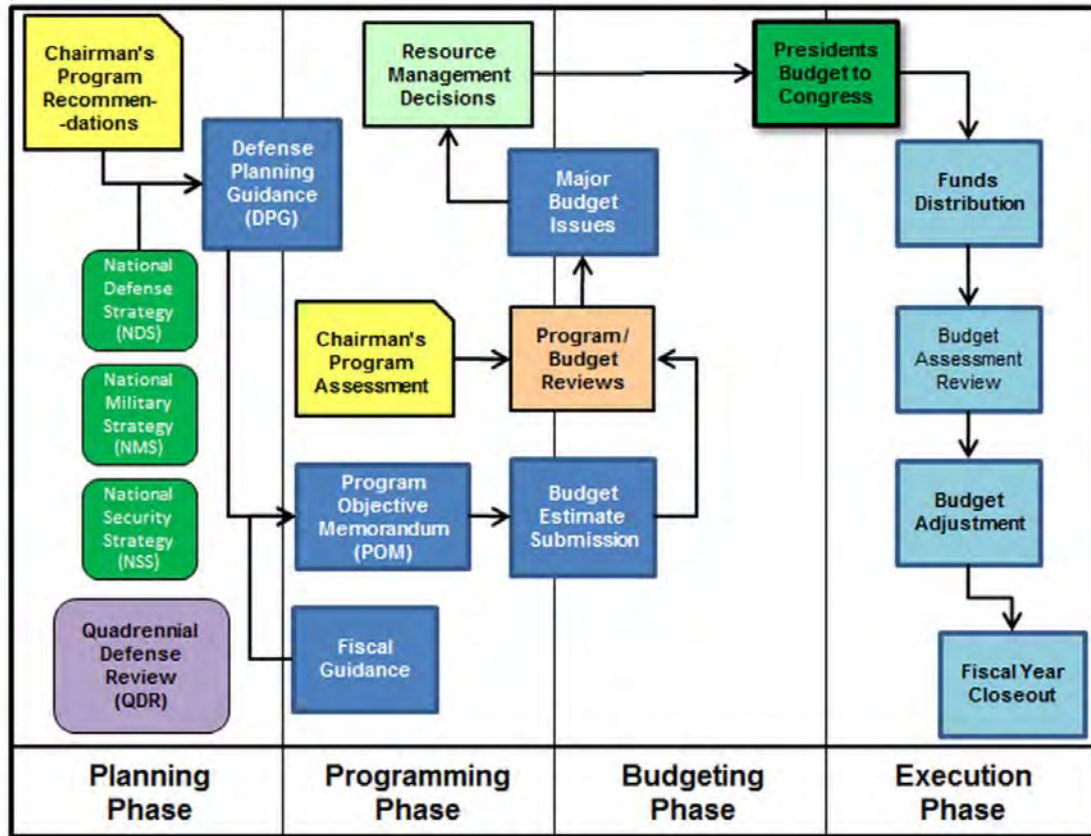
APPENDIX A. ORGANIZATION OF THE DEPARTMENT OF DEFENSE



(from Department of Defense, 2012)

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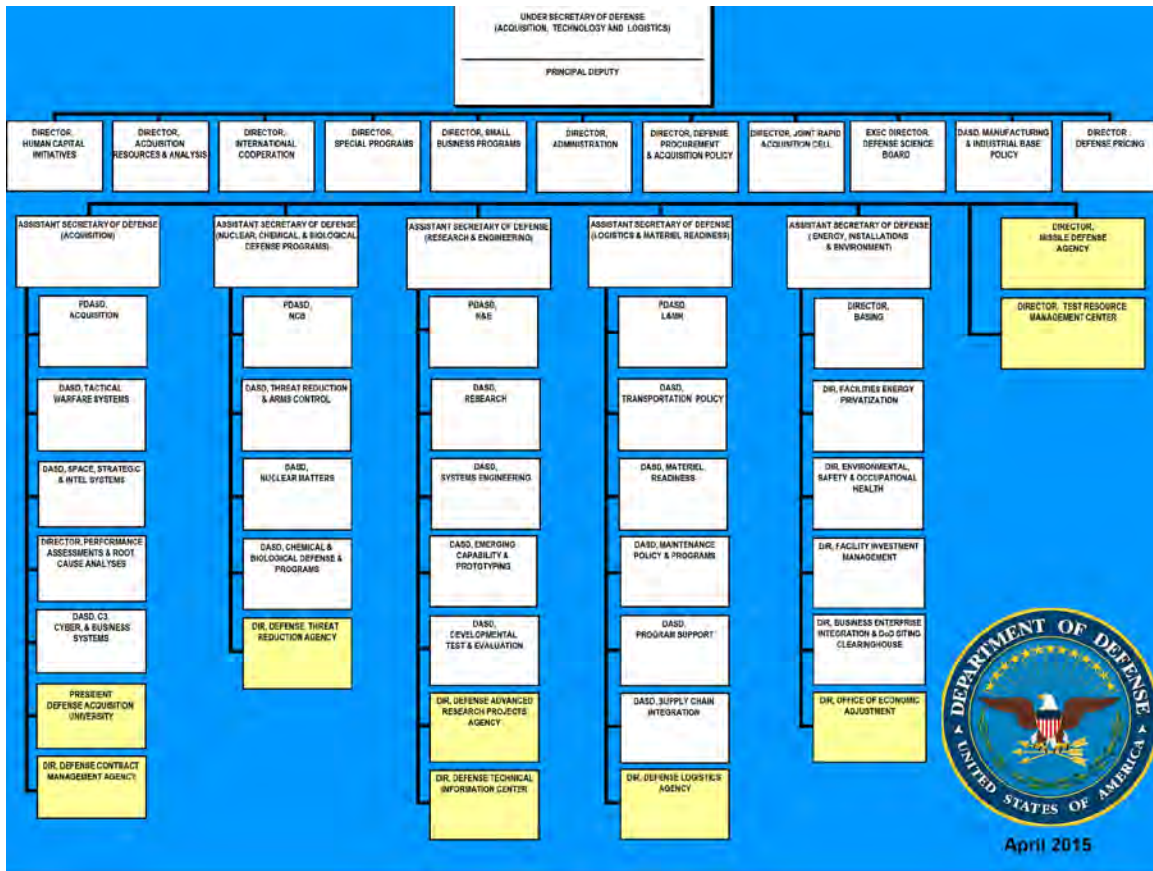
APPENDIX B. OVERVIEW OF THE DEPARTMENT OF DEFENSE PLANNING, PROGRAMMING, BUDGETING, AND EXECUTION SYSTEM



(from AcqNotes, 2015))

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APPENDIX C. ORGANIZATION CHART OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS



(from Department of Defense, 2015)

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APPENDIX D. COMPETITIVE PROCEDURES RESULTING IN FULL AND OPEN COMPETITION

Agencies meet CICA's requirement for full and open competition by using one of the "competitive procedures" recognized under the act.³⁴ CICA recognizes the following procedures as competitive:

1. ***Sealed bids***. Sealed bids are offers submitted in response to invitations for bids (IFBs); opened publicly at a specified time and place; and evaluated without discussions with the bidders, with the contract being awarded to the lowest-priced responsible bidder.³⁵ CICA requires that agencies solicit sealed bids if (1) time permits their solicitation, submission, and evaluation; (2) the award will be made on the basis of price and other price-related factors; (3) it is not necessary to conduct discussions with bidders about their bids; and (4) there is a reasonable expectation of receiving more than one sealed bid.³⁶
2. ***Competitive Proposals***. Agencies are to use competitive proposals whenever "sealed bids are not appropriate" in light of the previous four factors.³⁷ Competitive proposals are offers received in response to requests for proposals (RFPs). RFPs generally provide for discussion or negotiation between the government and at least those offerors within the "competitive range," with the contract being awarded to the responsible offeror whose proposal represents the "best value" for the government.³⁸
3. ***Combinations of competitive procedures***. These include procedures like two-step sealed bidding. With two-step sealed bidding, the first step consists of the submission, evaluation and, potentially, discussion of technical proposals from each bidder with no pricing involved. In the second step, sealed bids are submitted only by those who submitted technically acceptable proposals during the first step.
4. ***Procurement of architectural or engineering services*** conducted in accordance with the requirements of the Brooks Act (40 U.S.C. §§541-559). The Brooks Act allows the selection of architects and engineers based upon their qualifications without consideration of the proposed price for the work. Awards must be made to the highest-ranked offeror unless a reasonable price cannot be agreed upon.
5. ***Competitive selection of basic research proposals*** resulting from a general solicitation and peer or scientific review of proposals, or from a solicitation conducted pursuant to 15 U.S.C. §638 (research and development contracts for small businesses).

(from Manuel, 2011)

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APPENDIX E. CIRCUMSTANCES PERMITTING OTHER THAN FULL AND OPEN COMPETITION

By definition, under CICA, any procurement contract entered into without full and open competition is noncompetitive.⁴⁹ This is not to say, however, that every procurement contract entered into without using competitive procedures is in violation of CICA. This is because CICA recognizes seven circumstances wherein agencies can use other than competitive procedures without violating the act's competition requirements.⁵⁰ Such circumstances involve the following:

1. ***Single source for goods or services***: The property or services needed by the agency are available from only one responsible source and no other type of property or service satisfies the agency's needs.
2. ***Unusual and compelling circumstances***: The agency's need for property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.⁵¹
3. ***Maintenance of the industrial base***: It is necessary to award the contract to a particular source or sources in order (1) to maintain a facility, producer, manufacturer, or other supplier so that the maintained entity will be available to furnish property or services in the case of a national emergency or to achieve industrial mobilization, or (2) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.
4. ***Requirements of international agreements***: The terms of an international agreement or treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing a federal agency for the cost of procuring property or services, effectively require the use of procedures other than competitive procedures.
5. ***Statutory authorization or acquisition of brand-name items for resale***: A statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency's need is for brand-name commercial items for authorized resale.
6. ***National security***: Disclosure of the agency's procurement needs would compromise national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.
7. ***Necessary in the public interest***: The head of an executive agency determines that it is necessary in the public interest to use other than competitive procedures

(from Manuel, 2011, p. 11)

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APPENDIX F. SUMMARY OF CONTINGENCY PROCESS REQUIREMENTS

Summary Contingency Process Requirements											
Threshold	Small Business	Sole Source Justification	Contractor Review	Sole Source Negotiation	Competitive Source Just.	Pricing	Solicitations	Contracts	Comm. Contracts	Labor Standards	Notice
Micro Purchase \$3,000 ² (FAR 2.101) \$15,000 ² Contingency Inside US (FAR 2.101) \$30,000 ² Contingency Outside US (FAR 2.101)	No requirement						Request for Quote Document (RFQ)	Simplified Acquisition/ Purchase order		\$2,000 (FAR 2.101) Davis Bacon Copeland Contract Work Hours & Safety (FAR 22.400)	\$15,000 (FAR 5.101) Public Display of Solicitation (FAR 5.101)
\$3,000 to \$150,000 (FAR 13.003)	SB Coord. required on Solic./KT. OCONUS. Exempted	J&A or equivalent required	JO18 Contractor review Post-selection & pre-award	Price Negotiation Memorandum (PNM) If sole source	Abstract (comparison of offerings) If competitive	May request pricing if needed	use "Q" in solicitation #	Non-commercial ("M" informal)	Simplified Acquisition commercial ("M" informal)	\$2,500 Service Contract Act & SP98 (FAR 22.10)	\$4M Public announc. of award (FAR 5.303)
	FAR 13.003 Small bus. set aside required (may be waived)										
SAT \$150,000 ² (FAR 2.101) \$300,000 ² Contingency Inside US (FAR 2.101) SAT \$1,000,000 ² Contingency Outside US (FAR 2.101)	Open competition (Can set aside if 2+ SB are available)	J&A required If sole source			Price Competition Memorandum (PCM) If competitive	DD Form 350 \$700,000 Certified cost & pricing data required (FAR 42.709) If sole source (not commercial)	Request for Proposal Document (RFP) Use "R" in solicitation #	Formal contract Non-commercial ("C" formal)	Formal Contract commercial ("C" formal)	\$15,000 Walsh Healy Supply Contracts (FAR 22.603) \$150,000 Miller Act (FAR 28.10E)	

Termination for Convenience: Contracts under \$5,000 will normally be allowed to run to completion. (FAR 49.101)
Fast Pay: Limit \$30,000 (FAR 13.402)
Claims: Must be certified over \$100K (FAR 33.207)

Sub Contract Plans: Required \$650,000 (Construction=\$1.5M)(FAR 19.702)
 Note: A formal contract cannot accept proposals.

Rent/Lease > 60 days = Lease vs Buy Decision
 Competition Required > Micro-purchase

(from DOD, 2012, p. 80)

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APPENDIX G. UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS MEMORANDUM



THE UNDER SECRETARY OF DEFENSE

3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

JAN 5 2001

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
DIRECTOR, DEFENSE CONTRACT MANAGEMENT AGENCY
DIRECTOR, DEFENSE LOGISTICS AGENCY

SUBJECT: Commercial Acquisitions

Defense acquisitions should emphasize performance-based requirements, include provisions that enable commercial practices, and encourage the participation of nontraditional commercial entities. The efforts of all members of the acquisition team are crucial to achieving increased use of commercial acquisitions, but the input of requirements personnel and program managers is particularly essential, since they impart knowledge of available technology to the team. To the maximum extent possible, commercial acquisitions should be conducted using Federal Acquisition Regulation (FAR) Part 12. The use of FAR Part 12 is designed to provide the Department of Defense (DoD) with greater access to commercial markets with increased competition, better prices, and new market entrants and/or technologies.

In March 1999, I directed the Deputy Under Secretary of Defense (Acquisition Reform) (DUSD (AR)) and the Director of Defense Procurement to charter an Integrated Process Team (IPT) to review DoD commercial item determinations and evaluate whether additional guidance, tools, or training were necessary. The IPT found that, while some progress has been made, many obstacles to accessing commercial items remain. These obstacles include inconsistent commercial item determinations, weak market research, and confusion concerning pricing of commercial items. Additionally, lessons learned as to the applicability of FAR Part 12 determinations are not being shared across DoD buying offices. These factors unnecessarily increase workload and acquisition cycle time.

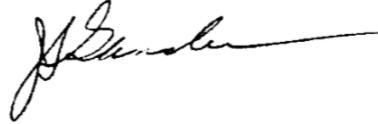
To help overcome these barriers to accessing commercial items, I am taking the following actions:

- ◆ Providing clarification on FAR Part 12 use to yield appropriate consistency across DoD;
- ◆ Establishing goals that DUSD(AR) will track to ensure the Department continues to make necessary progress;
- ◆ Requesting each Service and Defense Agency to provide me, within 90 days of the date of this memorandum, an implementation plan outlining its methodology to ensure we meet our commercial item acquisition goals; and
- ◆ Requesting that the IPT determine the feasibility of establishing a pilot program so that the Services and Agencies may collect market research and Commercial Item Determinations in a central database, or developing tools to assist in ensuring commercial item determinations are reasonably consistent. I request that the recommendation regarding this action be presented to DUSD (AR) within 90 days of the date of this memorandum.

April 7

The attachment provides some immediate clarification. In addition, DUSD (AR) and the components are developing a Commercial Item Handbook to provide further guidance on sound business strategies for acquiring commercial items. This guidebook is scheduled for release in February 2001.

To effectively provide our warfighters with the technological advantage to win future conflicts, we must uniformly look first to the commercial marketplace before developing new systems; upgrading legacy systems; or procuring spare parts and support services.

A handwritten signature in black ink, appearing to read 'J. S. Gansler', with a long horizontal flourish extending to the right.

J. S. Gansler

Attachment:
As stated

CLARIFICATION OF FAR PART 12 FOR CONSISTENCY

In implementing the guidance of FAR Part 12, misinterpretations and/or inconsistent applications have occurred with regard to the following definitions and issues: commercial-off-the-shelf; modified commercial items; of a type; Government-off-the-shelf; market versus catalog price; requirements definition; conduct of market research; use of Commerce Business Daily (CBD) Note 26; and, sole-source situations. The following clarifications are offered to create consistency across the Department.

Commercial Off-the-Shelf (COTS): A product does not have to be commercial-off-the-shelf (COTS) to meet the "commercial item" definition. COTS items are a subset of commercial items. The commercial item definition is much broader than products that are presently available off-the-shelf. It includes items that have only been "offered" for sale, lease, or license to the general public, as well as those that have evolved from a commercial item and are offered for sale, even if not yet available in the commercial marketplace. However, evolved items must be available in the commercial marketplace in time to satisfy solicitation delivery requirements. In addition, all other elements of the commercial item definition at FAR 2.101 must also be met.

Modified Commercial Items: When items available in the commercial market cannot meet the Department's need, DoD must determine whether market items can be or have been modified so that FAR Part 12 can be used. Two types of modifications are available: (1) modifications of a type available in the commercial marketplace; and, (2) minor modifications of a type not customarily available in the commercial marketplace made to Federal Government requirements. For modifications of a type available in the commercial marketplace, the size or extent of modifications is unimportant. For minor modifications, the item must retain a predominance of nongovernmental functions or physical characteristics.

"Of a Type": The phrase "of a type" is not intended to allow the use of FAR Part 12 to acquire sole-source, military unique items that are not closely related to items already in the marketplace. Instead, "of a type" broadens the commercial item definition so that qualifying items do not have to be identical to those in the commercial marketplace. The best value offer in a competitive Part 12 solicitation can be an item that has previously satisfied the Government's need but has not been sold, leased, licensed, nor offered for sale, lease or license to the general public (a nondevelopmental item as defined in 10 USC 403 (13)). In this scenario, the phrase "of a type" allows the best value offer to qualify for a Part 12 contract as long as it is sufficiently like similar items that meet the government's requirement and are sold, leased, licensed, or offered for sale, lease or license to the general public. In such instances, "of a type" broadens the statutory commercial item definition to allow Part 12 acquisition of a government-unique item that can compete with commercial items that meet the government's requirement. This avoids the undesirable result of shutting out otherwise price-competitive preexisting suppliers of government-unique items from Part 12 solicitations.

Government Off-the-Shelf (GOTS): GOTS is a commonly used term for nondevelopmental items (NDI) (as defined in 10 USC 403 (13)) that are Government-unique items in use by a Federal Agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement. The words "of a type" facilitate the acceptance of a best-value GOTS/NDI offer in response to a competitive FAR Part 12 solicitation when the offered GOTS/NDI items are sufficiently like similar items sold, leased, licensed, or offered for sale, lease or license to the general public.

Market Price versus Catalog Price for Services: The commercial item definition includes services of two general types: services in support of a commercial item; and, stand-alone services. In order to meet the commercial item definition, stand-alone services must be "based on established catalog or market prices." The price for the services must be based on either catalog prices or market prices.

"Catalog Prices" mean a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public.

"Market Prices" mean current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

The established market price for stand-alone services does not have to be published or written. Market research enables the Government to collect data from independent sources in order to substantiate the market price.

Requirements Definition: It is imperative that all members of the acquisition team are cognizant of available or emerging technology and that requirement statements reflect any available commercial solutions. Requirements personnel and contracting officers should work together to ensure that commercial items can be -- and are -- used. Contracting officers need the input, guidance, and support of requirements personnel (e.g., adopting more open system architectures, identifying possible commercial components and technologies) to enable the use of commercial item acquisitions. The key to this process is robust market research.

Market Research: Market research -- and the teaming it relies upon -- must be an ongoing activity throughout an acquisition, in order to gather the robust data needed to make smart acquisition decisions. Market research is not limited to locating commercial items, although that is one purpose of its conduct. At a minimum, market research should be used to define requirements, locate commercial best practices, and assist in determining price reasonableness.

Full Use of CBD Note 26: If market research establishes that the Government's need cannot be met by a commercial item, FAR Part 12 shall not be used. For proposed contract actions that require publication in the Commerce Business Daily (CBD), the contracting officer must include a notice to prospective offerors that the Department does not intend to use FAR Part 12 for the acquisition. For the Defense Department, this notification is accomplished through use of CBD Numbered Note 26. The Department must make full use of CBD Numbered Note 26, which reads as follows:

Based upon market research, the Government is not using the policies contained in Part 12, Acquisition of Commercial Items, in its solicitation for the described supplies or services. However, interested persons may identify to the contracting officer their interest and capability to satisfy the Government's requirement with a commercial item within 15 days of this notice.

Sole-Source Situations: Contracting officers and requirements personnel should work together to avoid sole-source situations. Competition is enabled when needs are broadly stated

in terms of performance outcomes. However, a sole-source situation may be unavoidable, presenting pricing challenges. Tools and techniques are available for assisting in the price reasonableness determination for sole-source commercial item procurements. Sometimes, sole-source suppliers may attempt to exploit the lack of competitive markets and demand unreasonable prices. In such circumstances, the team should consider revising negotiation strategies to consider innovative solutions (e.g., strategic supplier alliances); buying the bare minimum quantities and working to restate the need to expand possible solutions and qualify alternate suppliers; and ultimately upgrading systems to current, commercial technology. In some cases, it may be necessary to escalate negotiations. The first escalation should be to the Procurement Executive, then, if necessary, to the Head of the Agency.

ESTABLISHMENT OF COMMERCIAL ITEM ACQUISITION GOALS

Commercial item acquisition using FAR Part 12 procedures is designed to provide greater access to commercial markets. Benefits include increased competition; use of market and catalog prices; and, access to leading edge technology and "non-traditional" business segments. The Road Ahead published on 2 June 2000 by USD (AT&L) established as a goal "an accelerated rate of increase in the dollar value of FAR Part 12 acquisitions with primes". The baseline is for this goal is \$12.6 billion in FY 1999. Therefore, goals for Part 12 acquisitions are established for the components as follows:

1. Each Service and Defense Agency should double the dollar value of FAR Part 12 contract actions awarded in 1999 by the end of fiscal year (FY) 2005. This would bring the DoD total FAR Part 12 contract actions from \$12.6 billion to \$25.2 billion.*
2. Each Service and Defense Agency should strive to increase the number of FAR Part 12 contract actions awarded to 50 percent of all Government contract actions awarded by the end of FY 2005.*

(*For purposes of these goals, a contract action is defined as any new contract award and/or new delivery order placed against a contract awarded with a value greater than \$25,000.)

While it is important to emphasize use of Part 12 acquisitions where appropriate, it is also important to balance these goals with the objectives to increase competition, achieve access to leading edge technologies and non-defense business segments. Therefore, in evaluating each of the goals established above, each Service and Defense Agency, together with DUSD (AR) should ensure that these objectives are not achieved at the expense of the use of product support requirements, use of strategic alliances, consolidated support service contracts or multiple award type contracts. These overlapping objectives may, unavoidably, create challenges for the components. These issues should be addressed in the implementation plans due to DUSD (AR) within 90 days. Specific activities, such as the Defense Logistics Agency, may also need to establish goals above these thresholds, depending on the nature of their business.

Commercial Policy Coordination

Clarification of Commercial Item Policy

COTs – General Counsel recommended adding a sentence to the end of the paragraph, which was accepted.

Of a Type – The Inspector General strongly recommended that the “of a type” characterization be clarified. General Counsel wrote the clarification provided in this memorandum.

Modified Commercial Items – There was universal concern from all parties regarding the statement “For minor modifications of a type not customarily available, the modifications generally should not alter the nongovernmental function or essential physical characteristics by more than 50 percent.” This clarification has been removed from the memorandum. Additionally, as recommended by the Air Force, the handbook will stress the importance of adequately documenting the logic leading up to these determinations.

Market Price vs Catalog Price – Both DCAA and the IG expressed concern regarding the use of the phrase “through competition” used in the market price definition. While this policy memorandum was being processed, the Federal Acquisition Council published a proposed case 2000-303 containing the proposed definitions used in this policy memorandum. That case is now pending publication as a final rule. This policy is consistent with that final rule, notwithstanding the DCAA and IG concerns.

Market Research – DLA wants to add the term “appropriate to the circumstances” to the discussion of market research. Generally that’s good, but in this case it enables DLA personnel to do the absolute minimum, like checking who we bought it from last time, and still be in compliance. We will address this issue instead, in the commercial handbook.

Goals

The draft policy memorandum circulated, used the metrics established in *The Road Ahead* approved by the USD (AT&L) in June 2000. Each service expressed concern regarding the metrics:

Air Force & Army – Supported using number of actions as a goal but not dollars. AF recommended changing the title to emphasize goals.

Navy – Characterized the goals as arbitrary and capricious, stating that they could not be met, recommending as an alternative very conservative goals.

DLA – Recommended changing the approach to recognize that the goals need to be tailored to the business base of the activity. DLA already meets and exceeds the stated goals.

Defense Procurement – Recommended conducting an analysis of progress to date with Part 12 acquisition, before projecting further goals.

DCMA – Recommended a two stage approach: 1) asking the services for implementation plans 2) tailored to the activity.

IG – Noted that the measurement of only actions and dollars (i.e. volume) did not recognize that this policy area is complex and must balance the need to consolidate acquisitions (e.g. strategic alliances, product support pilot programs, or consolidated support service requirements) with the need to attract non-defense companies, and sustain competition.

Resolution - DUSD (AR) does not fundamentally disagree with the IG or component concerns, however, it is essential that stretch goals be established for the department regarding Part 12 acquisitions to ensure leadership involvement and to raise awareness. DCMA's recommendation is a sound one, as is the IG approach, which when combined leads to a policy that modifies the goals slightly, still ensures the goals will raise awareness but requires the development of an implementation plan regarding Part 12 acquisition. It also clarifies that component progress will be measured at the service level, thereby allowing for potential variation within that component. This approach also allows DLA to promote their tailored plan.

Commercial Item Determinations Database

DLA – Recommended that DUSD (AR) fund the development of an on-line decision resource tool for the acquisition workforce instead of a database.

AF/Navy/Army – While generally in support of this approach during the circulation of this policy in draft, each has now expressed concerns regarding the resources involved in supporting the database, even the pilot effort.

Defense Procurement – Expressed concern regarding the resources involved and stated that this information should not be intended to provide justification on future determinations.

Resolution – Clearly, we do not yet have resolution on this issue. The memo has been modified to keep the IPT in place and to review whether to develop tools or the data base, within two months, reporting to DUSD (AR) and DP as to how to proceed further.

Sole Source Pricing Trends

Despite the fact that the IG has been a member of the working group that developed this policy clarification, they chose to wait until coordinating on this policy to indicate that the primary issue requiring clarification was sole source pricing trends. The working group did not identify this issue specifically. In their second written non-concurrence,

they stated that an escalation sequence needed to be established that included OSD intervention for pricing issues.

Resolution – DUSD (AR) has specifically added language to address the IG's concerns, however recommends that the escalation process should be contained within the services/components. Specifically, The first escalation should be to the Procurement Executive, then, if necessary, to the Head of the Agency. This position was coordinated with the Section 803 pricing working group, chaired by Defense Procurement.

Unified Management

IG - Despite the fact that the IG has been a member of the working group that developed this policy clarification, they chose to wait until coordinating on this policy to remind DUSD (AR) that, in their opinion, Section 803 (d) of the 1999 Authorization Act had not been implemented. The working group did not identify this issue specifically.

Resolution – DUSD (AR) does not think this policy memorandum is the appropriate forum to resolve this issue.

Emphasis on Program Managers

IG – Requested that the role of the Program manager be emphasized. The tone of the memo has been strengthened to address their concerns.

(from Gansler, J.S, 2001)

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APPENDIX H. CERTIFICATE OF COST OR PRICING DATA

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 2.101 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.403-4) submitted, either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer's representative in support of _____* are accurate, complete, and current as of _____**. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

Firm _____
Signature _____
Name _____
Title _____
Date of execution*** _____

* Identify the proposal, request for price adjustment, or other submission involved, giving the appropriate identifying number (*e.g.*, RFP No.).

** Insert the day, month, and year when price negotiations were concluded and price agreement was reached or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price.

*** Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(from FAR 15.406-2, 2015)

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APPENDIX I. U.S. ARMY CONTRACTING AGENCY (ACA) PRE- /POST-NEGOTIATION DOCUMENTATION SAMPLES

Sample 1

SAMPLE FORMAT – COMPETITIVE COMMERCIAL – TYPE SERVICES PRENEGOTIATION OBJECTIVE MEMORANDUM (POM) GROUND MAINTENANCE – LAWN MOWING FORT FUTURE

- I. Solicitation Number: DABTXX-02-R-0000, including 3 amendments.
- II. Contract Type: Insert contract type and period of performance. Include any options for additional performance.
- III. Description of Requirement: Provide a brief description of the supplies or services being acquired.
- IV. Acquisition Background:
 - a. Previous buys of same or similar items.
 - b. Applicability of performance based contracting approaches.
 - c. Consideration for consolidation with regional requirements and any “bundling” issues.
 - d. Market Research results. Discuss the basis for making the commercial items determination and any actions to reevaluate the requirement to enable use of commercial or no developmental items. Identify any relevant contract terms and conditions and industry practices discovered during market research.
 - e. Efforts to identify potential sources. Address set-aside decisions or decisions to limit competition.
 - f. Any external conditions that may affect the requirement and acquisition.
 - g. Availability of funding.
- V. Acquisition Chronology: (Provide a brief discussion of significant acquisition events.)
 - a. Receipt of Requisition or Purchase Order. (If current action is definitizing a Letter Contract or other unpriced action, insert date it was issued.)
 - b. J&A Approval, if applicable.
 - c. Approval of the Acquisition Plan and Source Selection Plan, if applicable.
 - d. Issuance of any Draft RFP or meetings with industry not discussed under market research.
 - e. Date of synopsis.

- f. Date solicitation issued, and any amendments to the solicitation.
- g. Date proposals were received. Summarize number of proposals received.
- h. If adequate price competition does not exist, summarize actions to evaluate the proposal, Field Pricing Support and DCAA Audits, and fact-finding activities. See the Army Contracting Agency Cost & Price Analysis Handbook for specific guidance.

REVIEW/APPROVAL: (Always position on the bottom of the first page)

Prepared by:

Contract

Specialist: _____ Title _____ Date _____

Reviewed by:

Contracting

Officer: _____ Title _____ Date _____

Legal*: _____ Title _____ Date _____

DOC*: _____ Title _____ Date _____

Other: _____ Title _____ Date _____

Approved by: _____ Title _____ Date _____

***Only include/use Legal and DOC signature lines when required by the
ACA, Region Headquarters Document Submission Requirements or
Regulations.**

EXAMPLE

VI. Approval of this POM authorizes discussions/negotiations to begin with Company A, Company B, and Company C, based on the competitive range determination, as defined below. Also, approval of this POM authorizes the Contracting Officer to notify Company D and Company E that their proposals are not within the competitive range and they are excluded from further consideration and are entitled to receive a debriefing by the Contracting Officer.

a. Basis for Award:

Award will be based on the best value approach specified in AFARS 5115.101 – Best Value Continuum. Section M (attached) advises competitors that Technical, Management, and Past Performance factors are all equal in importance, and together are more important than price. (List evaluation factors and relative importance of each to the source selection process.)

b. Offerors/Prices/Rating:

List offerors, proposed prices, and ratings for each evaluation factor. Use a break line to show competitive range. When cost analysis or cost/price realism analysis is required or performed, include a columnar format breakout of the major cost elements of each contractor's proposal and the analysis (i.e., labor cost, direct cost, indirect cost, profit/fee). The analysis can be attached, but prices should still be included here. Use rating factors in Chapter 5 of the Army Source Selection guide

EXAMPLE

<u>Offeror</u>	<u>Proposed Price</u>	<u>Technical Rating</u>	<u>Management Rating</u>	<u>Past Performance</u>
Company A	\$1,950,000	Good	Good	Good
Company B	\$2,000,000	Good	Excellent	Good
Company C	\$2,050,500	Good	Good	Marginal
----- (Competitive Range) -----				
Company D	\$10,000,000	Unsatisfactory	Marginal	Marginal
Company E	\$998,800	Unsatisfactory	Unsatisfactory	Not Rated

c. Price Reasonableness and Cost Realism Analysis.

Describe the method and basis for determining price reasonableness of the proposals, in accordance with FAR Subpart 15.403-1. Identify the sources of information used in reaching the determination. Sources of information may include the Independent Government Cost Estimate, pricing information obtained during Market Research, prices for the same or similar items previously acquired, published catalogs and price lists, and information provided by the offerors. If prices are reasonable based on adequate price competition, explain the need for any cost or pricing data from the offerors. Discuss other uses of cost or pricing information, such as in performing a cost realism analysis or in developing a most probable cost to the Government estimate.

d. Competitive Range Determination.

After completing review of initial proposals, the following offerors were determined to not be within the group of those most highly rated for the reasons indicated, and will be excluded from the competitive range.

(NOTE: Use or establishment of an “efficient” competitive range CANNOT be done unless offerors are notified in the solicitation).

EXAMPLE

(1) Company D is excluded from the competitive range because deficiencies and shortcomings noted during the evaluation indicate a lack of understanding of the requirement. The proposed price was unreasonably high in comparison with the other offerors and the technical/management proposals were rated unacceptable. The proposal is rated lower than those that are most highly rated. Detailed deficiencies are included in the evaluation summary (Enclosure 1). (Specific information can be included here or by attachment.)

(2) Company E’s proposal is excluded from the competitive range because its proposed price was unrealistically low and the technical and management proposals demonstrate a lack of understanding of the requirement. Detailed deficiencies are included in the evaluation summary (Enclosure 2). (Specific information can be included here or as an attachment.)

e. Issues that will be discussed with the offerors in the competitive range.

(1) Identify any deficiencies, significant weaknesses, and concerns with each of the offerors that will be covered in discussions. These would include considerations that could affect the evaluation rating of an evaluation factor and may apply to cost or price and past performance, as well as technical and management factors.

(2) Identify significant strengths in each offeror's proposal, so that the offeror will know not to remove a desirable provision in its final revision that would reduce the value of its offer.

(3) The Government is not required to discuss the same topics with all of the offerors in the competitive range. However, discussion topics must relate to evaluation factors in the solicitation and the Government may not favor one offeror over another, reveal an offeror's solution to another offeror, reveal an offeror's price without the offeror's permission, disclose source selection information, or reveal the name of individuals providing past performance information.

VII. Attachments:

Include only attachments that are necessary to support negotiation objectives, negotiation issues, and competitive range determinations. Attach Sections L & M of the RFP and the Source Selection Evaluation Plan, however do not include proposals, proposal cover sheets, or audits. Only include cost/price, technical, management, past performance, and subcontracting plan evaluation documents when the subject cannot be adequately covered by a summary statement in the body of the POM. When in doubt, do not include information that may be proprietary or source selection sensitive. If needed, it can be provided later on request.

Sample 2

(SAMPLE FORMAT – COMPETITIVE COMMERCIAL – TYPE SERVICES)

POST NEGOTIATION MEMORANDUM (PNM)

GROUND MAINTENANCE – LAWN MOWING

I. Solicitation Number: DABTXX-02-R-0000

II. Contract Type: Insert contract type and period of performance. Include any options for additional performance.

III. Description of Requirement: See description from POM.

IV. Acquisition Background: Summarize information from POM, updated to include the results of source selection activities.

V. Basis for Award: Summarize the major factors in the Source Selection and their relative importance. Briefly describe the proposals in the competitive range and the tradeoffs that led to the Source Selection Decision. If the PNM is a standalone document, it must track with the Source Selection Decision Document.

REVIEW/APPROVAL: (Always position on the bottom of the first page)

Prepared by:

Contract

Specialist: _____ Title _____ Date _____

Reviewed by:

Contracting

Officer: _____ Title _____ Date _____

Legal*: _____ Title _____ Date _____

DOC*: _____ Title _____ Date _____

Other: _____ Title _____ Date _____

Approved by: _____ Title _____ Date _____

*** Only include/use SJA and DOC signature lines when required by the ACA, Region Headquarters' Document Submission Requirements or Regulations.**

VI. Participants in Discussions/Negotiations with each of the Offerors:

a. Face-to-face negotiations were conducted 2-5 August 2002 at the Fort Future DOC office.

b. (List discussion topics for each offeror or include as an attachment. Explain any differences from the topics in the POM.)

c. The following individuals participated in the negotiation/discussions:

EXAMPLE

<u>Name:</u>	<u>Title/Organization:</u>
John Doe	Pres. XYZ, Inc.
Jane Jones	Contracting Officer, Fort Future
Jack Smith	Legal Advisor, Fort Future
_____	_____
_____	_____

Note: If written discussions were held instead of face-to-face or telephonic, include names/title/organization of those who signed correspondence.

VII. Results of Negotiations/Discussion:

For each offeror in the competitive range, list the topics identified for discussions in the POM. Provide an explanation as to why any of these topics were not addressed in discussions and describe the basis for inclusion of any new topics. Discuss any questions and clarification requests received from each offeror. Describe each offeror's response to questions and to any proposal deficiencies and significant weaknesses provided by the Government during discussions. Finally, relate how information exchanged during discussions/negotiations were reflected in each offeror's revised proposal. Attach any correspondence, transcripts, or memoranda documenting the discussions.

VIII. Source Selection Decision Statement: If the PNM serves as the Source Selection Decision Document, include a statement similar to the example below, which is based on the sample statement in Figure 8-7 of the Army Source Selection Guide.

a. Decision Statement.

EXAMPLE

As Source Selection Authority for this acquisition, I have determined that the ____ product/service proposed by Offeror A provides the best overall value to satisfy Army needs. This selection was

made based upon the factors and sub factors established in the solicitation and my integrated assessment and comparison of the strengths, weaknesses, and risks of the proposals submitted in response to the solicitation. This memorandum documents the basis for my decision.

- b. Brief description of the product/service being procured.
- c. Brief description of the basis for award, including the major factors against which proposals were measured and their relative order of importance.
- d. A list of offerors in the competitive range.
- e. Rationale for business judgments and tradeoffs. Include the following:

__ Succinct comparison of each proposal, focusing on key proposal differences (strengths, weaknesses, and risks) that surfaced in the evaluation and their impact on the acquisition.

__ Explanation of specific tradeoffs that led to the decision.

__ Explanation of specific benefits of the technically superior offeror(s) and why they are or are not significant enough to warrant any additional cost.

- f. Summary.

EXAMPLE:

In summary, based on my integrated assessment of all proposals in accordance with the specified evaluation factors and sub factors, it is my decision that Offeror A's proposal offers the best overall value.

IX. Certifications/Clearances:

Yes No N/A

- a. ____ Was POM approved by appropriate authority before discussions?
- b. ____ Is the offeror on the List of Parties Excluded from Federal Procurement and Non-procurement Programs?
- c. ____ Certificate of Cost and Pricing data received?
- f. ____ Has offeror submitted all required certifications?
- g. ____ Was a satisfactory subcontracting plan submitted?

- h. ____ Was the PNM reviewed by an Installation Contract Review Board?
(Attach signature/comment page)

X. Attachments:

If the PNM is the Source Selection Decision document, attach the documents that support the evaluation and source selection decision. Do not include proposals, proposal cover sheets, or audits. Include cost/price, technical, management, past performance, and subcontracting plan evaluation documents, only when the subject cannot be adequately covered in a summary statement in the body of the PNM or separate attachment. When in doubt, do not include information that may be proprietary or source selection sensitive. If needed, it can be provided later on request.

Sample 3

PRENEGOTIATION OBJECTIVE MEMORANDUM (POM)

FOR NONCOMPETITIVE AWARDS

(EXAMPLE IS FOR HYPOTHETICAL NON COMMERCIAL SERVICE)

I. Solicitation Number: DABTXX-02-R-0000

II. Contract Type: (Insert contract type and period of performance. Include any options for additional performance.)

III. Brief Description of Requirement: (See description from POM).

IV. BACKGROUND: This requirement is sole source. See attached J&A dated dd/mm/yyyy.

V. ACQUISITION CHRONOLOGY

: See POM

REVIEW/APPROVAL: (Always position on the bottom of the first page)

Prepared by:

Contract

Specialist : _____ Title _____ Date _____

Reviewed by:

Contracting

Officer : _____ Title _____ Date _____

Legal* : _____ Title _____ Date _____

DOC* : _____ Title _____ Date _____

Other : _____ Title _____ Date _____

Approved by: _____ Title _____ Date _____

*** Only include/use SJA and DOC signature lines when required by the ACA, Region Headquarter's Document Submission Requirements or Regulations.**

EXAMPLE

V. Approval of this POM authorizes negotiations to begin with Company A, within the limits defined below.

	<u>Proposed</u>	<u>Objective</u>	<u>Questioned</u>
Cost	\$1,869,000	\$1,866,087	\$2,913
Profit	<u>131,000</u>	<u>130,626</u>	<u>374</u>
Total Price	\$2,000,000	\$1,996,713	\$3,287

An evaluation of Company A's cost proposal resulted in the following areas of questioned cost:

(a) Labor:

1. The proposed labor rate of \$7.50/hr. for Technician Level I is overstated. The DOL wage rate and/or historical data of prices paid in this geographical area indicate \$7.25/hr. is reasonable. Applying the recommended rate to the 10,000 estimated hours in the proposal results in questioned cost of \$2,500. The rate will be discussed during negotiations.

Questioned Cost of \$2,500

2. The labor rate of \$78.50/hr. proposed for the Project Manager's (PM) is excessive. The rate includes base pay of \$50.00/hr. plus \$28.50/hr. in fringe benefits and corporate overhead. DCAA found that the proposed rate includes \$8.50/hr. for corporate overhead rate that should not be included resulting in a recommended rate of \$70.00/hr. When applied to 2087 hours for a full time PM, the \$8.50/hr. reduction in rate equates to \$17,740 of questioned cost. The rate will be discussed during negotiations.

Questioned Cost of \$17,740

3. During fact-finding discussions with Company A, it was discovered that their cost proposal should be increased to include one additional Technician II position. The DOL wage rate for a Technician II is \$8.50/hr. For a full time equivalent, this would equate to a cost increase of \$17,740 (2087 hrs. X \$8.50).

Additional Cost of \$17,740

4. Summary of Questioned Labor Cost::

Labor Rates	\$2,500
Project Manager	\$17,740
Staffing Adjustment	<u>(\$17,740)</u>
Net Questioned Labor cost	\$2,500

(b) Equipment/Material: All equipment/material for this requirement will be Government furnished (GFE). Company A did not propose any equipment/material cost.

(c) Miscellaneous/Other Proposed Cost: (Include, if any)

(d) G&A: Company A's proposed G&A rate of 9.5% is acceptable. However, when applied to the Government's adjusted cost objectives, a total of \$238 G&A cost is questioned.

Questioned cost \$238

(e) Profit/Fee: Based on profit analysis using the weighted guidelines, no exception is taken to the proposed profit rate of 7 per cent. However, \$857 profit/fee is questioned based on application of the proposed profit rate of 7% to the baseline questioned costs.

Questioned Profit \$857

(f) Technical Issues:

Company A proposed three (3) full time equivalents (FTE) for the Technician I position. Based on the PWS and the number of areas to be mowed, a minimum of four (4) FTEs should be required. The offeror will be asked to support the use of 3 Technician is, or adjust their proposed staffing in their revised proposal.

IX. Request approval to begin negotiations with Company A.:

X. Attachments: List only the attachments included as part of the POM. Include only attachments that are necessary to support negotiation objectives, negotiation issues, and competitive range determinations. However, do not include proposals, proposal cover sheets, or audits. Only include cost/price, technical, management, past performance, and subcontracting plan evaluation documents, when the subject cannot be adequately covered in a summary statement in the body of the POM or separate attachment. When in doubt, do not include information that may be proprietary. If needed, it can be provided later on request.

Sample 4

PRICE NEGOTIATION MEMORANDUM (PNM)

FOR NONCOMPETITIVE AWARDS

(EXAMPLE IS FOR HYPOTHETICAL NON COMMERCIAL SERVICE)

I. Solicitation Number: DABTXX-02-R-0000

II. Contract Type: Insert contract type and period of performance. Include any options for additional performance.

III. Description of Requirement: (See description from POM).

IV. Extent of Competition: This requirement is sole source. See attached J&A dated dd/mm/yyyy.

REVIEW/APPROVAL: (Always position on the bottom of the first page)

Prepared by:

Contract

Specialist : _____ Title _____ Date _____

Reviewed by:

Contracting

Officer : _____ Title _____ Date _____

Legal* : _____ Title _____ Date _____

DOC* : _____ Title _____ Date _____

Other : _____ Title _____ Date _____

Approved by: _____ Title _____ Date _____

*** Only include/use SJA and DOC signature lines when required by the ACA, Region Headquarter's Document Submission Requirements or Regulations.**

V. Participants in Negotiations:

a. Face-to-face negotiations were conducted 2-5 August 2002 at the Fort Future DOC office.

b. (List discussion topics or include as an attachment.)

c. The following individuals participated in the negotiation/discussions:

<u>Name:</u>	<u>Title/Organization:</u>
John Doe	Pres. XYZ, Inc.
Jane Jones	Contracting Officer, Fort Future
Jack Smith	Legal Advisor, Fort Future
_____	_____
_____	_____

VI. Certifications/Clearances:

Yes No N/A

- a. ____ Was POM approved by appropriate authority prior to negotiations?
- b. ____ Is the offeror on the List of Parties Excluded from Federal Procurement and Non-procurement Programs?
- c. ____ Certificate of Cost and Pricing data received?
- f. ____ Has the offeror complied with/submitted all required certifications?
- g. ____ Was a satisfactory subcontracting plan submitted?
- h. ____ Was the PNM reviewed by an Installation Contract Review Board?
(Attach signature/comment page)

EXAMPLE

VII. Results of Negotiations:

	<u>Proposed</u>	<u>Objective</u>	<u>Questioned</u>	<u>Negotiated</u>
Cost	\$1,869,000	\$1,866,087	\$2,913	\$1,862,446
Profit	<u>131,000</u>	<u>130,626</u>	<u>374</u>	<u>130,371</u>
Total Price	\$2,000,000	\$1,996,713	\$3,287	\$1,992,817

a. Cost: A summary of proposed costs, Government objective costs, and cost values that are considered negotiated follows:

	<u>Proposed</u>	<u>Objective</u>	<u>Questioned</u>	<u>Negotiated</u>
Dir. Cost	\$1,706,994	\$1,704,494	\$2,500	\$1,700,864
G&A	<u>162,165</u>	<u>161,927</u>	<u>238</u>	<u>161,582</u>
Total	\$2,000,000	\$1,997,087	\$2,913	\$1,992,817

(1) Direct Cost (Labor): As a result of negotiations, labor costs were reduced from their initial proposal by \$6,130, as follows:

	<u>Proposed</u>	<u>Objective</u>	<u>Questioned</u>	<u>Negotiated</u>
Technician I	\$75,000	\$72,500	\$2,500	\$72,500
Project Manager	\$163,829	\$146,090	\$17,740	\$146,090
<u>Technician II</u>	<u>\$1,468,165</u>	<u>\$1,485,904</u>	<u>(\$17,740)</u>	<u>\$1,482,274</u>
Total	\$1,706,994	\$1,704,494	\$2,500	\$1,700,864

- i. Company A proposed a \$7.50/hr. wage rate for a Technician I. The prevailing DOL wage determination listed the rate at \$7.25/hr. The difference in the rates resulted in \$2,500 of questioned cost. During discussions, Company A agreed that the DOL rate of \$7.25 should apply.
- ii. Company A proposed a burdened Labor rate of \$78.50/hr. for their Project Manager. DCAA found the fringe/overhead portion of the rate to be overstated by \$8.50/hr. and recommended a rate of \$70.00/hr. This resulted in \$17,740 of questioned cost. During negotiations, Company A agreed that the DCAA recommended rate should apply.

iii. Analysis of Company A's technical staffing proposal found that the proposal was understated by one Technician II position. The DOL wage rate for the position is \$8.50/hr., or \$17,740 annually. The \$17,740 understatement was reflected in the Government's negotiation objective. During negotiations, it was determined that the task could be performed more efficiently by adding one part time Technician II at 1660 hours per year versus the 2087 used in the Government's negotiation objective. This results in a price increase of \$14,109 (1660 hrs. x \$8.50/hr. = \$14,109) from \$1,468,165 to \$1,482,274.

(2) Equipment/Material: No direct material or equipment was proposed. All material/equipment GFE/GFP.

(3) Indirect Cost (G&A):

<u>Proposed</u>	<u>Objective</u>	<u>Questioned</u>	<u>Negotiated</u>
\$162,165	\$161,927	\$238	\$161,582

Company A proposed \$162,165 for G&A cost based on application of 9.5% G&A to the proposed total direct cost of \$1,706,994. The 9.5% rate was audited by DCAA

and determined reasonable. The Government questioned \$238 of the proposed G&A cost based on application of the 9.5% G&A rate to the total direct cost objective of \$1,704,494. the amount considered negotiated for Indirect Costs is derived by applying the 9.5% G&A rate to the total direct costs of \$1,700,864 that are considered negotiated.

(d) Profit/Fee:

Based on profit analysis using the weighted guidelines, no exception is taken to the proposed profit rate of 7 per cent. The \$130,371 profit is derived by applying the 7 per cent rate to the considered negotiated costs.

VIII. Attachments: List and attach documents required to support the price reasonableness determination.

Sample 5

(a) <i>SIMPLIFIED ACQUISITION PROCEDURES</i> (i) DOCUMENTATION OF PRICE REASONABLENESS	
<u>RFP/RFO/PR NUMBER:</u>	Date
<u>ITEM DESCRIPTION:</u>	
<u>Offeror</u>	Price/Quote
1.	
2.	
3.	
4.	
5.	
In accordance with FAR 13.106-3(a), the award price is reasonable based on: (If Competitive quotations or offers is not selected, attach brief explanation)	
	Competitive quotations or offers.
	Market research.
	Comparison of the proposed price with prices found reasonable on previous purchases.
	Current price lists, catalogs, or advertisements.
	A comparison with similar items in a related industry.
	The contracting officer's personal knowledge of the item being purchased.
	Comparison to an independent Government estimate.
	Other reasonable basis (explain)
	The item can be obtained only from a supplier that quotes a minimum order price or quantity that unreasonably exceeds stated quantity requirements or results in an unreasonable price for the quantity required. The contracting officer has informed the requiring activity of all facts regarding the quotation or offer and ask it to confirm or alter its requirement. Attached document describes and supports the final action taken.
<u>AWARD TO:</u> <u>AWARD AMOUNT:</u>	
Buyer/Specialist:	Date
Contracting Officer:	Date

Note: If discussions are held or if further explanation is necessary, attach documentation to this form.

Sample 6

POM CHECKLIST

The following checklist contains most required determinations, approvals, and specific considerations IAW FAR, DFARS, & AFARS as applicable to the instant acquisition and as of the writing of this guide. However, this is not an all-inclusive listing and additions/deletions may be appropriate due to changes to the regulations and/or ACA or PARC requirements, or in support of a local requirement.

1. Determinations and Findings (D&F) to exclude a source (FAR 6.202, and Subpart 1.8) number _____ was approved on _____ by _____. Attached as Exhibit_____.
2. D&F for public interest circumstances permitting other than full and open competition (FAR 6.302-7 and Subpart 1.7) number _____ was approved on _____ by _____. Attached as Exhibit_____.
3. Justification for Other than Full & Open Competition (see FAR 6-303), number _____ was approved on _____ by _____. If approved at other than the Secretarial level a copy is attached as Exhibit_____.
4. Acquisition Plan (AP) Number _____ dated _____ was approved on _____ by _____. This acquisition is in conformity with the approved AP. Yes _____ No _____. If no, include explanation.
5. This acquisition was synopsisized on FedBizOps. Yes _____ No _____. If no, include explanation of the applicable exception in the POM.
6. a. Proposed services have been determined to be non-personal (FAR 37.103(a)) Yes _____ No _____ N/A _____. If no, complete paragraph 6.b. below and include explanation in POM.

b. Proposed services have been determined to be personal and the category of services is in conformity with (see DFARS 237.104 and AFARS 5137.104-90). A D&F to contract for personal services was approved by _____ on _____. Yes _____ N/A _____.
7. The proposed procurement has been reviewed by the contracting officer and SADBUS for Small and Disadvantaged Business and Labor Surplus Area consideration. Yes _____ No _____ N/A _____. If no, include explanation in POM. (FAR 19.502)
8. Warranty clause approval has been obtained (DFARS 247.704). Yes _____ No _____ N/A _____. If no, include explanation in the POM.

9. None of the exceptions to cost or pricing data at FAR 15.3 apply. Yes ____ No ____.
If yes,

a. The contractor(s) has/have submitted Cost & Pricing information IAW FAR 15.408.
Yes ____ No _____. If no, include explanation in the POM.

b. Cost & Pricing information IAW FAR 15.806 has been submitted for all major sub-
contractors. Yes_____ No _____ N/A _____. If no, include explanation in the POM.

c. Audits and/or field pricing reports requested after consideration of the criteria at
FAR 15.404, have been received. Yes_____ No _____. If no, include explanation in
POM.

10. An approved make or buy plan is on file (DFARS 215.407-2). Yes_____ No
_____ N/A _____.

11. Any other applicable compliances.

Sample 7

PNM CHECKLIST

The following checklist provides a listing of required determinations, approvals, and specific considerations IAW FAR, DFARS, & AFARS as applicable to the instant acquisition and as of the writing of this guide. However, this is not to be considered an all-inclusive listing, and additions/deletions may be required by changes to the regulations and/or ACA or PARC requirements, or in support of a local requirement.

1. A Disclosure Statement describing the contractor's cost accounting practices and procedures was submitted on _____(FAR Appendix B, Part 9903.202). The responsible contracting officer determined that the Disclosure Statement was current, accurate and complete on _____.
2. The contractor has an adequate accounting system as determined by the Contracting Office/DCAA on _____.
3. The contractor has an approved purchasing system (FAR 44.305) as determined by the contracting officer on _____.
4. The prospective contractor has been determined to be responsible within the meaning of FAR Subpart 9.103. Yes _____ No _____. If no, include explanation in the PNM.
5. Exception to the Buy American Act has been obtained. Yes _____ No _____ N/A _____. If no, include explanation in the PNM.
6. Progress Payments authorized (FAR 32.5): Customary _____ Flexible _____ Unusual _____. If unusual, include explanation and describe approvals obtained.
7. Certification of independent price determination received from the successful offeror (FAR 3-103-1)(fixed price only). Yes _____ No _____ N/A _____. If no, include explanation in PNM.
8. Is cost or pricing data required? Yes _____ No _____. If yes,
 - a. Has contractor submitted a certificate of current cost or pricing data per FAR 15.403-4(b)(2) in format indicated at Part 15.406-2? Yes _____ No _____ N/A _____.
 - b. Has contractor submitted sub-contractor cost or pricing information on major sub-contracts per FAR 15.408? Yes _____ No _____ N/A _____.
9. The List of Debarred, Suspended and Ineligible Contractors has been checked. (FAR 9.404 & 9.405) Yes _____ No _____ N/A _____. If no, include explanation in PNM.

10. Equal Employment Opportunity (EEO) compliance has been requested or obtained.
Yes _____ No _____ N/A _____.

11. Public announcement of award prepared and ready for issue per FAR 5.302 & 5.303.
Yes _____ No _____ N/A _____.

12. Any other applicable compliances - notate here.

from (Office of Secretary Defense, 2004)

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APPENDIX J. COMPARISON OF U.S. AND PAKISTAN ACQUISITION/PROCUREMENT PROCESSES

S No	United States of America	Pakistan
(a)	Personnel	
(1)	Recognition Contracting is recognized as a separate professional stream.	Contracting is not a recognized specialist professional stream.
(2)	Training/Capacity Building An extensive training structure is available in the shape of institutions like the DAU and NPS. The legal framework in the U.S. mandates that agency heads build skill sets of the acquisition community with career progression and various appointments. The legal binding for capacity building makes it easy for agency heads to request annual funding for training purposes. The contracting personnel undergo different certification courses like DAWIA at different stages of their professional career.	PPRA conducts training of contracting personnel on a very limited scale. It does not have a structure to carry out extensive training. However, there is a need for a robust training institutional regime. Legislature does not bind agency heads for mandatory capacity building of the supply corps personnel. Agency heads meet training requirements from limited annual budgets. In times of sequestration, agency heads easily slash training programs of support services compared to the operational workforce. There are no certification courses related to professional growth.
(b)	Platforms	
(1)	Organizations Different organizations like the DAU and NPS exist and contribute towards enhancement of skill level of acquisition community. Organizations like the DLA procures requirements of all agencies centrally.	There is a dearth of educational organization that offers undergraduate- or graduate-level courses for skill enhancement of contracting workforce. Each military arm procures its own inventory needs. As a result, there is an efficiency loss in the system.

(2)	Monitoring and Oversight Organizations like the DCMA and DCAA add to efficiency and effectiveness of the entire DOD by monitoring, administering, and overseeing contracting activities.	There is an extensive audit system available in Pakistan; however, the contract administration is weak.
(c)	Protocols	
(1)	Best Value Quantum The acquisition regulations envisage contracting personnel to use their judgment and obtain best value for taxpayers' dollars	The PPRA also envisages to obtain goods and services at best value of taxpayers' money.
(2)	Contract Methods Negotiated procurement is considered a competitive method of procurement, besides sealed bidding. SAP provides flexibility by increasing financial thresholds in a declared contingency environment. The increase in SAP thresholds during contingencies helps provide swift support to warfighters. GSA schedule increases efficiency and effectiveness as eligible federal/ state/local government agencies order through GSA e-library or GSA advantage. It saves time and effort by avoiding redundant actions and enhances efficiency and effectiveness of the acquisition community.	Only sealed bidding is considered a competitive form of procurement. Negotiated procurement and revision of proposal is forbidden. War and peacetime procurement thresholds are the same. Though the armed services place multiple orders through rate running contracts, each agency maintains separate basic order agreements with suppliers instead of a central online facility.
(3)	Accountability TINA encompasses suppliers into the accountability loop because government agencies are permitted to audit records of vendors involved in government business.	The legal framework does not encompass suppliers into the accountability loop because government agencies cannot access their data.

	Suppliers have to submit certificates regarding correctness, currency, and completeness of cost and pricing data.	Suppliers are not mandated, by law, to submit cost and pricing reasonableness certificates.
(4)	Whistleblower Protection The law provides protection and incentivizes whistleblowing by giving a share in recovered amount.	Whistleblower protection law does not exist at the federal government level.

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