Public Procurement Reform in Latin America and the Caribbean

Paul R. Schapper and Joao N. Veiga Malta

July 2011
Public Procurement Reform in Latin America and the Caribbean

Paul R. Schapper and Joao N. Veiga Malta

July 2011
Acknowledgements

The authors gratefully acknowledge the support, advice and interest from numerous sources. Special thanks to Alfonso Sanchez, Jorge Vargas, Enzo de Laurentiis (World Bank), Christine Tonkin (IAEA), Diomedes Berroa (World Bank), Denis Robitaille (World Bank), Knut Leipold (World Bank), Jacqueline Pontré (UNDP), Nick Manning (World Bank), and Pedro Arizti (World Bank). We would also like to acknowledge the valuable references provided by Sue Arrowsmith (Nottingham University).
Executive Summary

Procurement is a vital component of a country’s public administration that links the financial system with economic and social outcomes. The state of government procurement greatly determines the governance and performance of community services and cuts across almost every area of planning, program management, and budgeting. Managing up to 20% of gross domestic product, a public procurement system that optimizes value-for-money has wide-ranging national benefits. On the other hand, weaknesses in procurement management under-deliver social services and increase sovereign risk for foreign investment.

Given the significance of procurement and procurement reform to national development it is crucial that the reform proposals advocated by policy-makers and development agencies represent effective responses to the issues. This discussion seeks to re-evaluate the key reform assumptions and objectives, and the underlying procurement model, to consider whether these continue to align with the contemporary needs of governments, or whether alternatives are available that may better fit today’s challenges.

The analysis raises significant considerations about whether the development agencies, by promoting only a traditional model of procurement, are keeping pace with the changing needs of modern government.

Simple Procurement

Identifying public procurement with a set of regulated procedures is the predominant model for procurement legislation and management. This model has its historical origins in times when government procurement requirements were largely about basic administrative supplies, mostly goods and a few relatively simple services.

To drive behaviour towards performance criteria defined by best practice procurement principles, the traditional procurement framework has sought to regulate the procedures for various categories of acquisition, based on value thresholds and broad content. A strong focus of procurement regulations has been the avoidance of patronage by strengthening probity around the supplier selection and evaluation procedures.

The legislative frameworks for procurement in many jurisdictions have also explicitly recognized the core objectives for the governance of public procurement, such as transparency, value-for-money and efficiency. However, by regulating the procedures for undertaking procurement, the procurement principles themselves lose relevance for procurement management and accountability. Under these circumstances, deleting references to the principles or objectives, such as transparency, from the legislation would often have no consequences for the procurement legislation, regulations, governance or procedures, or indeed the outcomes. Within the procedures model for procurement, the performance criteria of procurement management are disconnected from the principles or objectives of procurement itself, with the implicit assumption that the achievement of one set of outcomes (compliance) will deliver another (performance).
A key issue is whether the needs of rapidly evolving governments, with complex service and financial requirements, can realistically be addressed at all by a schedule of regulated procedures derived from a historical model of simple procurement.

**Complex Procurement**

Modern governments are now complex service organisations and major economic players.

Where the practice of procurement is required to obtain optimum value for money from high value, complex arrangements or involves significant risk it is necessary for the practitioner to understand the market dynamics and structure. Similarly, judgment is required as to what kind of selection process should be used, what kind of contract, period of engagement, performance criteria that are contracted, whether there are alternative ways of addressing the needs analysis via leasing, subcontracting or outright purchase, or a framework agreement, are all issues that require professional input. The selection and design of the contractual form to deliver best value for money will depend on professional knowledge about the particular industry and its suppliers, and the ease with which a contractual arrangement can be monitored, evaluated and managed. These are not simple procedural steps: professional judgement is an indispensable part of this modern procurement environment. The three types of procurement (bidding, quoting and direct purchasing) are just not an adequate description of what is required to optimize the outcomes and achieve optimum value for money in modern administration.

Moreover, even procurement of common use items may not be simple in under some methodologies. Also, as government becomes larger and more complex the more often it will need specialised service providers who do not operate in competitive markets. In summary, the traditional model of regulated procurement procedures reflected in many procurement reform proposals, is of declining relevance in the modern context that requires flexibility, innovation and scope for professional judgement and insight to optimize results within a complex business environment.

**Standards and Results Based Procurement**

Some governments and NGOs have adapted their legislative frameworks to explicitly reflect the modern context, and to provide for accountability in an environment in which professional skills rather than prescribed procedures may prevail.

Unlike procedures-based procurement regulation, these frameworks distinguish between procurement practices (the means) and procurement outcomes (the ends), and accountability is assigned to both. To give management effect to the best practice procurement principles, standards are established rather than procedures proscribed.

The difference between the procedures-based and the standards-based models for procurement is essentially the choice of the units of accountability. Instead of regulated procedures, the practice of all but the simplest procurement is undertaken in accordance with a set of regulated standards. An extension of the standards-based model for procurement regulation is the outcomes or results-based model, which adopts the same principles for procurement and also explicitly includes contributions towards the entity’s goals and other government policies.
The standards and results-based approaches have the scope and flexibility to drive many organisational goals as well as stronger governance, largely because of the ways in which accountability is measured and assigned.

These frameworks seek to drive behaviour towards adherence to standards that link procurement directly to good governance and government policy. Results-based accountability weighs the potential for added value against risk, and therefore requires professional skills involving, inter alia, knowledge and judgement.

Procedures-based procurement methodologies drive behaviour towards compliance. The connection between compliance with the procedural rules and any defined objectives in the legislation is largely irrelevant to behaviour.

The consequences of the rule-based, versus standards/results-based model, impact on almost every part of the procurement cycle, and also require alternative models of risk management, audit and governance. The procedures-based model requires compliance audits as underpinning for transparency. Where the audit is of compliance to regulated procedures and not a hierarchy of standards then it can be expected that the quality of transparency will be diminished just as has been reported in surveys of supplier perceptions. In a standards/results-based framework compliance audits are replaced by performance audits.

While a traditional procedures-based approach yields simple, easily defined performance criteria for the purpose of audit, it is not sensible to adopt a sub-optimal management methodology on the grounds that it is simpler to audit.

The practicalities and benefits of the standards/results-based model are being demonstrated by diverse jurisdictions including Chile and New Zealand as well as some NGOs such as the IAEA.

**Training versus Professional Development**

These alternative models for the governance of procurement also have profound implications for training in this activity. Training for regulatory compliance is quite different from training for delivery of best value-for-money outcomes, for which there are requirements of knowledge of law, business practices, market segments, economic development issues, financial management, monitoring, evaluation and reporting, and all aspects of contract management and risk, etcetera. In short, where procurement accountability is defined in terms of procedures, training is largely at a clerical and accounting level. Where accountability is for outcomes and standards the management requirements are for higher levels of education and training procurement professionals.

**Conclusion**

A refocus of procurement legislation and regulation in terms of standards and results rather than procedures would seem to represent a better match for modern entities. This would represent a significant cultural shift in the administration of procurement in these jurisdictions, and would require a major shift in the monitoring, evaluation and audit of this function. It would also have major implications for its professionalization.
These reforms are challenging, but would seem unavoidable if procurement practices are to stay relevant and support higher value-adding activities and the levels of productivity increasingly expected of governments.
Public Procurement Reform in Latin America and the Caribbean

Introduction

The significance of public procurement in the modern state is increasingly being appreciated by governments and development agencies globally, which are recognizing procurement as a key component of public administration that links the public financial system with social and economic outcomes. Managing up to 20% of gross domestic product (OECD, 2002; Thai, 2009), a public procurement system that optimizes value-for-money has wide-ranging national benefits. On the other hand, weaknesses in procurement management both under-deliver social services and increase sovereign risk for foreign investment (Jones, 2002).

Greater middle class expectations have driven many reforms of this function that have occurred worldwide over the past few decades, and have led to the development of new methods of procurement such as framework agreements, e-procurement, outsourcing and public-private-partnerships. These developments have also been leading to a professionalization of procurement practitioners who were, not so long ago, predominately warehouse managers and accounts clerks, but are increasingly tertiary qualified at the diploma and masters levels.

Awareness of the significance of procurement has also emerged, since the late eighties, in relation to the Latin American and Caribbean (LAC) region. The catalyst for this was an expanding middle-class, but also was at least partly the financial crisis beginning during the period 1973-1987, when Latin America’s external debt increased by about US$349 billion, while capital flight from the region amounted to more than US$150 billion1. In the late 1980s, a program of debt relief for the region was initiated, predicated on the adoption of good governance policies, including more efficient procurement, aimed at reducing the sovereign risks for international investment.

As part of this regional program the World Bank pursued, from the 1990s, programs of financial management and procurement reforms, tied to the loan activities of the Bank. Initially, the World Bank’s primary objective was the fiduciary aspects of its loans and credits, but this evolved towards work on country management systems per se. To guide these initiatives two primary instruments have been applied, which have focused on assessing financial management including budgeting, auditing, taxation and reporting, and on outgoings, notably in terms of the public procurement processes of the region. These instruments were the Country Financial Accountability Assessments (CFAAs) and the Country Procurement Assessment Reviews2 (CPARs). All countries in the LAC region have, at various times, undertaken procurement assessment reviews in accordance with this programme, which has required each review to be updated every five years.

2 As a result, current Country Financial Accountability Assessments and Country Procurement Assessment Reports, undertaken by the Bank or jointly with its development partners, are now in place in substantially all Latin American and Caribbean countries with active World Bank portfolios.
The CPARs have sought to diagnose the robustness of a country’s procurement system and, in the process, facilitate dialogue with the government on appropriate reforms. More recently the modus operandi of the CPARs has been re-focused to be driven by country-specific circumstances and requirements, with their nature and scope being based on the type and level of Bank engagement, country priorities and the availability of information from other development institutions and the country itself.

Complementing the CPARs, the Organisation for Economic Cooperation and Development (OECD) has developed a Benchmarking and Assessment Methodology for Public Procurement Systems (OECD, 2006). The OECD/DAC approach includes a semi-quantitative set of performance indicators. Under this framework, base-line indicators seek to benchmark procurement systems against international standards along the four dimensions of: (i) the legal and regulatory framework; (ii) the institutional architecture; (iii) operations management; and (iv) independent oversight. The findings of the OECD/DAC methodology have been consistent with those of the CPARs.

There has now been more than 10 years of experience with these country assessments in this region. During the period 2000 – 2005 CPARs were undertaken or updated in 18 countries in the LAC region. These are public documents that provide a unique database of observations and analyses of the issues associated with the health of procurement management across this region.

Analyses of the findings of these reviews have been reported upon previously in a Brookings report (Brookings, 2009), where it was noted that progress in the reform of public procurement has been slow and often precarious.

Observations have included that while some progress has been made in automating information systems, significant issues remain with respect to a proliferation of procurement regulations and procedures, the lack of a professional procurement cadre, and a focus on transaction-specific ex-ante reviews instead of on ex-post performance monitoring (Brookings 2009, para 18). Notably, excessive procedural formality has been a constant feature in administering procurement across the region.

Based on the results of the CPARs the multilateral development agencies active in this region have been advocating procurement reforms, and for almost all governments these reform proposals have included the simplification and streamlining of procurement regulations and procedures. Other prominent proposals have sought to address the need for training in these regulations and procedures, and the need for stronger procurement coordinating institutions within these governments.

**Objective**

Given the significance of procurement and procurement reform to national development in the region it is crucial that the reform proposals advocated by policy-makers and the development agencies represent effective responses to the issues. The following discussion seeks to re-evaluate the key reform assumptions and objectives, and the underlying procurement model, to consider whether these proposals continue to align with the contemporary needs of these governments, or whether alternatives are available that may better fit modern-day challenges in the region.
The purpose of this paper is therefore to review the reform model itself, rather than to investigate the procurement management issues of the region, which have already been discussed in Brookings (2009). The main focus is on the legislative/regulatory framework as a key to assessing the reform model, and also because this is a major factor behind several other issues such as the lack of professionalization of procurement practice.

While this analysis draws on the evidence from the LAC region it is also more widely applicable in many of its observations and conclusions.

**Analytical Framework**

This analysis has been developed firstly from reviews of CPARs conducted in the region from 2000-2007. An extensive review of these reports has also been analyzed in the Brookings (2009) that assessed the governance of public expenditures in LAC, based on a sample of ten countries (selected to provide a cross section of large and small countries, middle and low-income countries) for the period 2000 to 2005. That report sought to “identify, from a regional perspective: (i) cross-cutting strengths and weaknesses of public financial management and procurement systems; and (ii) the characteristics of, and lessons that can be learned from reform programs.” Many of the observations from that research are drawn on in following discussions.

In addition to the CPARs, this analysis has drawn on reviews of procurement systems of several governments (UK, Australia, New Zealand, Chile) and non-government organisations (NGOs) from outside the region (UNDP, IAEA), European Union policy and working papers, and experiences with technical assistance by the World Bank in the region over the past five years.

The discussion is structured as follows:

First the objectives of public procurement are established: in some country procurement frameworks the procurement objectives are not explicit at all, or have little management meaning, making it ambiguous as to how performance of these frameworks can be assessed. The objectives are a basis of evaluation and form a cornerstone of much that follows. In addition, the performance characteristics that modern governments require of their procurement frameworks are discussed.

From these foundations, the regulatory model that predominates in the region is evaluated in terms of its ability to deliver against modern procurement objectives and procurement performance requirements of government. This regulatory model is compared to standards and results-based management models that are employed by some other governments and major NGOs.

These models have very different consequences for accountability and performance evaluation, and have training requirements that few CPARs or OECD/DAC reviews have fully addressed.

---

3 Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Guatemala, Honduras, Jamaica, Mexico, Panama, Paraguay and El Salvador.

4 Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Guatemala, Honduras, Jamaica, Panama, and Paraguay. Other Country Financial Accountability Assessments and Country Procurement Assessment Reports not included in the sample were also reviewed to confirm the validity of the general conclusions.
The analysis raises significant considerations about whether the development agencies, by promoting only a traditional model of procurement, are keeping pace with the changing needs of modern government, or with leading examples in the LAC region.

**Objectives of Procurement**

The objectives of public procurement are broadly consistent amongst many countries (Thai, 2001; Arrowsmith et al 2000). These objectives are commonly defined at two levels, namely in terms of ‘ends’ and ‘means’. For example, the Government Procurement Experts Group of the 21 Asia-Pacific Economic Cooperation (APEC) countries has developed a set of principles that includes value-for-money, transparency, open and effective competition, fair dealing, accountability and due process (APEC, 1999).

In terms of the ‘ends’, procurement objectives are often defined as achieving best value-for-money in advancing the goals and objectives of the entity. The ‘means’ by which value for money outcomes are achieved have two broad goals – those that help sustain the value for money objective and other goals of the agency, and those that protect the management integrity surrounding the use of public funds.

Thus the ‘ends’ and ‘means’ objectives for public procurement are often articulated (APEC, 1999; IAEA, 2010) in terms such as ‘achieving best value for money outcomes through processes that are transparent and non-discriminatory, that offer equality of access and open competition, and promote innovation’. Frequently an efficiency objective is also included.

The achievement of such objectives should be the performance indicators or success factors for public procurement, against which management accountability should be measured. Instead however, as discussed below, often few if any of these indicators have any operational relevance to the management accountabilities within the procurement systems of the region.

**The Regulatory Framework**

To drive behaviour towards performance criteria defined by the principles, the traditional procurement framework has sought to regulate for best practice procedures for various categories of acquisition, based on value thresholds and broad content. Best practice has been in the context of probity, and a strong focus of the regulations has been on the supplier selection and evaluation procedures.

The procurement rules in the LAC region almost universally reflect this approach, setting out the prescribed procedures for categories of tightly specified contractual requirements. Of ten country reports reviewed, all discussed the rules around tendering and thresholds and the eligibility criteria.

The multiplicity and diversity of detailed regulations are a common theme, which has had a detrimental impact on transparency, efficiency and costs, and result in market segmentation or reduced competition: suppliers find the regulatory environment too difficult to comprehend, and are also discouraged by the significant legal risks. For example, in 2003, 47% of Paraguayan businesses that did not do business with government cited process complexity as the primary reason (Paraguay, 2004) and in Costa Rica contractors indicated that it was easier for them to specialize in bidding for work at a single or a few agencies, the rules of which they knew well (Brookings 2009, para 24).
This issue is not unique to the LAC, and similar observations have been made in the case of the European Union (EU) directives and in the United States: “Further, the detailed nature of the rules is even counter-productive in some ways. It makes them more difficult to understand and apply, as well as requiring changes to existing practices. This may produce inconsistencies in application and also increase the hostility of purchasers. Lack of clarity may also deter firms from enforcement actions”\(^5\). It has also been noted that the bureaucracy of transparency rules can deter competitive firms from participating\(^6\).

Even at the level of centralized national legislation, as shown in Table 1 the volumes of regulations are substantial. The statistics may significantly understate the number of regulations involved because there are, for some countries, additional special Acts addressing, for example, public-private partnerships. This Table also provides, by way of a benchmark, the situation in some OECD countries.

In an effort to mitigate the impact of this proliferation of regulations and procedures most countries have created central organizations to issue regulations, procedures, training and standard documentation, as well as to oversee the performance of procurement operations, formulate policies, and resolve pre-contractual disputes.

These agencies are inherently in conflict situations with many of the ministries insofar as the standardization of micro-processes associated with many of the procurement regulations effectively dictates management procedures to agencies, in areas where agencies will often need scope to apply their own professional insights and judgement, depending on their roles, and their own particular capacities. Moreover, most of these agencies do not have the resources, capacity or the political mandate to perform their duties or to fulfil their mandates.

The lack of standardization of procurement legislation and regulations is recognized as a major issue, and most World Bank CPAR reform programs of the region during this period advocated the simplification of the legal/regulatory framework. However, this regulatory multiplicity is only one issue.

In drafting their legislative frameworks for procurement many jurisdictions worldwide explicitly include the core objectives for the governance of public procurement, often consistent with the above, such as transparency, value-for-money and efficiency. These inclusions usually reflect similar management objectives for procurement. Common procurement policies also are widespread between jurisdictions, notwithstanding variances in operational practice.

---


Table 1
Procurement Regulation

<table>
<thead>
<tr>
<th>Country</th>
<th>Guatemala</th>
<th>Honduras</th>
<th>El Salvador</th>
<th>Nicaragua</th>
<th>Costa Rica</th>
<th>Panama</th>
<th>Colombia</th>
<th>Venezuela</th>
<th>Ecuador</th>
<th>Bolivia</th>
<th>Peru</th>
<th>Chile</th>
<th>Australia</th>
<th>UK</th>
<th>New Zealand</th>
</tr>
</thead>
<tbody>
<tr>
<td>Articles Law</td>
<td>108</td>
<td>158</td>
<td>175</td>
<td>117</td>
<td>133</td>
<td>81</td>
<td>131</td>
<td>105</td>
<td>65</td>
<td>70</td>
<td>37</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Articles Reg</td>
<td>80</td>
<td>275</td>
<td>77</td>
<td>170</td>
<td>227</td>
<td>375</td>
<td>92</td>
<td>194</td>
<td>165</td>
<td>195</td>
<td>298</td>
<td>108</td>
<td>24</td>
<td>49</td>
<td>58</td>
</tr>
<tr>
<td>Total</td>
<td>188</td>
<td>433</td>
<td>252</td>
<td>287</td>
<td>340</td>
<td>508</td>
<td>173</td>
<td>325</td>
<td>270</td>
<td>368</td>
<td>145</td>
<td>25</td>
<td>50</td>
<td>59</td>
<td></td>
</tr>
</tbody>
</table>

Source: Inter American Development Bank for OECD/DAC Task force on procurement April 2010; Australian Government (2001, 2008); England and Wales, Northern Ireland (2006; New Zealand (2006). NOTE: Theses figures include all the articles (final and transitory ones, which usually are not numbered) of the national legislation, excludes treaties and guidelines.

However, within LAC, these objectives almost invariably are not established as a foundation for the regulations. In some cases these are not explicit at all, and where they do appear they are rarely adequately supported by the articles of the legislation and may also include objectives related to program management or other goals, rather than the governance of procurement.

Instead, the procurement legal frameworks of LAC are usually comprised of detailed sets of regulated administrative steps or procedures, with no obvious connection to the procurement principles even where these exist. Under this construction, deleting principles or objectives of procurement, such as transparency or efficiency, from the legislation would often have no consequences for the procurement legislation, regulations, governance or procedures, or indeed the outcomes. It also seems that the performance criteria of procurement management are largely unrelated to the principles or objectives of procurement itself, with the implicit assumption being that the achievement of one set of outcomes (compliance) will deliver another (performance).

The lack of nexus between the procurement objectives and the procedures leads to conflicts between procedures and objectives without any mechanism to guide their resolution. For example, several governments of the region have, in seeking to increase the efficiency of the procurement process, reduced the necessity to go to tender and/or have reduced the open time for tendering: both of these initiatives are likely to reduce transparency, competition and value-for-money. Other efforts to improve efficiency and reduce procurement bottlenecks have included the creation of secondary procedures to short-circuit the primary procedures through the use of special or emergency regulations: this is accomplished by seeking exemptions, which in a number of governments can only be awarded by the Executive or Congress. “In some LAC countries, as much as 50% of the total procurement is regulated under special regimes. Most of these special regimes were necessary because the existing national procurement laws were inadequate and lacked required speed and flexibility” (Brookings, 2009, para 141).
Conflicts between procedural rules and procurement principles have also arisen within the EU context. For example, “many rules governing the conduct of competitions can prejudice value for money” (Kruger, 2009).

Many reform proposals have been provided within the CPARs to address these problems by streamlining, standardizing and simplifying the legislation and the regulations. However, these solutions should be developed from an understanding of the causes: in particular whether this regulatory environment has arisen primarily from a lack of guidance and coordination in the (civil law) legislative drafting process, or from other factors such as the regulation per se of procurement procedures.

A key issue is whether the needs of rapidly evolving governments, with complex service and financial requirements, can realistically be addressed at all by a schedule of regulated procedures that are expected to deliver the procurement objectives and performance requirements for numerous public entities. The answer to this question cannot be found within the regulations themselves, but by understanding the needs of modern government and the characteristics of the supply markets that they operate within.

**Simple versus Complex Procurement**

Identifying public procurement with a set of regulated procedures has its historical origins in times when government procurement requirements were largely about basic administrative supplies, mostly goods and a few relatively simple services. Major and minor works were generally performed “in house” through the use of day labour supervised by government engineers. The presumption that procurement could be codified as administrative procedures was accurate within this context where it was concerned with procurement of simple low value standardized goods and services in competitive markets, or markets with low cost of entry.

For example, the procurement rules often define just three modes of supplier selection: for contract values that are expected to exceed the tender threshold an open tendering process is required, while for lesser values a quoting process or direct purchase process may be defined. Negotiations are generally locked out or narrowly defined, requiring requisitions to be specified in advance as a one-off exercise with little opportunity for modification. Similarly UNCITRAL Model law 1994 Article 18 requires goods and construction contracting to be strictly via the tendering procedure with minimal interaction between buyer and seller.

Modern governments are now complex service organisations and major economic players. Table 2 shows the features of this changing environment in which the clerical functions of the past are being overtaken by new professional skill sets, and technology.
Table 2
The Transformation of the Nature of Public Procurement

<table>
<thead>
<tr>
<th>Historic Simple Procurement</th>
<th>Modern Complex Procurement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Simple processes</td>
<td>Complex contracts &amp; relationships</td>
</tr>
<tr>
<td>Largely goods</td>
<td>Complete service solutions</td>
</tr>
<tr>
<td>Sourcing considerations</td>
<td>Strategic business decisions</td>
</tr>
<tr>
<td>Low value, low risk</td>
<td>High value, high risk</td>
</tr>
<tr>
<td>Back office function</td>
<td>Central to strategic management</td>
</tr>
<tr>
<td>Warehousing</td>
<td>Just-in-time</td>
</tr>
<tr>
<td>Basic skills</td>
<td>High level skills</td>
</tr>
</tbody>
</table>

Source: Schapper et al (2009)

Where the practice of procurement is required to obtain optimum value for money from high value, complex arrangements or involves significant risk it is necessary for the practitioner to understand the market dynamics and structure (an invitation-to-tender process in a monopoly or monopolistic market will be meaningless). Similarly, judgment is required as to what kind of selection process should be used, what kind of contract, period of engagement, performance criteria that are contracted, whether there are alternative ways of addressing the needs analysis via leasing, subcontracting or outright purchase, or a framework contract, are all issues that require professional input. The selection and design of the contractual form to deliver best value for money will depend on professional knowledge about the particular industry and its suppliers, and the ease with which a contractual arrangement can be monitored, evaluated and managed. Selection is made considering the nature of the supply market itself, the maturity of suppliers to deliver complex packages, the length of supply chains, whether inventory is required or just-in-time supply is satisfactory, whether significant economies of scale are available, whether suppliers are required to tool-up, etc. These are not simple administrative steps or even skills that can be imparted by training alone but require judgment and experience from professional procurement officials. Professional judgement is an indispensable part of this modern procurement environment. The three types of procurement (tendering, quoting and direct purchasing) are just not an adequate description of what is required to optimize the outcomes and achieve optimum value for money in modern administration; while the regulations and procedures that described the administration for the simple processes of Column 1 in Table 2 are not adequate for Column 2, and do not address the governance standards or outcomes required of this environment.

Examples can be found at all stages of the procurement cycle: for example in relation to the common prohibition on post-tender negotiations “contracting authorities that carry out particularly complex projects may without this being due to any fault on their part find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer” (Kruger, 2009). Also “Arguments in favour of extensive post tender negotiations before the contract award could be based on the partial need of the contracting entity to adapt join design and project schemes to the subsequent contract commitment. A strict procurement regime prohibiting flexibility in this respect may mean that
the adaptation must be done after conclusion of the contract by variation orders or worse renegotiation of contents and scope” (Kruger, 2009). Even for simple procurement it is sometimes difficult to entirely eliminate the role of professional judgement, while for complex procurement professional judgement is required and even desirable throughout the supply chain as shown in Table 3.

**Table 3**

**Procurement judgement in Public Procurement assuming good governance**

<table>
<thead>
<tr>
<th>Procedural Step</th>
<th>Simple goods (e.g. office stationary)</th>
<th>Complex goods or services, civil works</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identification of need</td>
<td>Generally minimal – inventory accounting procedure</td>
<td>Extensive room for professional judgement. Subjectivity in identifying extent and characteristics of “need”.</td>
</tr>
<tr>
<td>Registration of suppliers</td>
<td>Minimal</td>
<td>Minimal (but may be discriminatory)</td>
</tr>
<tr>
<td>Specification of requirements</td>
<td>Some professional judgement</td>
<td>Extensive depending on complexity of objectives</td>
</tr>
<tr>
<td>Market research</td>
<td>Minimal</td>
<td>Extensive professional judgement in TORs of research</td>
</tr>
<tr>
<td>Contract Planning</td>
<td>Some</td>
<td>Extensive professional judgement depending on market structure, needs analyses, supply chain management.</td>
</tr>
<tr>
<td>Contract design and methodology</td>
<td>Significant professional judgement between contracting types</td>
<td>Extensive professional judgement between contracting types</td>
</tr>
<tr>
<td>Costing and budgeting</td>
<td>Minimal</td>
<td>Extensive professional judgement</td>
</tr>
<tr>
<td>Pre-qualification</td>
<td>Minimal</td>
<td>Extensive professional judgement in the pre-qualification criteria</td>
</tr>
<tr>
<td>Quotes and catalogue search</td>
<td>Minimal</td>
<td>Minimal</td>
</tr>
<tr>
<td>Evaluation of bids</td>
<td>Some</td>
<td>Extensive interpretation of weightings and pre-requisites</td>
</tr>
<tr>
<td>Complaints and appeals management</td>
<td>Some</td>
<td>Some</td>
</tr>
<tr>
<td>Contract variations</td>
<td>Minimal</td>
<td>Extensive case-by-case</td>
</tr>
<tr>
<td>Verification and quality control</td>
<td>Minimal</td>
<td>Extensive case-by-case</td>
</tr>
<tr>
<td>Review and monitoring</td>
<td>Minimal</td>
<td>Extensive interpretation of technical standards</td>
</tr>
<tr>
<td>Audit and reporting</td>
<td>Minimal</td>
<td>Extensive interpretation of standards</td>
</tr>
</tbody>
</table>
Furthermore, even procurement of common use items may not be simple in under some methodologies more commonly used today: for example procurement of bond paper from a framework agreement would be conventional procurement but the development of a framework agreement for bond paper may require special knowledge of the subject rather than additional administrative procedures. Also, as government becomes larger and more complex the more often it will need specialised service providers who do not operate in competitive markets.

In summary, the traditional model of regulated procurement procedures reflected in many procurement reform proposals, is of declining relevance in the modern context that requires flexibility, innovation and scope for professional judgement and insight to optimize results within a complex business environment.

**Risk**

On the other hand, opening the regulatory framework to admit professional judgement might appear to pose risks to good governance insofar as it implies scope for discretion. For example:

- “The higher the degree of regulatory discretion, the higher the incidence of bribery of officials” (Kaufmann, 2006)
- “Whenever regulatory officials have discretion, an incentive for bribery exists” (Rose-Ackerman, 1999)

The same tension exists not only within developing countries but in almost all procurement environments. “A key problem is that whenever some discretion remains there remains scope for hidden discrimination. Discretion exists, for example, in deciding whether firms are technically qualified, even if, as under the classic sector directives, the factors that may be considered, such as qualifications of personnel, are exhaustively stated. For example, judgment is inevitable in deciding whether problems in performing previous contracts are sufficiently serious to warrant exclusion” (Arrowsmith, 2002).

The risks are real and cannot be disregarded. The response to these risks has, within the LAC and elsewhere, been to seek to minimize the scope for professional judgement in the procurement framework with an ever-more comprehensive rule set that prescribes processes (and their exemptions) in as many circumstances as possible. A standardised rule-set for governance control may be appropriate for simple procurement (see also Stromborn, 1998). Perversely this approach to risk management may also be at least partially self defeating: “the formal rules governing public procurement can make communication among rival companies easier, promoting collusion among bidders” (OECD 2008).

Equally however, the extensive application of professional judgment is a necessity within the modern practice of procurement: the needs of modern government are for public procurement to deliver the objectives and performance criteria such as transparency, competition, fair-dealing, and probity, while obtaining optimum value-for-money from complex environments. Similarly, a performance management approach has been advocated by the OECD/DAC Development Assistance Committee (2003), which described procurement and its governance in terms of strategic mainstream management.

---

8 Or whether, indeed, they are the contractor’s fault.
In other words, risk management through the minimisation of professional judgement or discretion may have little to do with the management of risks to the intended results: where procurement is defined in terms of procedures, then risks will be defined in terms of procedural compliance. Where procurement is defined in terms of the achievement of best value for money outcomes, then risks will be defined in terms of standards of management and results.

Modern management practices would address the risk management requirements on a cost/benefit basis\(^9\) and focus primarily on the risks to standards of management and results.

**Standards and Results Based Procurement**

Some governments and NGOs\(^{10}\) have adapted their legislative frameworks to explicitly reflect the modern context of Table 2, and to strengthen accountability in an environment in which professional skills rather than prescribed procedures may prevail. The same direction has been proposed for the procurement environment established for the EU: “it is necessary to consider a more radical approach that moves away from laying down contract award procedures. This is because there are mechanisms other than detailed award procedures that can secure compliance with Community objectives\(^{11}\). Alternatives can concentrate either on the *principles* underlying the detailed rules, notably transparency, without specifying the means for implementing them, or can focus directly on the *outcomes* sought through these principles” (Arrowsmith, 2002).

However, procurement principles *per se* are often inadequate as management parameters or as the criteria for accountability or performance. To give day-to-day management effect to the procurement principles, *standards* are established; much like are common in the public and private sector financial and audit frameworks in many countries. The standards provide measures of accountability for the adherence to the principles: this is the *standards-based* model as discussed below.

The difference between the procedures-based model and the standards-based model for procurement is essentially the choice of the unit of accountability. Instead of regulated *procedures*, the practice of all but the simplest procurement is undertaken in accordance with a set of regulated *standards*. The role of the legislation and regulations is then directed towards mandating performance and management standards rather than management procedures, where the standards constitute the measures for the principles. A procedures-based model may be focused on the same principles and seeks the adherence to these indirectly through proxies, whereas a standards-based model seeks to measure adherence more directly.

---

\(^9\) For example the UNDP applies a procurement risk management tool for this purpose.

\(^{10}\) For example, Australia, New Zealand, UK, APEC, IAEA, UNDP, also see Chile discussed below.

\(^{11}\) Recognition of the possibility of effective alternatives to detailed rules is one reason why national governments have moved away from them.
This distinction can be illustrated as a Kelsen hierarchy as shown in Figure 1 where, within the procurement framework, the core procurement principles and objectives are at the apex followed by performance standards, ethical standards and codes of conduct. The third tier represents the management processes, and at the lowest tier are the procurement guidelines and case studies. Within the LAC the regulations focus on the third layer, which makes the first and second layers largely redundant.

This is observed in the legislation throughout the region - in the case of the legislation and regulations of eight countries reviewed, none defined the meaning or scope of any of the core procurement principles, and none articulated these principles in any substantive way in their preambles or within the regulations themselves. In management terms the articulation of the principles and the standards is indeed irrelevant if management has no discretion other than to follow the defined procedures: the ‘means’ become the ‘ends’. Evidence for this comes to light from the proliferation of regulations as shown in Table 1, and from the individual reform proposals for the region. For example a review of Colombia (2001) reported that “the proliferation of regulation has brought about different interpretations and procurement inconsistent with the principles of economy, efficiency and transparency”.

The effect of regulating the third tier rather than the first and second tiers is profound – regulation of standards leaves those responsible for the management of procurement accountable for principles, while regulation of procedures shifts accountability for procurement performance standards (except for compliance) to the legislative authority (usually Congress).

The roles of the procurement principles in this model are not just to define the intent of procurement legislation and regulation, but also to establish the basis for accountability and performance assessment for the conduct of procurement. The procurement principles should guide the drafting of procurement legislation, the regulations, procurement policies and procurement guidelines applicable across
ministries and within departments or organisations, and are generic and independent of the particular responsibilities of any department. Within this framework the legislation and regulations are focused on the principles (rather than administrative procedures) against which standards must be maintained and evaluated. It is noteworthy that international corporations in many cases (for example BHP Billiton, 2010) broadly adopt similar core principles; while in at least one LAC government corporation there are different procedures and policies between different functions within the same entity, without any coherent support of, and scarcely any mention of, any core principle.

Where these procurement principles are not assigned a lead regulatory status or standard, then a consequence is that every possible activity must be codified into law. The effect of this is to multiply the number of regulations. Those that cannot be treated in this way are likely, by the nature of the regulations, which define permissible procedures, to be eliminated as management options. Yet it is these very options that are increasingly being drawn on in some OECD countries in the quest for ever-greater value from their supply chains. A flexible, innovative and effective bureaucracy is unlikely to emerge under these circumstances, but rather, regulations can become, perversely, the means to legitimize behaviours that contradict the intent of the legislation. For example, in one LAC organisation additional procurement regulations were regularly created as a means of immunizing officials from adverse audit findings: audit could not make a finding against them because they were following the regulations. In that case, if a new administrative shortcut were required then a new regulation would be created to legitimize it: the regulations were essentially independent of any principles. In no case in LAC except for Chile and the Panama Canal Authority (PCA) were comprehensive procurement principles defined and applied in management terms.

The consequences of the rule-based, versus standards-based model, impact on almost every part of the procurement cycle.

Finally, it is noted that LAC is mostly a civil law environment in which procedural formalities have traditionally been observed rather strictly (Trepte, 2004). Of the civil law environments however, the degree of regulatory prescriptive burden and complexity depends very much on local tradition and is not an inevitable consequence of the civil law environment: the standards and results-based frameworks are not excluded under civil law. An alternative approach also within the Napoleonic/Roman model is that of the EU, which is procedures-bound but more focused on rules that are principles-based. Even within the LAC region procedural rigidity is set aside when required – for example in relation to the Panama Canal

---

**Results-Based Procurement in Chile**

The application of Chile’s procurement law is progressive at an international level and establishes principles such as value-for-money and total cost of ownership. It has few of the procedures that are found in most other legislation in LAC, as shown in Table 1. Moreover, the conduct of this law is also subject to the Administrative law which is supported by effective internal controls, and which imposes high-level standards similar to those from APEC. “What differentiates Chile, which has a highly competent internal control function, is that this activity is not viewed as ensuring compliance, but as producing important management information” (Brookings 2009, para 100). Accountability in terms of the standards and results is held as paramount in the hierarchical fashion of the Kelsen framework.
Authority where there is extensive delegation and high levels of professionalism while, as noted below, Chile has adopted a results-based management approach rather than a prescriptive rule set.

**Results-based Management**

An extension of the standards-based model for procurement regulation is the outcomes or results-based model, which adopts the same principles for procurement and also explicitly includes contributions towards the entity’s goals and other government policies. Accountability is not only in terms of adherence to standards (usually associated with the ‘means’), but also to the advancement of the goals of the organisation (the ‘ends’). A results-based management approach includes identification and analysis of risk and opportunity as a basis for procurement action to achieve defined outcomes; and direct accountability for both process and outcomes. The results-based management approach also seeks to positively encourage innovation from its suppliers. Invitations to tender or requests for proposals focus primarily on specifying what outcomes are being sought rather than strictly specifying inputs or processes.

The practicalities of the Standards-based and Results-based models for the region are already being demonstrated by Chile. Notably Chile has not adopted the traditional reform model, but is shifting to a results-based accountability framework, and has become the standout performer in goods and services procurement in the region. “Possibly the biggest single factor in Chile’s improved public sector performance is its recognition that reform starts with a change in management focus on inputs to a focus on outputs, outcomes and impacts. Other LAC countries would benefit from following Chile’s example in this respect” (Brookings 2009, para 175).

The Standards and Results-based approaches\(^{12}\) have the scope and flexibility to drive many organisational goals as well as stronger governance, largely because of the ways in which accountability is measured and assigned.

**Accountability and Control**

Principles-based methodologies seek to drive behaviour towards adherence to standards that link procurement directly to good governance and government policy. Results-based accountability weighs the potential for added value against risk, and therefore requires professional skill sets involving, inter alia, knowledge and judgement. Professionalism and effective management information and reporting systems become key determinants of clear delegation of authority and corresponding accountabilities.

Procedures-based procurement methodologies drive behaviour towards compliance. The connection between compliance with the procedural rules and any defined objectives in the legislation is largely

---

12 Such as in Chile, New Zealand, IAEA.
irrelevant to behaviour. The connection between the procurement legislative preamble and the specific roles or objectives of a procuring agency is often even more tenuous. A procedures-based approach requires accountability for the process and none for whether the governance standards were actual outcomes: under this model the primary governance principles are neither monitored nor managerially relevant.

The role of audit is similarly differentiated between these models. A primary role of audit in any government is to ensure transparency as one of the pillars of public accountability. Transparency in procedural-compliance is fundamentally of a different quality in terms of providing meaningful oversight information, from transparency in standards-compliance. Audit in LAC generally has a singular focus on procedural compliance. The exception is, as already noted, the case of Chile where internal controls and accountability are at least partially principles and results-based.

This means that audit cannot demand accountability against the core principles. For example there were cases in the CPARs (Uruguay, CPAR 2005, P7; Peru, CPAR, 2005, P37) where the internal procedures for supplier registration were not subordinate to procurement principles and significantly compromised competition and fair dealing. Where the audit is of compliance to regulated procedures and not a hierarchy of standards for the principles then it can be expected that the quality of transparency and accountability will be diminished just as has been reported in surveys of supplier perceptions.

**Performance Assessment**

Management performance in a principles or results-based approach are assessed by measures of results or outcomes rather than in terms of a one-dimensional concept such as ‘compliance’. Performance measures are developed in terms that directly target the standards and objectives and in formats consistent with other elements of public administration and financial management, such as: reporting the significant achievements from the year just finished, why these results, the opportunities and blockage encountered that impacted on performance, linked to the entity’s business objectives, and establishing targets for the forthcoming reporting period. Outcome measures can include quantitative and qualitative aspects. For example, simple measures of the basic concept of ‘efficiency’ include: transaction costs versus benchmarks, transaction types versus targets, buyer satisfaction index, savings and cost-avoidance targets versus actual, non-cost benefits targeted versus outcomes. Other performance measures can be adopted for ‘effectiveness’, ‘value-for-money, ‘transparency’ etc. Such measures form the basis for accountability in a standards or results-based system. These measures should be able to address questions such as ‘were the objectives of the organisation met?’ or ‘did the organisation receive best value for money?’ or ‘was this action undertaken in the most efficient manner?’.  

These measures cannot form the basis for accountability in a procedures-based approach, where accountability is to compliance. For LAC the organisation, systems, policies, rules and procedures and capabilities supporting procurement are almost entirely transaction focused. Thus there is fundamentally the same approach applied to the management of each transaction regardless of the value, risk or context. The only scope for efficiency improvement is to reduce the timelines for regulated procedures. This indeed is what has happened in several countries in the region (e.g. Peru, CPAR 2005), which have,
as already noted, reduced the time required for tender advertising in ways that risk the prospects for high quality bids and transparency.

While the procedures-based approach yields simple, easily defined performance criteria for the purpose of audit, it is not legitimate to adopt a sub-optimal management methodology on the grounds that it is simpler to audit.

Training versus Professional Development

Almost all reform reports for procurement in LAC emphasise the need for training. In most cases the shortage of trained personnel is identified with the lack of training itself: the focus in these cases is on the supply side. Training that may sometimes be on offer is often sporadic or spot training and training budgets for procurement are usually non-existent. However, while these issues are important there is often little recognition of the human resource environment for these officials other than in terms of the pay scales. Attrition of procurement officials seems often to be perceived as an externality that is to be addressed by expanding the training numbers.

On the other hand, by regulating the procedures rather than the standards, the higher value-adding processes that require procurement professionals are not recognized, and professionalism and career-path development is undermined. Procurement is perceived mostly in terms of simple procurement. In one jurisdiction procurement officials reported that their only role was to ensure procedural compliance, which was an adversarial role, and that their roles had no career paths but included all the liabilities of any problems. All officials surveyed were seeking alternative positions.

Typically, procurement reform proposals merely refer to training, without a definition of needs, and seem not to acknowledge the major distinction between the skills for simple procurement (a printer ink cartridge) versus complex procurement (a transport infrastructure). Under the circumstances where procurement is perceived in terms of procurement of the nineteenth century, the need for training, albeit seemingly acute, is a relatively simple requirement, and increasingly being overtaken by technology. Indeed the application of technology to this area is trivializing procedures-based training requirements of simple procurement. Professional procurement officials are not, and never have been, required for this sort of procurement which accounts for large numbers of transactions but typically less than one fifth of the value of government procurement.

Usually the context is for training in terms of procedures and regulations. Training requirements are identified in terms of numbers of personnel, and sometimes these numbers are substantial. For example Peru has targeted more than 40,000 officials for procurement training (Peru, 2005, P29). However, the notion of training procurement officials in the LAC context sometimes seems misplaced, reflecting the regulated administrative procedures that largely define this discipline in the region. Training needs are perceived in terms of the (largely rote) learning of the procedures. Where procurement officials need responsibilities to manage higher value-adding functions such as described above, requiring professional judgment, market knowledge and the operations and applicability of alternative contracting methodologies including complex service solutions, outsourcing, in-sourcing and even public-private partnerships, training does not suffice, and also the numbers required are much smaller.
Instead such officials would, if the regulations permitted the application of these skills, require knowledge of law, business practices, market segments, economic development issues, financial management, monitoring, evaluation and reporting, and all aspects of contract management and risk, etcetera. Similarly, Snider and Walkner (2009) observed that “procurement is a highly complex enterprise that entails the overlap and interplay of a variety of contexts – management, business, politics and technology, to name a few”.

In short these professionals are required to be educated rather than trained. Clerical officials responsible for simple procurement need training. More senior procurement officials responsible for complex procurement need professional development.

**Summary and Conclusions**

Modern requirements of government that are focused on productivity, efficiency and social and economic goals have been transforming the role and complexity of public administration, and the regulation of procurement. The procedures-based regulatory model for procurement in LAC, suitable for simple procurement, is increasingly a mismatch for the requirements of the region. The focus of the regulations in the region has also prevented the exploitation of value-adding procurement tools common elsewhere, reduced the potential for innovation, and restricted procurement to a simplistic model that can weaken accountability and undermine the development of a cadre of professional procurement officials. Under this model, audit and accountability are compliance based, procurement is simplistic and training is elementary. Where regulation is not explicitly principle and objectives driven, the assessments of outcomes is non-existent even though compliance prevails.

A refocus of procurement legislation and regulation in terms of standards and results rather than procedures would seem to represent a better match for the growing needs of the region. This would represent a significant cultural shift in the administration of procurement in these jurisdictions, and would require a major shift in the monitoring, evaluation and audit approach for this function. It would also have major implications for the professionalization of this function. These changes are well underway in Chile with strongly positive results.

These reforms are challenging, but would seem unavoidable if procurement practices are to stay relevant and support higher value-adding activities and the levels of productivity increasingly expected of governments.
References


Arrowsmith, S. (2002); European Law Review


England and Wales, Northern Ireland (2006), The Public Contracts Regulations No 5.


Krüger, K (2009); “Ban-on-negotiations in tender procedures: Undermining the best value for money” in International Handbook of Public Procurement edited by K.V.Thai CRC Press

New Zealand (2006) Mandatory Rules for Procurement by Government Departments


