

**PUBLIC PROCUREMENT IN PAKISTAN AND WTO GOVERNMENT
PROCUREMENT AGREEMENT (GPA):
A COMPARATIVE ANALYSIS**



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Dedications:

I dedicate instant research and LLM Degree to my late father **Mr. Abdul Jabbar Advocate** who advised me to have a law graduate degree to supplement my engineering degree.

Declaration

I Muhammad Zubair do hereby declare that this dissertation is original and has never been presented in any other institution. I further declare that any secondary information used in this dissertation has been duly acknowledged.

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Acknowledgement

I do hereby acknowledge the motivation and stimulation caused by my Professor Dr. Aziz-ur-Rehman Director School of Law, Quaid-e-Azam University Islamabad in his capacity as former Chairman of the Law Department of Faculty of Shariah and Law International Islamic University Islamabad who proposed the idea of comparative analysis of the WTO GPA and Public Procurement Regulatory Framework of Pakistan.

I further acknowledge the support of Professor Dr. Asim Iqbal, Head of Law Department of National University of Sciences and Technology Islamabad who supported me as the former Chairman of Law Department of International Islamic University Islamabad in maturing the idea of this research.

I further acknowledge the kind support and guidance of Dr, Fida Muhammad Wazir, former Managing Director PPRA who ever appreciated me to take such measures for strengthening the procurement regulatory infrastructure of Pakistan.

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List of Abbreviations

ECC: Economic Coordination Committee

E-PADS: Electronic Pakistan Acquisition and Disposal System

EVs: Electric Vehicles

FBR: Federal Board of Revenue

FIDIC: Fédération Internationale Des Ingénieurs-Conseils (International Federation of Consulting Engineers)

FTA: Free Trade Agreement

GATT: General Agreement on Tariffs and Trade

GATS: General Agreement on Trade in Services

GDP: Gross Domestic Product

GFR: General Financial Rules

GLCN: Global Lead City Network

GPA: Government Procurement Agreement

ITO: International Trade Organization (proposed but never established)

LCBS: Least-Cost-Based Selection

M&E: Monitoring and Evaluation

MFN: Most-Favored Nation

NDC: Nationally Determined Contributions

NEPRA: National Electric Power Regulatory Authority

NGRA: National Gas Regulatory Authority (now dissolved)

NT: National Treatment

OECD: Organization for Economic Co-operation and Development

OGRA: Oil and Gas Regulatory Authority

PEC: Pakistan Engineering Council

PEMRA: Pakistan Electronic Media Regulatory Authority

PIDC: Pakistan Industrial Development Corporation

PNRA: Pakistan Nuclear Regulatory Authority

PPRA: (Federal) Public Procurement Regulatory Authority

PP-Rules: Public Procurement Rules

PTA: Pakistan Telecommunication Authority / Preferential Trade Agreement

QBS: Quality-Based Selection

QCBS: Quality- and Cost-Based Selection

RTA: Regional Trade Agreement

SMEs: Small and Medium Enterprises

SMGs: Seoul Metropolitan Government

SOEs: State-Owned Enterprises

SRO: Statutory Regulatory Order

TRIPS: Trade-Related Aspects of Intellectual Property Rights

UK: United Kingdom

USA: United States of America

USAID: United States Agency for International Development

VfM: Value for Money

WIPO: World Intellectual Property Organization

WTO: World Trade Organization

List of Legal Cases

- 7Cs Corporate Services v. Oil and Gas Development Authority, 2017 PLD 117 (Islamabad).
- Ahmad Mehmood v. Government of Punjab through Chief Secretary and Others, PLD 2019 Lahore 206.
- Ahmar Iqbal v. Ministry of Energy (Petroleum Division), 2020 MLD 1849 (Islamabad).
- Hafeez Ullah Lehri v. National Highway Authority, 2024 CLC 1370 (Islamabad).
- ICC Private Ltd. v. Ministry of Energy (Petroleum Division) through Secretary Civil Secretariat Islamabad, 2023 SCMR 360 (Supreme Court of Pakistan).
- Joint Venture of Messers Kamal Nasir Khan (Pvt) Ltd. and Another through Authorized Representatives v. National Highway Authority through Chairman and Others, 2023 CLC 1657 (Islamabad High Court).
- KAC-RMS (Joint Venture) v. National Highway Authority, 2024 PLD 213 (Islamabad).
- Messer Power Construction Corporation of China Ltd. Through Authorized Representative v. Pakistan Water and Power Development Authority through Chairman WAPDA and Two Others, 2017 PLD 83 (Supreme Court of Pakistan).
- Messrs. Sky Overseas through Authorized Attorney v. Federation of Pakistan through Secretary Revenue Division and Four Others, 2019 PTD 1964 (Sindh High Court).
- Mrs. Humaira Imran v. Government of Pakistan, Ministry of Defense Production, 2019 PLD 467 (Sindh High Court).
- Ms. Ghani Gases Limited v. Federation of Pakistan and Two Others, PLD 2016 Lahore 207.
- Muhammad Azhar Siddique v. Federation of Pakistan, 2024 CLC 744 (Lahore High Court).
- Muhammad Hanif and Company v. Chief Engineer North, PWD, 2023 CLC 443 (Islamabad High Court).
- M/s. Kulja Industries Ltd. v. Chief General Manager W.T. Project BSNL and Others, 2014 SCMR 1748 (Supreme Court of India).
- Non-Transparent Procedure for Purchase of 150 Locomotives by Ministry of Railways Resultantly Causing 40 Billion Losses to the Public Exchequer, 2012 SCMR 226.
- Pakistan International Airlines and Others v. Tanveer ur Rehman and Others, PLD 2010 SC 676 (Supreme Court of Pakistan).

Taj Medicos through Proprietor v. Public Procurement Regulatory Authority, 2021 CLC 472 (Karachi High Court Sindh).

WSKB Operator (Pvt.) Limited v. National Highway Authority through Chairman and 20 Others, 2023 MLD 674 (Islamabad High Court).

Xiamen Golden Dragon Bus Company Limited v. Sindh Infrastructure Development Company, 2021 YLR 1886 (Karachi High Court Sindh).

Abstract

Considering the exemption to the government procurements from applicability of the provisions of the multilateral international agreements such as the GATT, GATS and TRIPS, the WTO introduced a plurilateral Agreement on Government Procurements (GPA) with the option to acceding to the instrument as per the will of the WTO member states. Like other instruments the very objective of the GPA is to eliminate the barriers to international trade based on the core principle of non-discrimination along with supporting principles of fairness, impartiality and transparency. However, GPA intentionally ignored the most essential objective of procurement which is obviously “value for money” as an essential element of sustainable procurement. GPA claims to address the constraints of developing countries; however, such claim is to the extent of some transitional measures for a limited period. It was expected that the WTO GPA is the yardstick for improving the national procurement regimes, however, after a comprehensive and comparative analysis of the WTO GPA and Public Procurement Regulatory Framework of Pakistan, it revealed that provisions of the later are comparatively stringent though need to be elaborated further in the form of regulations and procurement guidelines for effective application and implementation of these provisions. Both the WTO GPA and Public Procurement Regulatory Framework of Pakistan lacks the essential aspect of sustainable procurement, protection of intellectual property rights during public procurement, technology transfer. Moreover, both the frameworks lack distinguishing between national and international tendering; and allied mandatory and guiding principles to invoke the international tendering. Both the frameworks need to be revised by the experts of interdisciplinary fields of engineering, science and technology having through understanding of the national and international economic legislations.

Chapter 1

Introduction

1.1 Thesis Statement

Federal Public Procurement Regulatory Framework of Pakistan is a concise piece of legislation that contains stringent provisions as compared to the WTO Government Procurement Agreement, however, needs to be elaborated both by the essential amendments in Public Procurement Rules and by devising comprehensive regulations, at par with international standards, to win the confidence of national and international trade market.

1.2 Significance of Study

Public Procurement is a significant portion of GDP and taxpayers' contribution; hence Government is expected to carry out the public procurement processes efficiently by ensuring value of money. There are only twenty-two (22) parties comprising forty-eight (48) member states who are party to the "WTO Agreement on Government Procurement"; and all these countries are mostly the developed countries of three (03) continents of North America, Australia and Europe. WTO couldn't convince the remaining states to become party to the Agreement, and most of the remaining states are enjoying the observer status, because WTO has not succeeded in considering the national constraints of the least developed or developing countries regarding international trade.

During last two decades, the substantial Procurement Regulatory Framework of Pakistan consisted of Public Procurement Rules, 2004 containing few basic principles and concise procedure for competitive bidding along with Consultancy Service Regulations, 2010. Hence, the Federal PPRA couldn't accomplish its regulatory framework from planning to close out of the contract. There is a huge room of improvement in the existing procurement regulatory infrastructure by

incorporating the new provisions, and elaborating the existing ones, by introducing the new amendments, and developing procurement regulations and regulatory guides.

During our research, we will be able to identify the deficit areas of the international instruments and national regulatory infrastructure of the public procurement, with appropriate recommendations for improvement, which will pave the way for winning the confidence of the international and national trade market.

1.3 Research Questions:

1. Whether the “WTO Agreement on Government Procurement” is a comprehensive international instrument developed considering the national constraints of developing countries.
2. Whether the “WTO Agreement on Government Procurement” and the Federal Public Procurement Regulatory Framework of Pakistan address the needs and provides the guiding principles for sustainable procurement addressing the UN SGDs?
3. Whether the Federal Public Procurement Regulatory Framework of Pakistan is comprehensive enough in defining the substantial parameters and guiding principles to distinguish the national and international competitive bidding?
4. Whether the measures taken by the Federal PPRA, for elimination of non-discriminatory conditions and defining the principles of domestic preference are effectively applicable in defining the technical specifications of the procurement?
5. Whether the Federal Public Procurement Regulatory Framework of Pakistan presents effective dispute resolution mechanisms both before and after the award of the procurement contracts?

6. Whether the Federal Public Procurement Regulatory Framework of Pakistan contains the effectively applicable provisions for the protection of Intellectual Property Rights of the project proponents?

1.4 Objectives of the Study

The main objectives of the study are:

1. To make an analysis of the international instruments on the procurement regarding the provisions and guiding principles for sustainable procurement and the national constraints of the least developed and developing countries.
2. To make an analysis of the Federal Public Procurement System of Pakistan to examine the effectiveness and applicability of the provisions of the level playing field for the national and international stakeholders.
3. To make an analysis of the Federal Public Procurement System of Pakistan regarding applicability and effectiveness of the existing measures for alternate dispute resolution.
4. To examine the Federal Public Procurement System of Pakistan to examine the measures paving the way for research and development by providing the protection to the intellectual property of the proponents

1.5 Research Methodology

This research shall employ a comprehensive literature review, encompassing international publications, journal articles, WTO instruments on trade and procurement, government documents, regulations, laws, news articles, webpages, and a dissertation within the realm of public procurement. A conceptual analysis approach shall be utilized to identify the issues in development of international and national documentation related to international trade and public procurement. Furthermore, the study shall also incorporate the experience feedback of the

personnel involved in regulating and conducting public procurement in Pakistan. The instant research shall have focus on the efficacy of both the international instruments on procurement as well as national procurement regulatory infrastructure of Pakistan. To achieve the very objective, qualitative research shall be the preferred approach by focusing on the “Document Review”.

1.6 Introduction

Public Procurement is a significant portion of GDP and taxpayers’ contribution; hence Government is expected to carry out the public procurement processes efficiently by ensuring value of money. There are only twenty-two (22) parties comprising forty-nine (49) member states who are party to the “WTO Agreement on Government Procurement”; and all these countries are mostly the developed countries of three (03) continents of North America, Australia and Europe. WTO couldn’t convince the remaining states to become party to the Agreement, and most of the remaining states are enjoying the observer status, because WTO has not succeeded in considering the national constraints of the least developed or developing countries regarding international trade.

During last two decades, the substantial Procurement Regulatory Framework of Pakistan consisted of Public Procurement Rules, 2004 containing few basic principles and concise procedure for competitive bidding along with Consultancy Service Regulations, 2010. Hence, the Federal PPRA couldn’t accomplish its regulatory framework from planning to close out of the contract. There is a huge room of improvement in the existing procurement regulatory infrastructure by incorporating the new provisions, and elaborating the existing ones, by introducing the new amendments, and developing procurement regulations and regulatory guides.

During our research, we will be able to identify the deficit areas of the international instruments and national regulatory infrastructure of the public procurement, with appropriate

recommendations for improvement, which will pave the way for winning the confidence of the international and national trade market.

Initially the “VfM i.e. Value for Money” was the primary objective of the most procurement regime, however, with the passage of time, transparency, level playing field along with efficiency and economy had emerged as the basic principles of procurement. It was realized that the preferential treatment for domestic goods, services and suppliers is one of the barriers to the international trade, and such barriers are not addressed in the WTO multilateral agreement, and the government procurement is explicitly exempted from the major disciplines of the “General Agreement on Tariff and Trade” (i.e. GATT) and “General Agreement on Trades in Services” (i.e. GATS). The liberalization of government procurement markets holds the potential to generate benefits both in terms of procurement efficiency and commercial interests. Early efforts were made to bring the Government Procurement within the ambit of GATT; however, the same was not acceded to. The first agreement on government procurement was signed in 1979, as a Tokyo Round Code on Government Procurement, and entered into force in 1981. As a result of further negotiations, the GPA-1994 signed in Marrakesh in April 1994, and the same was enforced on 1st January 1996. In accordance with the provisions of Article XXIV: 9 of the GPA, it was renegotiated and was formally adopted in March 2012, and was enforced on 6th April 2014 to the extent parties who ratified the same. The GPA is flexible enough, allowing the parties to undertake further negotiations to gradually eliminate the discriminatory measures, and to attain the maximum possible coverage. To date, there are twenty-two (22) GPA parties consisting of forty-nine (49) WTO member states, mainly belonging to three (03) continents i.e. North America, Europe and Australia, whereas there are thirty-five (35) WTO members are enjoying the observer status. Pakistan is also an observer state since 11th January 2015. The GPA guarantees the principles of National Treatment (NT), Most Favored Nation (MFN) Treatment (MFN) and non-discrimination

for the suppliers of parties to the Agreement with respect to procurement of covered goods, services and construction services as set out in each party's schedules. GPA considers provisions regarding special and differential treatment for developing and least-developed countries. GPA also considers the provisions regarding the application of the WTO Dispute Settlement Understanding in public procurement.

Despite all the measures taken by the WTO in GPA, WTO couldn't convince the developing countries to become the party to the agreement, and participation of such countries is limited to the extent of observer status only. It means WTO has failed to introduce such provisions which address the national and regional constraints of the least developed or developing countries, especially regarding the Preferential Treatment Agreements (PTAs) between various countries and reservations and preferences regarding domestic industry. Until unless these constraints are not addressed to the satisfaction of the WTO member states, there shall be restraints to become the party to the GPA.

Public Procurement Ordinance, 2002 is the first piece of legislation in the history of Pakistan that contains nothing regarding the substance of procurement except few definitions such as goods, services, works, procuring agency, public procurement and mis-procurement. It is surprising fact that these definitions are nowhere referred to in any other part of the Ordinance, which reveals that the essential parts of the proposed legislation were eliminated before promulgation of the same; however, few definitions couldn't be removed inadvertently. Public Procurement Regulatory Authority (PPRA) was established in 2002, and Government of Pakistan introduced the concise set of Public Procurement Rules in 2004, which include the basic principles of procurement and some substantial and procedural requirements, without any elaboration of these rules for application and implementation in an effective manner. In the year, 2008 and 2009, two (02) further Regulations regarding substantial requirement of record keeping and publication of

contract were made. Rather than introducing its own set of standard procurement documents, the procuring agencies were obliged to use the standard bidding documents published by the Pakistan Engineering Council (PEC). The first time, in the year 2010, Procurement of Consultancy Services Regulations, was made by the Authority, wherein, trade-off between quality and cost was introduced, however to the extent of just consultancy services. Few minor amendments were introduced in PPRA Ordinance in 2020, whereas some substantial amendments were introduced in Public Procurement Rules, 2004 in the year 2020 and 2021, by either insertion of some new rules on framework agreements, unsolicited proposal and letter of credit, along with some amendment in existing rules. The Rule on unsolicited proposal brings the idea for the preferential treatment and protection of their proprietary information for such project proponents, whose projects are aligned with the mission of the procuring agencies in the respective field of research and development.

Rule-19 was revised by introducing the provision of internationally backlisted firms and by declaring the duration of blacklisting of the firms involved in corrupt and fraudulent practices or performance failure. Rule-48 was revised by introducing the third tier for grievance redressal. Accordingly, the Regulations were introduced in 2021 for filing appeals against the decisions of the procuring agencies regarding grievances and blacklisting. An electronic procurement system namely, E-Pak Acquisition and Disposal System (E-PADS) was introduced to achieve the objective of the public procurement in accordance with the principles of procurement.

Section-21 of the PPRA Ordinance authorizes the Federal Government to grant exemption from the applicability of PP Rules on the recommendation of PPRA, if it falls in national interest, and the instrument of section-21 was used many a times for deviation from the applicability of PP Rules. In addition, there is Rule-5 of the PP Rules, which allows the deviation from the applicability of PPR Rules to the extent of conflict arising from the international obligation of the

Federal Government with any state or international organization. Moreover, other PP Rules are very concise and just describe the substantial requirements without any elaboration or guidelines for effective application and implementation of these requirements.

The instant research aims to critically review the WTO GPA, Public Procurement Regulatory Infrastructure of Pakistan along with allied documentation to identify the deficit areas and imparting vital recommendations for WTO to address the national/regional constraints of developing countries, and to fill the gaps of public procurement regime of Pakistan.

1.7 Literature Review

WTO plurilateral agreements are the substitute of the multilateral trade agreements, providing the option to the WTO members whether to become the party to the plurilateral agreement. As per the Hoekman and Sabel (2021) note, plurilateral differs from traditional trade agreements in that (i) they are issue-specific or combine a small number of policy issues and (ii) do not focus solely on the liberalization of market access barriers. Traditional trade agreements – which may include any number of WTO Members – started off as shallow integration arrangements imposing limits on the imposition of barriers to international trade and – when they were other than multilateral – applying those limits only between signatories.¹ The WTO places no constraint on how plurilateral negotiations are initiated and organized. There is a long tradition of negotiations occurring between small groups of Members, starting with the GATT's practice of determining tariff concessions by talks between the market and the principal supplier of the product and then extending it to other Members via the Most-Favored Nation (MFN) clause.² Woolcock (2013) notes that the Tokyo

¹ Hoekman, B. and C. Sabel. 2021. "Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time," *Global Policy*, 12(S3): 49-60.

² Irwin, D., Mavroidis, P. and Sykes, A. 2008. 'The Creation of the GATT'. In *The Genesis of the GATT (The American Law Institute Reports Studies on WTO Law*, pp. 5-97). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511817953.005

Round GPA originated in Paris, and was based on a set of principles developed by an OECD working group over the course of a decade of talks (see, e.g., Winham, 1986; Blank and Marceau, 1997) and that other innovations in rule-making on procurement such as incorporating a bid-challenge provision derived from the Canada-US FTA.³ Woolcock (2013) argues that trade agreements have not supported genuine diffusion of liberal procurement regimes because of the central focus on reciprocity (market access) rather than on efficiency considerations and that this has been one reason why developing countries are not incentivized to join the GPA.⁴ In addition to the GPA, preferential trade agreements (PTAs) often include provisions on procurement and in practice PTAs have become the main vehicle to extend procurement rules to non GPA members. Although liberalization occurs on a preferential basis, this is also true for the GPA as GPA signatories may restrict market opening to other GPA members. There are over 40 PTAs currently in force that include commitments to open access to procurement contracts on a bilateral or regional basis (Ueno, 2013; Rickard and Kono, 2014).⁵ The last revision of the GPA included agreement to launch work programs and engage in deliberation on several subjects: (i) best practice with respect to measures and policies to support the participation of SMEs in government procurement; (ii) promoting the use of sustainable procurement practices; (iii) safety standards in international procurement; (iv) restrictions and exclusions in parties' coverage commitments under the Agreement; and (v) improving procedures to collect and report statistical data relating to the GPA. In addition to these areas GPA members also agreed to conduct work in the future on public-private partnerships and their relationship to procurement covered by the GPA, and the advantages

³ Woolcock, S. 2013, "Policy diffusion in public procurement: The role of regional trade agreements," *International Negotiation*, 8(1): 153-73.

⁴ *ibid*

⁵ Ueno, A. 2013, "Multi-lateralizing Regionalism on Government Procurement", OECD Trade Policy Paper No. 151, TAD/TC/WP(2012)30/FINAL.

and disadvantages of developing common nomenclature for goods and services and standardized notices.⁶

According to Thai (2001), the government engages in four main economic activities: establishing the legal framework, disbursing revenue, providing public goods and services, and purchasing goods, services, and capital assets.⁷ Public procurement is both a strategic tool and a means for implementing policies for socioeconomic development and transformation.⁸ Given the significant portion of public resources consumed by procurement, the process must be conducted in an accountable, transparent, and well-managed manner to ensure high-quality service delivery and protect the public interest (Frøystad et al., 2010).⁹ Pakistan's public procurement system is governed by the Public Procurement Regulatory Authority (PPRA), which was established in 2002 (Zaidi et al., 2019). In Pakistan, the Public Procurement Regulatory Authority (PPRA) is responsible for overseeing public procurement (Zaidi et al., 2019). Established under the Public Procurement Regulatory Authority Law 2002, the PPRA has the mandate to formulate rules and procedures for public sector organizations' procurements. The Public Procurement Regulations were introduced and implemented in 2004, with the aim of promoting transparency, fairness to suppliers, and accountability in public sector procurement. Despite having established procurement regulations, the PPRA has not yet formulated regulations for sustainable public purchases (Zaidi et al., 2019).¹⁰ Fair competition is crucial for achieving the best value for money in public procurement. However, the public procurement process in Pakistan has been criticized

⁶ https://www.wto.org/english/tratop_e/gproc_e/gpa_wk_prog_e.htm

⁷ Thai, K. V. (2001). Public procurement re-examined. *Journal of public procurement*.

⁸ Turley, L., & Perera, O. (2014). Implementing sustainable public procurement in South Africa: Where to start.

⁹ Frøystad, M., Heggstad, K. K., & Fjeldstad, O. H. (2010). Linking procurement and political economy. UK Department for International Development and the World Bank Institute.

¹⁰ Zaidi, S. A. H., Mirza, F. M., Hou, F., & Ashraf, R. U. (2019). Addressing the sustainable development through sustainable procurement: What factors resist the implementation of sustainable procurement in Pakistan. *Socio-Economic Planning Sciences*, 68, 100671.

for creating barriers to entry, particularly for small and medium-sized enterprises (SMEs) (Pickernell et al., 2011).¹¹

National Procurement Strategy of Pakistan was made in the year 2013 with the support of USAID. As per the National Procurement Strategy, the legal framework may be reviewed and amended periodically to address the gaps and weaknesses, improve transparency and facilitate efficiency and economy in procurement processes. It further suggests that technological innovations such as e-procurements and electronic reverse auctions can enhance the efficiency of procurement, eliminate bid rigging, strengthen transparency and achieve value for money. The digitalization of procurement processes eliminates the direct interface between procurement officials and bidders and thereby significantly reduces the chances of bribery and corruption.¹² While giving recommendations, National Procurement Strategy recommends that the federal and provincial governments may institute deliberate efforts to develop a public procurement professional cadre within the civil service through concerted staff training and development programs. As part of its obligation to enhance the capacity of bidders to submit responsive bids, PPRAs may take the initiative of training the potential bidders in the important provisions of the PPRA Rules and Regulations as well as the procedures for the Procurement of goods, works and services.¹³

Sometimes PPRA issues General Instruction to clarify the ambiguities in the PP Rules. While issuing General Instruction regarding award of contract to second most advantageous bidder, PPRA explains that “The purpose of Regulatory Framework is to streamline the processes rather than creating unnecessary impediments leading towards delay in achieving the desired objectives. The processes with delayed outcomes are least efficient, whereas having no outcome are treated

¹¹ Pickernell, D., Kay, A., Packham, G., & Miller, C. (2011). Competing agendas in public procurement: An empirical analysis of opportunities and limits in the UK for SMEs. *Environment and Planning C: Government and Policy*, 29(4), 641-658

¹² USAID, 2013, National Procurement Strategy of Pakistan.

¹³ Ibid

as inefficient and uneconomical. Some procurement processes (due to their nature and complexity) are too lengthy, and months or even more than a year may be consumed to conclude these processes. After issuance of evaluation report (or acceptance of proposal), the first ever risk in the procurement process is the escape of the most advantageous (or lowest evaluated) bidder. If such processes are annulled just due to escape of one of the bidders by forfeiting comparatively a nominal price of bid security, it means the procurement processes are uneconomical and inefficient having no flexibility or resilience to accommodate the changes in terms of even highly expected risks, and the same is again the basic principles of (project management and) procurement (management), also defined in PP Rule-4, which demands transparent, fair, efficient and economical procurement processes bringing "Value for Money" in acquiring the objects of procurement. As per the PP Rule-2(1)(1), acquisition in a timely manner is one of the most important aspects of "Value for Money" in addition to other traits such as quality, reliability, after sale service, upgrade ability, price, source and whole life cost.”¹⁴

¹⁴ Public Procurement Regulatory Authority, 2021, General Clarification regarding Award of Contract to the Second Most Advantageous Bidder.

Chapter 2

Major WTO Instruments for International Trade

2.1 Evolution of WTO and Role in International Trade

The first ever effort to create an international body for promotion of international trade with prime objective of reducing the barriers to international trade, was made in the 1940s after the establishment of United Nations. Even before such an effort during World War-II, on 14th August 1941 the President of the United States of America Mr. Franklin D. Roosevelt and the Prime Minister of the United Kingdom Mr. Winston S. Churchill signed a concise piece of agreement namely “Atlantic Charter” consisting of only one page and eight (08) brief clauses desiring peace and security amongst the nations for the improved labor standards, economic advancement and social security.¹⁵ The continued war time discussions between the USA and the UK paved the way for the 1946-48 negotiations on proposed International Trade Organizations (ITO) and a worldwide instrument on international trade namely “General Agreement on Tariffs and Trade (GATT)”. Meanwhile the USA also offered some other countries to take part in negotiations at the Havana Conference in 1946 for establishing an International Trade Organization (ITO) and for reduction of tariffs and to eliminate the other barriers to trade. Later, in Geneva, the Session was held in 1947 with a two-point agenda for working on the draft charter of the Havana Conference and revising the draft Agreement on Tariffs and Trade. The General Agreement on Tariff and Trade (GATT) was signed on 30th October 1947 between the twenty-three (23) contracting parties. and was to be enforced from 1st January 1948.¹⁶ Although the GATT was largely based on Havana

¹⁵ Montenegro, Juan Xavier Hermosa. "An Introductory of the General Agreement on Tariffs and Trade and Their Dispute Settlement System." *Tirayasa Journal of International Law* 2, no. 2 (2023): 127-137.

¹⁶ Santana, Roy. "70th Anniversary of the GATT: Stalin, the Marshall Plan, and the Provisional Application of the GATT 1947." *Trade L. & Dev.* 9 (2017): 1.

Charter and could be strengthened further if it was to be administered by the proposed International Trade Organization (ITO) more effectively, however the idea of the ITO couldn't be matured because the same was not ratified by the USA Senate. Hence, GATT remained a provisional arrangement and a treaty without any planned administrative unit at international level for enforcement of the obligations for almost half a century despite various rounds of negotiation throughout the interim duration.

The principles of GATT initially encompassed mainly tariff reduction; and the various initial trade rounds were mainly revolving around the need for further tariff reduction. Hence, the core contents and principles remained unchanged for forty-seven years except for few additions such introducing GATT Anti-Dumping Agreement and a section of development in 1960s and option of negotiating volunteer plurilateral agreements on various trade topics of international interest in 1970s. The 7th and so called the Tokyo Round (with 102 participant countries) during 1970s was the first ever attempt to deal with the other conventional and emerging barriers to the international trade to improve the overall economic system. The 8th Uruguay Round of 1986-94 was the most essential and successful round of negotiations which fulfilled the old desire of establishing an international organization the 'World Trade Organization (the WTO) on 1st January 1995 as a substitute of the ideal non-existing ITO.¹⁷ In addition to such huge success, a few other multilateral agreements were adopted having a binding effect on all WTO members the most important of which were Revised General Agreement on Tariff and Trade (GATT); General Agreement on Trades in Service (GATS); and Trade Related Aspects of Intellectual Property (TRIPS). Four plurilateral agreements had also emerged the most important of which were Government Agreement on

¹⁷ Demaret, Paul. "Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization, The." *Colum. J. Transnat'l L.* 34 (1996): 123.

Procurement (GPA) and Agreement on Trade in Civil Aircrafts, whereas the other two (02) were dropped within a couple of years.

Since WTO can be treated as the baby of the GATT, hence it inherited the following principles from GATT for the promotion of international trade:

- I. The core Non-Discriminatory Principal with application in the form of Most Favored Nation Treatment (MFN), and National Treatment.
- II. Reciprocity Principle allowing by-default exchange of market access as commitments among members.
- III. Liberalization by negotiating on lowering the tariffs and eliminating barriers to the progressive international markets.
- IV. Predictable Market Structures by making countries bound for their obligations and commitments and not raising any barriers without compensation for the countries having adverse effects.
- V. Fairness Principle by discouraging any unfair competitive practices such as export subsidies in dumping practices (by selling products below the variable or fixed costs).
- VI. Helpful attitude towards developing and least developed nations and providing them with transition periods to adjust to the provisions of the multilateral and plurilateral agreements with greater flexibility and special privileges.

2.2 WTO Main Instruments on International Trade

2.2.1 General Agreement on Tariffs and Trade (GATT)

The Session of the Contracting Parties, which is called biannually, is the highest body of the GATT; wherein normally the decisions are taken by consensus. However, when voting is essential, each country has one vote, and in such cases, the decision is taken by the simple majority. For any “waiver” in terms of any authorization to escape from the application of specific obligation, more than two third majority of the members present is required in a manner that such majority

constitutes more than half the total membership. The Council of Representatives referred to as GATT Council comprising of member countries is responsible for dealing with routine and urgent matters.¹⁸ Sindh High Court while discussing the objective of the GATT appreciated its preamble that recognizes the relations in the field of trade and economic endeavors to be conducted with a view to raising living standards, ensuring employment at large, steadily growing volume of real income and effective demand, developing the full use of resources of the world and expanding the production and exchange of good.¹⁹

2.2.1.1 Principles of GATT

GATT performs its functions and decision making based on inter-alia following set of principles subject to some exception such as general exceptions, security exceptions and some specific exceptions:

a) Most-Favored-Nation Treatment (MFN)

Article-I is known as the ‘Most Favored Nation Clause according to which each member state is bound to treat the products (i.e. goods) of any other member states no less favorable than any other nation.

b) National Treatment (NT) Principle

Article-III is known as the ‘National Treatment Clause according to which each member state is bound to treat the foreign products (i.e. goods) of any other member states no less favorable than the equivalent domestically produced goods when such foreign products are imported.

¹⁸ World Trade Organization. “Agreement on Government Procurement as Amended by the 2012 Protocol Amending the Agreement on Government Procurement”. (2012)

¹⁹ "Messrs. Sky Overseas through Authorized Attorney v. Federation of Pakistan through Secretary Revenue Division and Four Others." 2019 PTD 1964 (Sindh High Court).

c) Anti Non-Tariff Barrier Principle

According to this principle where any protection is available to the products of domestic industry, the same should be extended exclusively (with limited exceptions) to the extent of custom tariff and not with respect to any other commercial flexibility, however such other fees and charges must be attributed to the approximate cost of the auxiliary services. Treatment available based on the rules of origin must be non-discriminatory in a manner consistent with the measures taken for consumer protection. In addition to general and security exception a specific exception clause allows deviation for the various events and circumstances such as unforeseeable developments and such an enhanced import quantity of the domestically competing products which may cause harm to domestic producers. Such exception is interim in nature and limited in scope to the extent of providing remedy to the prospective injury.

3.2.1.2 Exception to the Public Procurements

Paragraph-8 of Article-III exempts the public procurement laws, regulations or allied requirements from the application of the 'Principle of National Treatment' prescribed in the same article to the extent that these procurements are made with the objective of utilization of these products for government purposes and not for the purpose of commercial resale or any such allied production for commercial sale.

2.2.2 General Agreement on Trade in Services (GATS)

The General Agreement on Trade in Services (GATS) is the first of its own kind that deals in international trade in services. GATS is the outcome of 8th round of trade negotiations namely Uruguay Round from 1986 to 1993.

2.2.2.1 Types of Services

GAT deals with the following four (04) types of service depending on the nature of the transaction between suppliers and consumers of the services.²⁰

a) Cross Border Trade Mode

This includes such services which may be supplied through any mode of communication (i.e. through telecommunication or internet services or through the postal network) without physical transfer of the service provider. These services may include distance learning, consultancy reports, tele-medical advice or architectural drawings.

b) Consumption Abroad

This includes services which are consumed by the physical transfer of the consumer to the country providing services such as tourism, study abroad, and treatment of patients.

c) Commercial Presence Mode

This includes services which are provided to the consumers of the receiving country through the existence of locally established foreign affiliates or subsidiaries such as banking services, chain of hotels and construction services.

d) Natural Persons Movement Mode

This includes services such as services which are provided by a foreign company or firm or individual consultant as an independent supplier or as an employee of foreign firm or as a foreign

²⁰ WTO Trade in Services and Investment Division “General Agreement on Trade in Service- An Introduction”. (2022)

individual consonant such as construction company or an engineering consultant to manage and supervise construction works.

2.2.2.2 Principles of GATS

Each WTO member is bound to fulfil their obligations to facilitate all service sectors keeping in view inter-alia the following principles: ²¹

a) Most-Favored-Nation Treatment (MFN)

Article-I is known as the ‘Most Favored Nation Clause according to which each member state is bound to treat the service or service providers of any other member states no less favorable than those of any other nation subject to such exemptions provided in the respective annexure.

b) National Treatment (NT) Principle

Article XVII requires the member state to treat the services and service suppliers no less favorable treatment than those to the like local services and suppliers subject to any conditions and qualifications

c) Market Access

Article XVI requires the member state shall provide access through the (above referred) modes of supply to the services and service suppliers no less favorable than provided under the agreed terms, conditions and limitation specified in the schedule subject to any conditions and qualifications, shall treat the services and service suppliers no less favorable treatment than those to the like local services and suppliers.

²¹ Ibid

d) Transparency

Article III requires the member states to promptly publish any such information regarding measures pertaining to operation of GATS subject to no disclosure of confidential information. Enquiry points or facilitation desk points are to be established concerning the commercial and technical aspects of the supply of services. Members are also required to establish enquiry points which provide specific information to other Members upon request. Moreover, pursuant to Article IV:2, developed countries (and other Members to the extent possible) are to establish contact points to which developing country service suppliers can turn for relevant information concerning commercial and technical aspects of the supply of services; registration process; recognition of professional qualification from respective statutory bodies.

e) Domestic Review

Article VI (2) requires the member states to develop regulations for domestic review mechanism to promptly address the grievances of the suppliers aggrieved from the adverse decisions along with providing remedies against the adverse administrative decisions concerning the trades in services.

2.2.2.3 Exception to Public Procurement

Article VIII provides exemption from the applicability of the principles of National Treatment (NT), Most Favored Nation (MFN) principle and provisions of market access in such public procurement of services which are not procured for commercial resale or to use as an input to such services having commercial sale.

2.2.3 Agreement on Trade Related Aspects on Intellectual Property Rights (TRIPS)

"Intellectual property" means and includes any such assets which are creation of mind in the forms of various outcomes such as artistic expressions, literature, eligible inventions, designs and symbols of identification of the products and services. Technically these creative outcomes and identification marks are known as copy rights (for artistic expressions and literature etc.), patents (for eligible interventions), trademarks (for brand names and logos for identification of variety products). The TRIPS Agreement was adopted in 1995 at the time of inception of WTO as the multilateral agreement binding on all WTO member states, TRIPS requires the members to establish minimum standards for the protection and enforcement of intellectual property rights international levels for all forms and categories of intellectual property such as copy rights, patents, industrial designs, geographical indications, integrated circuits, trademarks and trade secrets.²²

Patents Convention for the protection of Industrial Property focused on patents, eligible inventions and industrial designs, whereas Berne Convention for the Protection of Literacy and Artistic Works focused on the copyrights. The World Intellectual Property Organization (WTO) already existed for the protection and enforcement of intellectual property rights at an international level; hence the TRIPS Agreement emphasizes the need for cooperation between the WTO and WIPO. Some additional features and standards not existing in above referred conventions regarding intellectual property were introduced in TRIPS. Like other WTO instruments, TRIPS agreement is also based on the principle of non-discrimination including 'the Most Favored Nation (MFN) Treatment' and 'National Treatment Principle'. An additional objective of the TRIPS Agreement

²² World Trade Organization, "Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)" (1994)

is that intellectual property protection should not hinder the transfer of technology and commercial utilization of the technical innovations for the enhanced socio-economic welfare.

2.3 WTO Government Procurement Agreement (GPA)

2.3.1 Background and Objectives

The ‘value for money’ is the primary objective of most government procurement regimes while acquiring the goods and services for the functionaries of the states. While achieving the objective of ‘Value for Money’ other state policies regarding the promotion of local industry may be construed as discrimination or barrier to the international trade. Since such type of discrimination and barriers were excluded earlier in the form of general exceptions to the government procurements while promulgating other international instruments such as GATT and GATS. To achieve the objective of liberalization in government procurement WTO started work on three (03) fronts i.e. Government Procurement Agreement; Doha Development Agenda (DDA) Working Group on Transparency in International Procurement; and GATS negotiations on Government Procurement. DDA is currently inactive while negotiations on GATS are still on going, while the work on GPA being the plurilateral agreement has brought a lot of success and majority of developed countries joined the agreement either at the time of inception or with little delay. Agreement on Government Procurements (GPA) is the most dominant amongst the plurilateral agreements which were negotiated to achieve the objective of greater liberalization of international trade and to maintain the integrity and predictability of government procurement system in a way to restrict the member states from taking such measures as to afford the protection to national suppliers by discriminating against foreign suppliers. First formal GPA was signed and accepted in 1994 and was entered into force on 1st January 1996. Initial members to the GPA include USA, UK, Israel, Japan, Norway and majority of European Union. The existing GPA was revised on 30th

March 2012, and was enforced from 6th April 2014. Till date, forty-eight (48) countries including twenty-seven European Union countries are parties to the GPA. Thirty-six (36) countries are enjoying the observer status amongst which eleven (11) including China are negotiating the accession to the agreement. Pakistan has attained the status of observer since 11th February 2015.

Article XXI of the GPA defines the institutional arrangements to administer the GPA. The main administrative body of the GPA is the Committee on Government Procurement having representatives from all the Parties. The committee shall elect its Chairman and have frequency of meeting not less than once a year, wherein it shall also review the operation of the agreement and effective implementation of the provisions of the agreement. The Committee shall inform the progress of activities and implementation of the operation of GPA to the WTO General Council.

2.3.1.1 General Principles of GPA in Achieve the Objective of Liberalization

To achieve its objectives, the GPA functions on the following principles:

Non-Discrimination

Non-Discrimination is the core principle of the GPA.²³ It is derived from the two main principles of the WTO i.e. Most Favored Nations (MFN) and National Treatment. According to this principle, the Party (i.e. the member country) shall accord unconditional treatment to the covered goods and services of the other Party no less favorable than those of its own or of any other Party. No discrimination shall be made amongst locally established supplier based on the degree of foreign affiliation or offering goods or services of any other Party.

²³ Evenett, Simon J. "The WTO government procurement agreement: an assessment of current research and options for reform." In *World Bank conference, "Informing the Doha Process: New Trade Research for Developing Economies,"* Cairo, Egypt. 2002.

Application of Rules of Origin

This can be treated as a supplementary principle that supplements the core principle of non-discrimination according to which no Party can apply the rules of origin for the products or service imported from other party in a manner different from the subject rule which the party applies in the normal course of trade for the import of same products or services.

Transparency & Impartiality

Transparency and impartiality in the procurement processes must be another essential principle of the government procurement processes, and these processes must be consistent with the provisions of the GPA using open, selective or limited tendering avoiding conflict of interest and preventing corrupt practices. To ensure the transparency, intime availability of essential information regarding public procurement shall be ensured subject to confidentiality requirements. All the tenders shall be treated in a fair and impartial manner, and to ensure such impartiality an independent administrative or judicial review forum shall be available to address the challenges and grievances raised by the aggrieved parties.

2.3.2 Methodology of Accession and Modifications

Article XXII of the GPA deals with the accession to the Agreement. Membership of the WTO is the basic condition for accession to the GPA. Any WTO member may accede to the GPA on the terms and conditions (sated in the decision of the GPA Committee) agreed b/w the respective acceding member and the existing Parties to the GPA. On successful negotiations the acceding Party shall deposit the instrument of accession to the Director General of the WTO, and agreement shall enter into force for the acceding Part from 30th day following the depository of instrument of ratification, and from the date of accession each party shall ensure the conformity of domestic legal procurement regime and allied practices with the provisions of this agreement. Each Party

shall provide the list of all the procuring entities along with list of covered goods and services including construction services. In case of proposed withdrawal of any entity from the list on the ground of elimination of governmental control on the subject entity, or any other proposed modification regarding changes in mutually agreed covered procurements, the respective party may have the option to notify the GPA Committee. Any other Party being affected from such prized modification may file its objection which may be resolved through consultative sessions between the respective Parties, and in case of revised modification the same shall again be notified to the GPA Committee in the same manner as that of original proposed modification. The proposed modification shall become effective after the lapse of 150 days subject to raising no objection within 45 days or withdrawal of any such abjection.²⁴

2.3.2 Essential Aspects of GPA

The following are the essential aspects based on which the structure of GPA stands:²⁵

3.3.2.1 Scope and Coverage

The WTO GPA explicitly explains the list of goods and services covered in the scope of the GPA and excludes those which are acquired with the objective of commercial resale or utilized to produce goods or services produced for commercial purposes. It excludes acquisition of immovable property, financial induments such as loans, grants, securities, bonds, liquidation and management services, and public employment contracts. It further excludes the procurements made under the obligations of international commitments.

In addition to the clearly defined scope, the GPA provides general exceptions on security related procurements, and any other procurement essential for maintaining public morals, orders or safety;

²⁴ World Trade Organization, “Agreement on Government Procurement, as Amended on 30 March 2012 (GPA 2012)” (2012)

²⁵ Ibid

necessary to protect human, animal or plant health; to protect intellectual property rights; and to facilitate philanthropic institutions, prisons and special persons.

2.3.2.2 General Principles

General Principles relating to non-discrimination on the analogy of WTO Principles of ‘Most Favored Nations’ and ‘National Treatment’; nondiscriminatory application of the Rules of Origin; and Transparency and Imperiality have been discussed earlier in this section.

2.3.2.3 Effective Notices of Intended Procurement

The GPA requires the in-time publication of accessible procurement notices with sufficient information and response time (keeping in view the complexity of procurement) for timely submission of the tenders to ensue broader competition. The procuring entities are encouraged to announce their procurement plans well in advance before the start of the upcoming fiscal years in a concise and comprehensive manner having such information for the interested parties at national and international level to prepare them for participation in the intended procurements.

2.3.2.4 Conditions of Participation

The procuring entities at liberty prescribe the conditions for participation to ensure the legal, financial capacities and commercial and technical abilities of the prospective bidders in a manner not to restrict international trade. Disqualification parameters in terms of bankruptcy, false declarations, significant or persistent performance failure, criminal convictions, misconduct or omissions adversely affecting the commercial integrity; and failure to payment of taxes, may result in disqualification of the suppliers for participating in the procurement process. In practice some procuring agencies impose unreasonable conditions such as the condition of no litigation history. Islamabad High Court, while deciding a case declared that the procuring agency may require the information regarding the litigation history of the participant supplier however, the State or the

procuring agency cannot disqualify the bidder considering the fact that he instituted legal proceedings against the Sate or the procuring agency.²⁶

2.3.2.5 Performance Specific Technical Specifications

Auricle X of the GPA requires that the procuring entities shall not apply any such technical specifications or the conformity assessment parameters which may create unnecessary barriers to international trade. It emphasizes the need of specification based on performance parameters and functional requirements and restricts the use of descriptive or design requirements. It further restricts any reference to trade narks, patents, copyrights, specific origin; and if any such reference is essential to precisely define the object of procurement, all such equivalent products shall also be evaluated keeping in view the outcome or functional parameters of the object of procurement.

2.3.2.6 Types of Tendering

The GPA prescribes three (03) types of tendering namely open tendering, selective tendering and limited tendering. Open tendering is the tendering process wherein all the prospective bidders are allowed to submit their tenders (or bids), and the selective tendering process involves prequalification or simply the qualification round to evaluate the capacity and capability of the participant firms to reduce the burden of evaluation by ousting the non-serious suppliers from the competition in advance to floating the tender. The limited tendering is the third mode of tendering which invites only a few suppliers to submit their tenders owing to various circumstances in which open and selective tendering couldn't be invoked. The GPA though prescribes selective tendering as the second mode of tendering however doesn't differentiate between the scenarios and circumstances where selective tendering should be invoked, and it leaves at the option of the

²⁶ 7Cs Corporate Services v. Oil and Gas Development Authority, 2017 PLD 117 (Islamabad).

procuring entity. Whereas the GPA comprehensively defines all those circumstances where limited tendering could be invoked.

2.3.2.7 Tender Documentation

The GPA requires that the tender documents should contain all such information to submit a responsive tender. The tender documents should contain the complete description of the procurement including known or estimated quantity of the products, technical specifications, conformity assessment parameters, plan, drawings, instructional materials, conditions of participation, evaluation criteria and selection techniques, time and place of tender opening, delivery schedule and any other terms and conditions. Any modifications to the tender documents need to be communicated in the same manner as those of original information along with sufficient (extended) to submit or resubmit the responsive tender.

2.3.2.8 Treatment of Tenders

The GPA requires that all the tenders shall be treated in a fair and impartial manner, and no adverse effect should be borne by the tenders owing to the mishandling or mismanagement of the procuring entity. Opportunity of rectifying the unintentional errors should be available on equal opportunity basis. The contract should be awarded to the most advantageous tenderer unless such award is not in the public interest. In the case of abnormally low prices quoted in the most advantageous tenders, the capacity of the suppliers should be verified in terms of condition of participation.

2.3.2.9 Domestic Review Procedure

Article XVIII of the GPA requires an effective review mechanism at national level wherein there should be an adequate opportunity for the aggrieved suppliers to challenge the deviation from the requirements before an independent and impartial administrative or judicial forum for redressal of their grievances regarding challenge. The respective forum should have the power to grant interim

injunctions for suspension of the procurement process until resolution of the issue, in addition to the powers for awarding the cost of litigation and damages caused by such injustice.

2.4 WTO GPA and Intellectual Property Rights

As per the World Intellectual Property Organization Intellectual property refers to the creation of mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce. The basic elements of the intellectual proper are innovation, non-obviousness and utility of creation. Public procurement accounts for a significant proportion of overall demand for goods and services and is increasingly seen as an attractive and feasible instrument for furthering the goals of innovation policy.²⁷ The WIPO distinguishes various types of intellectual property rights by defining six (06) categories such as patents, copy rights, trademarks, industrial designs, geographical indications and trade secrets. Patent is an exclusive right granted for an invention and includes all the essential elements of intellectual property including commercial productions relying on such an innovative and non-obvious creation. To meet the objectives, the patent owners decided to utilize the benefits of its invention by society at large, and hence the patent owner makes such innovative ideas and allied technical aspects publicly available in the published patent documents. Copy rights describe the rights of innovative literary or artistic work and include music, paintings, sculptures, software applications, database and technical drawings etc. Trademarks are a distinguished sign for identification of the goods and services of the enterprises. Industrial designs consist of two dimensional or three-dimensional features along with additional information describing these features for actual development based on these designs. Geographic indications and appellation of origin are signs used to specify the origin of goods that suffice to predict the quality of the products considering the reputation and characteristics attributed to the

²⁷ Uyarra, Elvira, and Kieron Flanagan. "Understanding the innovation impacts of public procurement." *European planning studies* 18, no. 1 (2010): 123-143.

region. Trade secrets are intellectual property rights regarding the confidential information which may be sold or licensed, and any such unauthorized acquisition, use or disclosure of such information is regarded as an unfair practice and a violation of the trade secret protection.

Paragraph 2(c) of Article III of the WTO GPA allows the procuring entity to make such measures necessary to protect the intellectual property. Paragraph 1(b) of the same article allows the procuring entities to opt for limited tendering if the required goods or services cannot be supplied by any alternate source considering the artistic nature of the required products or due to the protection of patents, copy rights or other exclusive rights or due to an absence of competition for technical reasons, Paragraph 1(f) further allows the procuring entity to opt for limited tendering for the procurement of prototype or for the first development of its own kind in addition to particular contract for research, experiment, study or original development, subject to the condition that such contract is not for the commercial level production or to recover the costs of the research and development. Paragraph (h) of the same article further allows the contract to the winner of the design contest provided that the contest was organized in a manner consistent with the provisions of the GPA (in an open competitive manner without any discrimination). There is very little literature regarding the protection of intellectual property rights in the public procurement. Khan (1996) has done comprehensive research for developing linkage between public procurement and intellectual property rights, however a dedicated and pure piece of research needs to be done to evaluate the best international practices in this regard.²⁸

²⁸ Kahn, S. "Public Procurement and Intellectual Property Rights." *INTERNATIONAL BUSINESS LAWYER* 24 (1996): 320-321.

2.5 WTO GPA-National and Regional Constraints of Developing Nations

From the list of the Parties to the GPA it reflects that majority of the developed countries have acceded to the GPA, whereas developing countries have not become the Party to the agreement and most of them have restricted themselves to the extent of observer status.²⁹ The developed countries have a large range of industries due to access to the advanced technology and intine utilization of natural resources to attain such level of advancement. Considering such advancement and available resources they want to enhance their marginal revenue by optimizing the economy of the scale, and to meet such objective they want access to the market of other countries especially the developing countries. Both due to the economy of the scale and variety of quality products, they can better meet compete in the open market as well as in the tendering process if they are provided with equal opportunity. Hence, any such non-discriminatory principles will be favorable for the developed countries. On the other hand, the developing or the least developed countries, if accede to the GPA, the domestic industry wouldn't be able to compete with their international counterparts in the public procurement proceedings in the presence of already available reduced tariffs for the imported products committed under the ambit of GATT. Moreover, the governments of the developing countries need to address various sectors such as small and medium enterprises (SMEs) which are already under pressure.

2.5.1 General Constraints Addressed in GPA

Paragraph-1 of Article V of the GPA allows special and differential treatment to the least developed countries and the developing countries according to the development, financial and

²⁹ Evenett, Simon J. "The WTO government procurement agreement: an assessment of current research and options for reform." In *World Bank conference, "Informing the Doha Process: New Trade Research for Developing Economies,"* Cairo, Egypt. 2002.

trade needs of those countries on a case-to-case basis, keeping in view the varying circumstances. Paragraph-8 of the article requires due consideration for technical cooperation programs and capacity building programs for developing countries. Paragraph-2 of the same article while applying the principles of non-discrimination allows the developing countries to allow the most favorable coverage to the respective Party of the GPA subject to the terms negotiating between the (interested) Party and the developing country in a manner to maintain appropriate balance of opportunities. Paragraph-3 of the article provides the option of one or more transitional measures during the transition period of five (05) years for least developed countries and not more than three (03) years for developing countries. The transition period may be extended, and new transition measures may be approved in special circumstances which couldn't be foreseen at the time of accession process. These transitional measures include:³⁰

- I. a transparent price preference program for the domestic suppliers and the suppliers of the other country to whom any preferential treatment agreement (PTA) is signed subject to the condition that the other country is Party to the GPA in accordance with any conditions set by the GPA committee.
- II. An offset clearly prescribed in the notice of intended procurement.
- III. The phased – in addition of specific entities or sectors.
- IV. A higher threshold for adopting competitive bidding.

2.5.2 Policies on Preferential and Regional Trade

Developing countries, considering their development needs and enhancing international trade may have various types of free trade agreements and preferential trade agreements. Since most of the countries are already members of the WTO, so already these preferential trade agreements already fulfil the requirements of GATT and GATS and are bound to provide the same treatment in terms

³⁰World Trade Organization, “Agreement on Government Procurement, as Amended on 30 March 2012 (GPA 2012)” (2012)

of tariff and opportunities which is granted to the products and services of the countries to whom these agreements are signed.

PTAs and RTAs are often signed due to long term historical and sometimes religious relations between the countries, and hence the respective countries are motivated to prefer these agreements due to strategic partnership with these countries rather than signing any plurilateral agreements especially if it disrupts already established relationships. PTAs and RTAs are often complemented with the Rules of origin to determine the qualification of goods and services to be governed under the preferential treatment. These rules of origin being complex in nature could be the potential hindrance in the application of equal treatment by limiting the competing capacity of other foreign suppliers for public contracts in that region. Since previous WTO multilateral instruments such as GATT and GATS exempted the government procurements, hence the WTO member countries are at liberty to sign such PTA and RTAs which may allow to provide preferential treatment to the suppliers of the countries to whom these agreements are signed. In this way, accession to the GPA should directly hit the obligations committed with those countries and wouldn't be possible without reconciling the earlier obligations. The above-mentioned constraints may be addressed by various strategies like gradual liberalization by phasing out preferential treatments during the transition period after the accession of GPA during which developing countries are allowed to fulfill their regional or strategic obligations by gradually adjusting to the GPA standards.

2.5.3 Policies to Promote Small and Medium Enterprises

The developing countries need to formulate such policies essential to promote their domestic industry, especially the small and medium enterprises (SMEs). These SMEs, considering their small sizes and less resources in terms of finances and technology constraints, need special attention from the government for the development and strengthening of the small and medium

industries. There are lot of barriers for the SMEs to compete with the large enterprises including the lack of optimization of resources in attaining the higher level of marginal revenue, and hence SMEs cannot compete for the supply of the same products and services on the price which can be offered by the other suppliers. Even if it became able to compete by reducing the supernormal profit near the variable cost, they cannot have the capacity to supply the requisite quantity of the public contracts. Qualification requirements or the participation requirements in terms of production and financial capacity is another big challenge which restricts the SMEs for participation in the public contracts. Sometimes governments introduce such policies to ensure the participation of the SMEs in the government contracts.

Article XXII-8 of the GPA allows the facilitation of implementation of the agreement through adoption of work programs on various topics such as SMEs, collection of statistical data, sustainable procurement and safety standards in GPA etc. In this regard a decision was made on 30th March 2012 to initiate work program for facilitating the participation of SMEs in the government procurement without distorting the principles of the GPA and without distorting the open competition. As per paragraph 2 of the decision, the parties shall avoid introducing such measures which favor the domestic SMEs as compared to those of other Parties. Hence any such efforts of the GPA to promote SMEs is the promotion of SMEs around the globe (or to the extent of GPA members) and not for any such domestic promotion.

To facilitate the SMEs, the GPA decided to conduct a survey to collect the data reading measures taken by the Parties to promote and facilitate their SMEs. After the completion of the survey and analysis of the statistical data, best practices shall be identified to facilitate the SMEs.³¹ The Survey shall include the following aspects:

³¹ World Trade Organization, “Decision on a Work Program on SMES”. (2012)

- I. How the various countries define their SMES.
- II. Existence of specialized agencies to assist the SMEs for participation in public procurements
- III. Level of participation of SMEs in public procurement both in terms of value of contracts and number of contracts.
- IV. Policies and practices on subcontracting with the SMEs
- V. Facilitation of SMEs for formulating Joint Ventures for participation in public procurement.
- VI. The Capacity requirements, and sizes of the procurement contracts facilitating the participation of SMEs in public contracts.
- VII. On account and final payments for delivery of the products.

After more than a decade the report was presented before the GPA committee, and a decision was made to facilitate the SMEs in the following manner: ³²

- I. Transparency is the key aspect to promote the SMEs, and enhanced transparency needs to ensure through visible easy and quick access to the procurement information through electronic means.
- II. Reduction in administrative burden by introducing an e-Procurement System in a manner to simplifying the process of registration and submitting the bids.
- III. Reduction in the participatory requirements especially by reducing the economic and financial requirements and splitting the large contracts without any such intention to bring the value of procurement below the threshold of the procurement.
- IV. Raising awareness both for sub-contracting and filing the tenders by such joint venture having SMEs as partner.
- V. Capacity building of the government entities helping to develop SMEs friendly specifications to ensure the participation of SMEs in the public procurement.

³² World Trade Organization, “Report of the Committee on Government Procurement on Best Practices for Promoting and Facilitating the Participation of SMEs in Government Procurement” (2024)

2.5.4 Role of the Observer Status

Paragraph 4 of Article XXI allows all WO members to be entitled to be participant in the GPA committee in the capacity of the status of the observer on the request in writing to the WTO Director General for onward communication of the request to the GPA committee. The committee shall decide the observer status upon receipt of requisite information. The committee may invite any international organization as an observer to the meetings of the committee and may consider any request from any intergovernmental organizations on a case-to-case basis. The observers may participate in the discussion, however, cannot participate in the decision-making process. Currently thirty-six (36) countries including Pakistan are enjoying the status of observer states and eleven (11) of them including China are negotiating the accession to the GPA.

Chapter 3

Public Procurement Regulatory Infrastructure of Pakistan

3.1 Regulatory Regime of Pakistan

The basic objective of regulating the various sectors of the economy is the economic and social welfare of society. Developed countries like the USA have a long history of regularization of the economic sector. Later, in the mid-20th century, the USA established various regulatory commissions not just to ensure economic welfare but also to promote safety and security in industry. The concept of regulating the economies was also derived from the various international instruments of the United Nations.

In 1950s Pakistan Industrial Development Corporation (PIDC) was established and further invigorated by the President Ayub Khan with the objective to promote the manufacturing industry of Pakistan. In the absence of any effective consumer protection laws, the manufacturers were inclined to earn supernormal profits either due to monopoly or monopolistic competition. Hence the Monopoly Control Authority was established in 1971. In the 1970s, the Federal Government started the progressive nationalization of the industrial sector. The Government as a part of controlling measures made legislation to control the prices and restricting the hoarding and passed an Act titled as “The Price Control and Prevention of Profiting and Hoarding Act, 1977” for securing equitable distribution of an essential commodity and its availability at fair prices. Later, with the change of the Government, the nationalization policy was revoked with gradual privatization of the industry as far as possible. The Companies Ordinance 1984 was promulgated by the President of Pakistan with the objective to consolidate the laws for the effective growth of the corporations and promotion of investment and consequent economic growth. The Security and

Exchange Commission of Pakistan was established in 1997 with the objective of developing and regularizing an efficient corporate infrastructure.

With the passage of time, it was realized that for the effective implementation of regulations and to evaluate the applicability of laws and regulations, there should be independent regulatory infrastructures for the respective trade, business or industry. Some of the regulatory authorities in Pakistan are either established as fulfillment of the requirement of the international commitment or on the recommendations of the international development associations (like World Bank), whereas few are established based on international experience feedback to overcome the market failures or to promote the social and economic welfare of the society. In the following para, a short description of the few of the renowned Federal Regulatory Authorities is presented.

Pakistan Nuclear Regulatory Authority (PNRA) was established in January 2001 with the promulgation of “Pakistan Nuclear Regulatory Authority Ordinance, (III of) 2001” as part of the international commitment and fulfillment of requirements of the “Convention of Nuclear Safety-1994” by dissolving the Pakistan Nuclear Regulatory Board (under the control of the Chairman Pakistan Atomic Energy Commission) with the objective of regulating the nuclear industry with emphasis on nuclear safety, radiation protection and to determine the extent of civil liability for any nuclear damage.³³ Pakistan Nuclear Regulatory Authority despite under the practical influence of the Strategic Plans Division (the secretariat of National Command Authority) has proved to be a successful and stringent regulator prefer to take a lead role in fulfilment of the international obligations in addition to volunteer needs to promote safety and security of nuclear installations and protecting operators, public and the environment from the hazards of ionizing radiations.

³³ <http://www.pnra.org/history.html>, last accessed on 11/10/2024 at 03:00 pm

Pakistan Telecommunication Authority (PTA) was established in 1996 after the promulgation of “Telecommunication Re-Organization Act (XVII of) 1996” to regulate the establishment, operation and maintenance of telecommunication systems and provision of telecommunication services in Pakistan. Pakistan Electronic Media Regulatory Authority (PEMRA) was established in 2002 in terms of section 3 of Pakistan Electronic Media Regulatory Ordinance, 2002 with the objectives to inter-alia improve the standards of information, education and entertainment and to ensure the accountability, transparency and good governance by optimizing the free flow of information. National Electric Power Regulatory Authority (NEPRA) was established under section-3 of the “Regulations on the Generation, Transmission and Distribution of Electric Power Act, 1997”. This was also a legal split of the three (03) major electric power sectors i.e. generation and production of electricity, transmission and dispatch center (under National Transmission and Dispatch Company) and distribution of electric supply through various distribution companies (working under Pakistan Electric Power Company). NEPRA is not only responsible for determining the tariff of the electricity but also implementing the safety standards. Government influence on NEPRA is obvious which is reflected from the subsidies while determining tariffs for the various consumer sectors. Oil and Gas Regulatory Authority (OGRA) was established in March 2002 in terms of section 3 of the Oil and Gas Regulatory Authority Ordinance 2002 with the objective of fostering competition, increasing private investment and ownership in the petroleum industry and promoting public welfare with specific reference to petroleum and gas products. The formation of OGRA is the result of a short evolutionary process because the same was promulgated after repealing of “National Gas Regulatory Authority (NGRA) Ordinance, 2002 within two (02) years of its promulgation. Public Procurement Regulatory Authority (PPRA) was established in 2002 in terms of the provisions of section-3 of the Public Procurement Regulatory Authority, Ordinance 2002 with the objective of regulating the public procurement of goods,

works and services, however the scope was enhanced by incorporating the disposal of public asset in July 2020. Climate Change Authority is established in the year 2024 on the intervention of the Honorable Supreme Court of Pakistan after six (06) years of the promulgation of Climate Change Act, 2017, which shows the approach of the Federal Government towards the robust and effective regulatory regime in the country. While discussing the importance of regulatory effectiveness of NEPRA, Lahore High Court observed that NEPRA remained unsuccessful in improving regulatory infrastructure in power sector. Its de-jure performance is high, but de-facto performance highlights its poor regulatory function.³⁴

3.2 Public Procurement Regulatory Framework (Primary Legislation)

Before the establishment of Public Procurement Regulatory Authority, the public procurement was made in terms of the provisions of various instruments in vogue. General commodities were procured in terms of the provisions of “The Purchase Manual” of the defunct ‘Department of Supplies and Disposal’, whereas engineering works and services were procured in accordance with the provisions of “The West Pakistan Building and Roads Department Code” in collaboration with the respective provisions of the “General Financial Rules (GFR) of the Federal Government”.³⁵

In 1990, it was realized that Public Procurement was an essential area of interest both for the national as well as international stakeholders. The international development partner, especially the World Bank, especially focused on the spendings of the Federal Government and presented its first ever assessment on public expenditures in the year 1999. As part of the assessment report, recommendations were made for legislative and systematic reforms for a robust and effective

³⁴ "Muhammad Azhar Siddique v. Federation of Pakistan." 2024 CLC 744 (Lahore High Court).

³⁵ Authority, Public Procurement Regulatory. "National procurement strategy 2013–2016." (2013).

procurement regime in Pakistan.³⁶ Public Procurement Regulatory Authority Ordinance was drafted back in the year 2002 after consultation with the stakeholders and international donors.

3.2.1 Public Procurement Primary Legislation and its Main Features

Public Procurement Regulatory Authority Ordinance (No. XXII of 2002), hereinafter referred as the PPRA Ordinance, the primary legislation for the public procurement in Pakistan which was promulgated by the President of Islamic Republic of Pakistan on 15th May 2002 was a toothless ordinance from its very inception. The (Federal) Public Procurement Regulatory Authority (herein after called the PPRA) was established in terms of the provisions of section-3 of the PPRA Ordinance read with those of sections 6 to 8 of the same Ordinance, having no such basic principles of the public procurement based on which the building of a strong sub-ordinate legislation could be formed. The basic characteristics and features of the PPRA ordinance are hereby discussed in detail:

3.2.1.1 Establishment of the Authority by Default

Normally the regulatory authorities are established by the issuance of notification in the official gazette either within the prescribed time or as early as possible in terms of the provisions of the respective section of the respective Ordinance or the Act, however, the wording of the section 3 of the PPRA Ordinance is informative in nature that informs that the *“There is hereby established an Authority to be called as the Public Procurement Regulatory Authority for carrying out the purpose of this Ordinance”*.³⁷ This language is itself conclusive regarding its formulation because most of the members of the PPRA Board are the federal secretaries as the ex-officio members and

³⁶ Ibid

³⁷ Public Procurement Regulatory Authority Ordinance, 2002, as amended up to 2023” (2023)

such a majority is sufficient to constitute a quorum for a meeting of the Board requiring a decision by the Board.

3.2.1.2 Company in the Disguise of the Authority

Almost all the Federal Regulatory Authorities constituted by the Ordinance or the Parliamentary Act have such composition having the executive powers with its chairman and the full-time members in addition to any part time or ex-officio-members if any. However, in the case of PPRA, the executive powers of the Authority vests in the single person named as Managing Director, whereas meetings of the PPRA Board are chaired by the Secretary Finance, being the Chairperson of the PPRA Board. Hence, the organizational structure of the PPRA is not compatible with the other Regulatory Authorities of Pakistan, and PPRA operates like a Single Member of Company (SMC), working under the influence of a Board (and not even the Board of Directors) having its members from the Federal Bureaucracy, to make any policy level decisions, as the general direction and administration of the Authority vests in the Board who may delegate any of the powers to the Managing Director with the exception of there (03) as prescribed in section 20 of the PPRA Ordinance.

3.2.1.3 Broader Established Conflict of Interest

Section 6 of the PPRA Ordinance narrates the composition of the PPRA Board as follows:

S. No.	Designation	Nature of Membership	Tenure	Executive Status
1.	Secretary, Finance Division	Chairperson	Ex-Officio	Nil
2.	Secretary, Ministry of Industries	Member	Ex-Officio	Nil
3.	Secretary, Defense Production Division	Member	Ex-Officio	Nil
4.	Secretary, Ministry of Water and Power (Split into two Ministries) Secretary, Ministry of Water Resources & Secretary, Power Division	Member	Ex-Officio	Nil
5.	Secretary, Ministry of Housing & Works	Member	Ex-Officio	Nil

S. No.	Designation	Nature of Membership	Tenure	Executive Status
6.	Secretary, Ministry of Communications	Member	Ex-Officio	Nil
7.	Private Member	Member	3 Years	Nil
8.	Private Member	Member	3 Years	Nil
9.	Private Member	Member	3 Years	Nil
10.	Managing Director	Member/Secretary	3 Years	Yes

After the split of the Ministry of Water and Power into two ministries, the number of Federal Secretaries has exceeded from six (06) to seven (07) out of eleven (11), hence the composition of the PPRA Board is itself an obvious Conflict of Interest wherein it can be construed that the procuring agencies (or entities) are regulating themselves at their own.³⁸ Moreover, considering the ex-officio status of all these secretaries, no one would be willing to take ownership of the Authority, and has no vital interest in the autonomy and independence of the Authority considering his limited period of membership which expires automatically after the transfer to some other ministry or on the retirement of the respective secretary.

As far as the appointments of the private board members are concerned, all three (03) posts remained vacant throughout since the inception of PPRA except for a very short duration. Last time one of the seats of private board members was filled in the year 2022, however, he resigned from the post within few months after attending three to four meetings. According to one of the old employees of the PPRA, the reason for the discontinuity of membership by the private members is no remuneration or benefits for attending the board meetings. The situation favors the Federal Government since it would be difficult to influence the private members as compared to the Federal Secretaries for attaining any favorable decision.

³⁸ Authority, Public Procurement Regulatory. "National procurement strategy 2013–2016." (2013).

3.2.1.4 Appointment(s) of the Managing Director(s) from Bureaucracy

Section-8 of the PPRA Ordinance deals with the provisions regarding the appointment of the Managing Director and his powers and responsibilities. There is a conflict in the subsection (1) and subsection (2) of the section-8 as the former allows the federal government to appoint the Managing Director for such period as determined by the Government, whereas the later prescribes the duration as three (03) years. Section 8(6) of the Ordinance restricts the Managing Director to engage himself to any other service, business, vocation or employment during the term of his office in addition to extension of this restriction till expiration of one year for entering (any) employment or accept any advisory or consultancy service related to public procurement. However, the later part of the restriction is not valid where the Managing Director is a Government Servant, and he is retired or transferred from the post of the Managing Director. This is not only discrimination between the Managing Directors from the government sector and private sector but also shows the intension of the legislature to appoint the Managing Directors from the civil bureaucracy. This is a great compromise on the autonomy of the regulatory authority and an intension to control the regulator by the entities being regulated. Exploiting such proviso, the Federal Government never appointed any Managing Director from the private sector or through an open competitive process since the inception of PPRA (from 2001 to date i.e. January 2025). Normally the Managing Directors appointed till 2021 were 22 grade officers from the civil bureaucracy, however, since 2021, the government started new practice to appoint 21 grade officers on the dominant posts including both the key posts of Secretary Finance (Chairperson PPRA Board) and the Managing Director PPRA. To control the grade-21 officers is relatively easy considering his promotion in the hands of the Prime Minister. Hence, the autonomy of the regulator is being completely compromised.

3.2.1.5 Meetings and Decisions of the Authority

Section-7 of the PPRA Ordinance defines the substantial requirements for the conduct of the meetings of the PPRA Board and allied decisions making. Only five (05) members are required to constitute the quorum of the meeting, and majority of the members present shall suffice any decision making. Hence, only three (03) federal secretaries are sufficient for decisions making during a meeting conducted after fulfilling the minimum requirement of the quorum. Despite there is no such provision in the respective section of the PPRA Ordinance for attending the meeting by any of the representatives of the respective Member/Secretary, the record of the PPRA Board Meetings reflects those meetings that were attended by the Additional or Joint Secretaries in the absence of the respective Federal Secretaries. Considering the broader conflict of interest and the deciding majority of the Federal Secretaries in the PPRA Board, the Federal Government easily controls the policy decisions of the Authority and recommendations for granting exemptions to the procuring agencies from the applicability of the public procurement laws. Regulations on Transaction of the Business through the Board Meetings of Public Procurement Regulatory Authority” were notified on 7th January 2021 after highlighting a lot of irregularities in the meetings of the PPRA Board.

3.2.1.6 Power of Monitoring & Evaluation

While discussing the objectives of the Public Procurement Regulatory Authority (PPRA), Islamabad High Court observed that principles of fairness, transparency and economy lie at the heart of PPRA framework.³⁹ To ensure the above principles, section-5 of the PPRA Ordinance empowers the Authority to monitor the application, implementation and evaluation of laws, regulations, policies and procedures in respect of and related to inspection or quality of goods,

³⁹ "Muhammad Hanif and Company v. Chief Engineer North, PWD." 2023 CLC 443 (Islamabad High Court).

services and works, and recommend reformulation thereof or revision therein. The same section also empowers the Authority to monitor the public procurement practices and overall performance of the procuring agencies and make recommendations for improvement in governance, transparency, accountability, quality of the procurement in addition to the improvement in the institutional setup. For this purpose, the Authority may call for any information from the procuring agencies, and they are bound to provide the same as required in section-5 read with section 16 of the same Ordinance. Despite such powers of the monitoring and evaluation derived from the parent statute, the Authority issued the first Investigation and Evaluation Report in the year 2018. After that the Authority also issued Inquiry Reports, Evaluation Reports and Regulatory Reviews on the identified procurements or on receipt of some complaints. These reports included the findings and observations followed by the directives, recommendations and suggestions for improvement in the institutional setups or to improve governance, transparency or the quality of procurement. To further strengthen the monitoring mechanism an electronic procurement system was established having the provision of the statistical analysis of the procurement data and as tool to identify the gaps paving the way for further evaluation of the identified cases.

3.2.1.7 No Substantial Feature of Procurement in the Primary Legislation

PPRA Ordinance contains 27 sections describing the establishment of Authority, functions and powers of the Authority, management and administration of the Authority, financial provisions and some other miscellaneous provisions, however, none of the section prescribes any substantial features or even broader principles of procurement. It is the only primary and unique legislation of its own kind which leaves all such substantial requirements and principles to be formulated by the Federal Government and/or the Authority.

From the comprehensive analysis of the Ordinance, it establishes that any such provisions were deliberately omitted from the draft because there exist few definitions in the section of definition

clause, wherein there are some definitions having no such reference in the main body of the statute. It is evidence of the fact that while omitting some substantial provisions, the reference definitions couldn't be omitted inadvertently. As per section 17 of the Ordinance the Annual Report should contain inquiries and investigations conducted by the Authority, however, neither in section-5 nor in any other provision, there is some explicit power to conduct such inquiries and investigations. It is once again evidence of the fact that the respective provision of conducting inquiries and investigation was deliberately omitted while promulgating the Ordinance, however, the same couldn't be omitted from section 17 of the Ordinance inadvertently. Prima-facie this seems to be a malaise act on the part of the then bureaucracy who changed the final draft just before presenting the same to the President office.

3.2.1.8 Power to Exempt and its Exploitation

Section-21 of the PPRA Ordinance authorizes the Authority to recommend to the Federal Government (for subsequent decisions) any exemption from the operation of this ordinance or any rule or regulations made thereunder or any other law relating to public procurement, in the national interest. As per the Michael G. Roskin “What is good for the nation as a whole in international affairs” is national interest and “what is good for the nation as a whole in domestic affairs is the public interest.”⁴⁰ Although the scope of the referred section is not broad enough considering the narrow scope of the national interest (being the key component of the International Law) as compared to the public interest, however, the provision of this section was extremely exploited to grant the exemptions to the procuring agencies to make contracts.

⁴⁰Michael G. Roskin, “National Interest: From Abstraction to Strategy,” Strategic Studies Institute, US Army War College, (May 20, 1994): 1.

First time in the history of PPRA, in its 48th meeting held in 2021, the same fact was realized to the PPRA Board, when the Board recommended the grant of three (03) exemptions and was inclined to grant two (02) more in the same session to the Capital Development Authority (CDA) for direct contracting with the FWO in the works projects under the disguise of national interest. On such realization, they hesitated to grant the two (02) more exemption, and directed to record the minutes of the meeting to include the comments of the Secretary Finance that ground realities of national interest might be different from the academic concept of the national interest.⁴¹

3.2.1.9 No Consequence of Mis-Procurement

Clause (h) of section-2 of the PPRA ordinance defines mis procurement as the public procurement in contravention of any provision of the Ordinance, any rules, regulations, orders or instructions made thereunder or any other relevant law, however, doesn't refer any consequence of these violations. Moreover, the definition also acks any difference b/w substantial and procedural requirements or mandatory or directory provisions of any rules and regulations while determining the mis-procurement.

3.3 Public Procurement Regulatory Framework (Sub-Ordinate Legislation)

Section 26 of PPRA Ordinance authorizes the Federal Government to make rules for carrying out the purpose of the Ordinance, whereas section 27 of the same authorizes the Authority to make regulations not inconsistent with the provisions of the Ordinance and the rules made thereunder for carrying out the purpose of the Ordinance.⁴² Section 3(47) of the General Clauses Act 1897 declares the status of the rules and regulations as the same. Both the rules and regulations (as a

⁴¹ Public Procurement Regulatory Authority, "Minutes of 48th Meeting of PPRA Board", (2021)

⁴² Public Procurement Ordinance, 2002 as amended up to 2023, (2023).

rule) may be made under any enactment.⁴³ PPRA Ordinance also doesn't prioritize the status of any of the sub-ordinance legislation made as rules or regulations except with the explanation that regulations shall not be inconsistent with the provisions of the Ordinance and rules made thereunder.

3.3.1 Public Procurement Rules, 2004 and its Main Features

3.3.1.1 Ultra-Vire Provisions of the Rules

There are a few provisions in the Public Procurement Rules 2004 which don't have any vires with the parent statute, the brief description of which is as follows:

a) International and Intergovernmental Commitments

Rule-5 of the Public Procurement Rules, 2004 allows the deviation from the applicability of these rules to the extent of conflict with an obligation or commitment of the Federal Government arising out of an international treaty or agreement with a State or States, or any international financial institution. Since, section-26 of the PPRA Ordinance requires the rule making to fulfill the purpose of the Ordinance and no such purpose is referred in the ordinance, so the said rule has no vires with any of the provisions of the Ordinance, especially when section-21 of the PPRA Ordinance, 2001 allows the exemption in case of national interest after following a mandatory procedure of exemption by the Federal Government on the recommendation of the PPRA Board. Hence, any such commitments should be placed before the PPRA Board for granting exemption as defined in the primary legislation rather than considering an auto-exemption through a sub-ordinate legislation having no vires with the parent statute. No such case has ever been filed to challenge the vires of the Rules, however, there are some other case laws regarding the application of the same Rule. While deciding a case regarding the international commitment of the Federal

⁴³ General Clauses Act, 1897.

Government in Rule-5 of PP Rules, Islamabad High Court declared that though the provisions of international commitment of the government with the International Financial Institution will prevail to the extent of conflict between these provisions and Public Procurement Rules, 2004, however mere fact that the tender was floated in pursuance of loan agreement with Asian Development Bank (ADB) doesn't ipso facto lead to a complete ouster of Public Procurement Rules, 2004.⁴⁴

b) Exceptions from the Advertisement

Rule 14 of the Public Procurement Rules 2004 allows another deviation from the procurement advertisement with the prior approval of the Authority (i.e. PPRA) in case the proposed procurement may jeopardize national security or relate to such information which is proprietary in nature and falls within the ambit of intellectual property. The deviation from the advertisement is not just a single deviation but its scope is broader in nature and infect the same is deviation from all the remaining allied provisions of the competitive process. Moreover, the Rule is again without any vires to the parent statute as the PPRA Ordinance just allows the exemption in natural interest by the Federal Government on the recommendation of the Authority and not by the Authority itself. No such case has ever been filed to challenge the vires of the Rules, however, there are some other case laws regarding the application of the same Rule. Sindh High Court while deciding another case of Defense Export Promotion Organization (DEPO) declared that the DEPO was not authorized to invoke the exception provided by Rule 14(1) for deciding of International Defense Exhibition and Seminar (IDEAS-2020) because the same is a public seminar not covered under the ambit of national security exceptions. Moreover, no such exemption was sought from PPRA

⁴⁴ "Joint Venture of Messers Kamal Nasir Khan (Pvt) Ltd. and Another through Authorized Representatives v. National Highway Authority through Chairman and Others." 2023 CLC 1657 (Islamabad High Court).

as required by the respective provision of Rule and hence set aside the contract to initiate the tendering process.⁴⁵

c) Direct Contracting with SOEs

A newly inserted clause (f) of the same rule allows direct contacting with State Owned Entities (SOEs) in case of such works and services which are time sensitive and in the public interest. Since all the projects of the procurement are time bound and initiated in the public interest, hence it wouldn't be difficult for any organization or the ministry to declare any such project as time sensitive and in public interest by exploiting the ambiguous provisions for which the respective organization is predetermined to award the contract to some SOE. Moreover, the respective rule is in direct conflict with the principal of "fairness and transparency" as prescribed in the Rule-4 of the same rules. There is no such provision in the Ordinance, hence the same was not the intention of the legislature to allow any such direct contracting in deviation of public procurement. If it had been the case, the same would have been reflected in the same manner as that of exemption in the national interest. Although there is no direct judgement regarding ultra-vire status of the said Rule of Federal PPRA, Lahore High Court has declared Rule 61(2) and 61(3) of Punjab Procurement Rules ultra-vire with Articles 4, 18 and 25 of the constitution as well as with parent statute, as the same rule widened the scope of the parent statute by creating discrimination between public and private sector entities. The Lahore High Court declared that the Rule Making Authority cannot widen the purpose of the statute and add new and different means of carrying them out or depart from or vary its terms.⁴⁶

⁴⁵ "Mrs. Humaira Imran v. Government of Pakistan, Ministry of Defense Production." 2019 PLD 467 (Sindh High Court).

⁴⁶ "Ahmad Mehmood v. Government of Punjab through Chief Secretary and Others." PLD 2019 Lahore 206

3.3.1.2 Principles of Procurement

There are three (03) principles of procurement defined in Public Procurement Rule-4 (of Public Procurement Rules, 2004).⁴⁷ One of these pertain to the object of the procurement, whereas the remaining two regarding the procurement process.

“Value for Money” is the principle of procurement regarding the object of procurement, and the said principle is though concise but comprehensive in nature as the definition clause of the said principle is very clear and has been defined keeping in view the principles of engineering and microeconomics, and defines the same as best return for each rupee spent in terms of quality, timeliness, reliability, after sales service, upgrade ability, price source and the combination of whole life cost and quality to meet the procuring agency’s requirements.

“Fairness and Transparency” is another principle of procurement although not defined anywhere in the Public Procurement Regulatory Framework, however, the same is implicitly very clear in its meaning. According to Zaidi (2023), one crucial aspect of the procurement process is the establishment of fair competition.⁴⁸ Fairness emphasizes the need for a level playing field and equity for the potential participants and competitors, whereas transparency demands unquestionable clarity in the processes for all the competing partners as well as for the public and interested parties. Rule 35 regarding announcement of evaluation report and rule-46 and 47 inter-alia regarding maintenance of procurement record and publication of procurement contracts ensure public access to the procurement record and support the principle of transparency. Further two-tier grievance redressal system prescribed in Rule-48 of the same rule supports the principle of fairness in case of any grievance regarding any such complaints.

⁴⁷ Public Procurement Rules, 2004, as amended up to 2022.

⁴⁸ Zaidi, Syed Ali Mujtaba, Swera Ashraf, and Syed Asad Ali Shah. "The Public Procurement System in Pakistan: A Critical Analysis." (2023)

“Efficiency and Economy of the procurement processes” is another principle which requires that the procurement processes should be accomplished in an optimized manner with effective utilization of resources including time and money.

3.3.1.3 Procurement Planning

Procurement Planning is an essential aspect of Procurement Management.⁴⁹ A robust planning is a pre-requisite for efficient and economic procurement processes as well as an effective tool as the general notice to ensure the competition amongst the potential parties by its timely publication by the procuring agencies well before the start of the financial year (having the details of all the proposed procurements and allied defined timelines) helping the potential participants to prepare themselves in advance to the specific notice or the advertisement for the particular procurement. Moreover, such published procurement plans would restrict the procuring agencies from unjust and unnecessary splitting or regrouping the proposed procurement. Rules 8 & 9 of the Public Procurement Rules, 2004 require the procuring agencies to have procurement plans having restrictions on the splitting or regrouping.

3.3.1.4 Principal Method of Procurement

Rule 20 of the Public Procurement Rules, 2004 declares the open competitive bidding as the principal method of procurement for the goods, services and works, and Rules 12 and 13 prescribe the methods of the advertisement and response time to ensure competitive bidding for the defined threshold of the procurement. Although Rule-13 defines the minimum timeline required both for national and international complete bidding with guiding principle based on the complexity, availability and urgency of the procurement, however, nowhere in the said rules, any principle or

⁴⁹ Rashid, Harunur. "Procurement management is a challenge of project management: a study on department of social services, ministry of social welfare." PhD diss., Brac University, 2023.

guideline is prescribed for defining the difference between the national and international competitive bidding.

3.3.1.5 Broader Competition and Elimination of Discriminatory Treatment

According to Zaidi (2023), procurement specifications should be generic and non-discriminatory, and equal opportunities should be provided for all suppliers, to promote the fair competition.⁵⁰ To ensure the proper competition and broader participation, Rule-10 of the Public Procurement Rules, 2004 requires that any terms, specifications, standard features, characteristics and requirements prescribing the technical or quality characteristics shall be generic in nature without any reference to brand name, model number, catalogue number, name and origin of the country or similar classification, except where such reference is inevitable to complete an otherwise incomplete specifications, however the word “equivalent” shall be used even in such a case. Rules 36 defines the four methods of open competitive bidding namely “single stage single envelop procedure”, “single stage two envelop procedure”, two stage bidding procedure” and “two sage two envelop bidding procedure”, whereas Rule-37 defines the conditions under which a procuring agency may adopt any such procedure.

Sub-rule (1) of Rule-24 also requires the procuring agency to allow all the prospective bidders to participate in the competitive process without regard to nationality, except in case it is decided to limit the participation to national bidders only or prohibit the participation from some nationality in accordance with the policy of the Federal Government. Further, Rule 32 of the same rules restricts the procuring agency from introducing any conditions discriminating against bidders and considered to be met with difficulty. For determination of the difficulty index, practices of the

⁵⁰ Zaidi, Syed Ali Mujtaba, Swera Ashraf, and Syed Asad Ali Shah. "The Public Procurement System in Pakistan: A Critical Analysis." (2023).

respective trade, manufacturing business, construction industry or services shall be treated as reference.

3.3.1.6 Reservations and Preferences

Before June 2021, domestic preferences were allowed in a broader sense without any reference to the category of procurement i.e. goods, works or services. However, after the amendment made in June 2021, the category of services was excluded and certain goods, certain assets and works were explicitly included in the list despite a huge pressure from the Ministry of Information Technology for granting preference to the domestic IT industry. After the amendment made in 2021, sub rule (2) of the Rule-24 allows the domestic preference to the domestic suppliers or contractors while competing with the international bidders as per the policy of the Federal Government or regulations made by the Authority for the works projects and certain goods manufactured, mined, extracted and grown in the Islamic Republic of Pakistan, and the percentage of preference needs to be clarified while floating the bidding documents. This rule allows such preference for the disposal of certain assets having any potential impact on national security. There is no threshold for determining the magnitude of preference and no such regulations have been issued by the Authority till January 2025 despite lapsing four (04) years from the date of amendment in the subject rule. As far as preferences are concerned, according to Grandia (2015), several policies to support SME consortium subcontracting, equitable rights, reserving shares, reviewing preferences, and educating SMEs, have been promulgated in various advanced countries.⁵¹

⁵¹ Grandia, Jolien, and Joanne Meehan. "Public procurement as a policy tool: using procurement to reach desired outcomes in society." *International Journal of Public Sector Management* 30, no. 4 (2017).

3.3.1.7 Alternate Methods of Procurement

Prima-facie Rule-42 of the Public Procurement Rules, 2004 defines the alternate methods of procurement, however, there are many other rules which prescribe either alternate methods of procurement or pave the way for limited tendering or unsolicited tendering.

a) Prequalification for Selective Tendering

Rules 15 and 16 define the prequalification process, if essential in case of services, civil works, turnkey projects and for the procurement of expensive and technically complex equipment to avoid any such parties having no such capacity and ability in terms of technicality and finances. Hence, any such prequalified firm shall be called for participation in the procurement process for limited tendering to make the processes more efficient and economical without suffering the fairness and transparency. Despite prior shortlisting of the qualified firms, there is no such provision in Rule-13 for any such variations in the response time for the shortlisted firms to whom any communications are to be made through other means rather than an open advertisement.

b) Framework Agreements for Selective Tendering

Newly inserted Rule 16(A) allows the procurement of common use items, services and commodities through open or closed framework agreements, in which procuring agency may sign framework agreement with the prequalified parties, and either call for the mini-competition amongst them for entering into further contracts for the supply of these items or commodities or may issue call-off order in case the prices have been locked earlier. It is pertinent to mention here that the terminology of the Public Procurement Rules 2004 regarding open and closed framework agreement is different from those of the World Bank. The World Bank refers to the open framework agreements where new parties can be added through pre-qualification with the passage of time during the defined period, and the number of prequalified parties shall remain fixed in case

of closed framework agreements. Whereas in the case of Pakistan, in the closed framework agreement, prices shall be locked with the suppliers to whom framework agreements for the defined period, and call-off orders may be issued to them, however, mini-competition shall be essential amongst those with whom open framework agreements are signed before entering to the successful party or the parties.

c) Unsolicited Proposal

Newly inserted Rule (37-A) allows the prospective bidder or the project proponent to tender his unsolicited proposal aligned with the mission of the procuring agency, and the same shall be assessed by the procuring agency in terms of its technical and financial viability flowed by a competitive process wherein, the project proponent shall have added advantage to the extent of five (05) percentage in the combined (i.e. technical and financial) evaluation without sharing his proprietary information with the competitors.

d) Petty Cash Shopping and Request for Quotation

Rule 42 of the Public Procurement Rules, 2004 allows petty cash shopping within prescribed limit of money from the open market without any quotation, whereas minimally three (03) price quotations shall be sought if the prescribed limit exceeds the petty cash limit but remains under the threshold of open competitive bidding in case of standards specifications.

e) Direct Contracting by Limited or No Tendering

Rule 42 of the Public Procurement Rules, 2004 allows direct contracting in different circumstances such as emergency procurements, acquisition of motor vehicles, acquisition of spare parts from the original manufacturer, acquisition from the supplier having monopoly, acquisition of supplies to avoid incompatibility and disproportionate technical difficulties, in case of repeat orders up to 15 % of the original orders and to acquire such goods and services having prices fixed by the

government or anybody on its behalf. Another newly inserted clause (e) of the same rule of the same rule allows direct contracting titled as “Force Account” under the prescribed threshold subject to fulfilling some conditions. A newly inserted clause (f) of the same rule allows direct contracting with State Owned Entities (SOEs) in case of such works and services which are time sensitive and in the public interest. The same clause is in direct conflict with the principal of “fairness and transparency” as prescribed in the Rule-4 of the same rules. It has been discussed earlier in this section.

f) Negotiated Contracting by Limited or No Tendering

Clause (d) of Rule 42 of Public Procurement Rules, 2004 allows negotiated tendering with one or more suppliers with or without prior publication of procurement notification in case of specific piece of research or development or for technical or artistic reasons or the reasons connected with the intellectual property or in case of reasons of unforeseeable extreme urgency (not attributed to the procuring agency).

3.3.1.8 Second Tier Grievance Redressal System

Before the June 2021, there was a single tier grievance redressal system in terms of Rule-48 of the Public Procurement Rules, 2004 wherein the procuring agency was empowered to constitute a grievance redressal committee to hear the grievances of the aggrieved bidders after the issuance of final evaluation report, however, the same rule-48 was amended in June 2021 to split such grievance opportunity by providing the option to file the grievance at three (03) stages of the procurement process. Firstly, at the very initial stage, wherein bidders were allowed to file their grievances against the eligibility parameters, evaluation criteria or any terms and conditions prescribed in the bidding documents, and any such grievance was to be resolved before the proposed submission deadline and proceeding any further. Secondly, bidders were allowed to file

their grievance on the technical evaluation carried out by the evaluation committee (in case of separate technical evaluation report), and the same is also to be decided before opening of financial bids. Finally, the bidders were allowed to file grievance after issuance of the final evaluation report, however, with the restriction not to raise any objection on such terms and conditions and/or the technical evaluation for which he was allowed to raise objection at the respective stage of the procurement process. In addition to such a split, second tier grievance redressal system was also introduced through the same amendment, wherein any part aggrieved from the decision of the grievance redressal committee was allowed with the opportunity to file an appeal before the PPRA to decide the same. Hence, through this amendment, an effort was made to provide a robust system of addressing the grievances of the bidder to promote fairness and transparency in the procurement process. While deciding a case, Islamabad High Court appreciated the new statutory remedial scheme referred in Rule 48 of the Public Procurement Rules, 2004 in consonance with the principle of fairness, as Rule 48(2) provides the fair chance to the (potential) participant to challenge in advance the eligibility parameters, evaluation criteria or other terms and conditions contrary to the procurement regulatory framework, before entering into the bidding process, in addition to second tier grievance redressal provided in subsequent sub-rules.⁵²

3.3.1.9 Blacklisting Mechanism

With a new amendment in Rule 19 of the Public Procurement Rules, 2004, first time in the history, internationally debarred firms were also declared debarred from participating in the public procurement in Pakistan. Moreover, the duration for blacklisting was defined for various types of offenses ranging from six months to ten years. Further, it was clarified that the blacklisted bidder shall be cross debarred i.e. a bidder debarred by any procuring agency shall be considered as

⁵² "WSKB Operator (Pvt.) Limited v. National Highway Authority through Chairman and 20 Others." 2023 MLD 674 (Islamabad High Court).

debarred by all the procuring agencies. Before such an amendment the Karachi High Court set aside the decision of the procuring agency for not awarding the contract to the successful bidder (pharmaceutical company) because of its blacklisting by some other procuring agency considering the fact that the procuring agency in its bidding documents only imposed the condition of no blacklisting by the Pharmacy Council and Drug Regulatory Authority of Pakistan.⁵³

The bidders were also provided an opportunity to file the review petition before the PPRA regarding their grievance in case of unfair blacklisting. Internationally backlisted firms were also provided with an opportunity for examination of their cases by the PPRA Board based on the evaluation made by the Authority. Moreover, the blacklisted firms were declared bound to fulfil their contractual obligations in the on-going contracts at the option of the respective procuring agency. The new amendment fulfills the criteria of fair opportunity of hearing as well as proportional treatment. Indian Supreme Court while deciding a case of blacklisting emphasized the need of fair opportunity of hearing. The Supreme Court declares that a fair hearing to the party, being blacklisted, thus becomes an essential precondition for the proper exercise of the power and a valid order of the blacklisting made pursuant thereto.⁵⁴

3.3.1.7 No Effective Provisions for Contract Management

Rules 43-45 of the Public Procurement Rules 2004 define some provisions related to procurement contracts in a very concise manner. Rule 43 emphasizes the need for prompt payments to the suppliers and contractors against their invoices and running bills within the time specified in the conditions of the contract, however not exceeding thirty days. Rule 44 describes the provisions for entry into force of the procurement contract both in the case of purchase orders or the formal

⁵³ Taj Medicos through Proprietor v. Public Procurement Regulatory Authority, 2021 CLC 472 (Karachi High Court Sindh).

⁵⁴ "M/s. Kulja Industries Ltd. v. Chief General Manager W.T. Project BSNL and Others." 2014 SCMR 1748 (Supreme Court of India).

contract. Rule-45 describes some requirements at the closure of the contract, more particularly related to the requirements of the overall delivery certificate, defect liability requirements and payment of final bills except unsettled claims. Hence, there are no provisions for the execution of the procurement contract and effective contract management.

On the other hand, section-8(p) of the Pakistan Engineering Council Act, 1975 empowers the Pakistan Engineering Council (PEC) to establish the standards of the procurement contracts for engineering contracts. Rather than establishing the standards of the engineering contracts, the PEC started the formulation of engineering contracts at micro-level by defining each aspect of the engineering contracts including general and special conditions of the contract in line with FIDIC Contracts.

3.3.2 Public Procurement Regulations

3.3.2.1 Procurement of Constancy Services Regulations

Procurement of Consultancy Regulations, 2010 were notified on 26th November 2010, wherein for the first time various selection techniques were introduced for the selection of the consultants such as quality based selection (QBS), quality and cost-based selection (QCBS), least cost-based section (LCBS), single source or direct selection and fixed budget selection. Criteria for determining the eligibility of the consultants and subsequent shortlisting and prequalification were briefly introduced. Moreover, types of contracts such as lumpsum contracts, time-based contracts, hourly or daily rates-based contracts were introduced. The concept of technical negotiations with the high ranked bidders were introduced and the professional liability of the consultants was also defined.

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⁵⁵ Public Procurement Regulatory Authority, “Procurement of Consultancy Regulations, 2010”.

3.3.2.2 Regulations for Record Keeping & Delegation

Public Procurement Regulations 2008 provide the requirements for record keeping for at least five (05) years from the date of completion of procurement contract or that of rejection of all the bids. It also provides a list of the information and documents for which record is to be maintained and to whom such information or record is accessible. Regulation-3 of the same Regulations also allows requires using the standard form of bidding documents prescribed by the Pakistan Engineering Council for the procurement of (engineering) works.⁵⁶

3.3.2.3 E-Procurement Regulations for Record Keeping & Delegation

PPRA issued E-Procurement Regulations 2023 for the effective implementation of the E-Procurement System namely E-Pak Acquisition and Disposal System (E-PADS) to ensure the compatibility of the conventional laws, rules and regulations with that of e-Procurement System.⁵⁷

3.3.2.4 Other Regulations

Public Procurement Regulations 2011 (amended up to 2019) prescribe that the rule regarding international and intergovernmental commitments can be invoked after the approval of the case by the Economic Coordination Council (ECC) after the consultation with the stakeholder ministries, however it exempts any such requirement where any such commitment arise out of the obligations committed with international financial institutions in terms of financial assistance to Pakistan.⁵⁸ Regulations 2015 require the bidders to be active taxpayers except the procurement below the threshold of open competitive bidding. Public Procurement (Specimen for Advertisement) Regulations provide the format and contents of various types of procurement notices.⁵⁹

⁵⁶ Public Procurement Regulatory Authority, “Public Procurement Regulations, 2008”.

⁵⁷ Public Procurement Regulatory Authority, “E-Pak Procurement Regulations, 2023”.

⁵⁸ Public Procurement Regulatory Authority, “Public Procurement Regulations, 2011, amended up to 2019”.

⁵⁹ Public Procurement Regulatory Authority, “Public Procurement (Specimen for Advertisement) Regulations, 2015”.

3.3.2.5 Standard Procurement Documents

Two decades after its establishment, for the first time PPRA issued standard procurement documents for various sectors in the form of Regulations, the list of which is as follows:⁶⁰

- National Standard Bidding Document for Procurement of General Goods
- National Request for Proposal Document for Procurement of Consultancy Services
National Standard Procurement Document for Procurement of Good through Closed Framework Agreements
- National Standard Bidding Document for Procurement of Therapeutic Goods (Pharmaceuticals)
- National Standard Bidding Document for Procurement of Information System (Supply and Installation)
- National Standard Bidding Document for Procurement of Cloud Services vide S.R.O. 730(I)/2024.
- National Standard Bidding Document for Procurement of Cloud Services
- National Standard Bidding Document for Procurement of Works (Civil Works)

3.4 Public Procurement Framework of Pakistan and Aspects of Intellectual Property

3.4.1 Alternate Methods of Procurement for Protection of IP Rights

Cluses d(i) of Rule 42 of the Public Procurement Rules 2004 authorizes the procuring agency to engage in negotiated tendering with one or more supplier with or without prior publication of notice of intended procurement where the supplies involved are manufactured purely for the purpose of supporting a specific piece of research or an experiment, a study or development. Clause d(ii) of the same rule further allows the explicit protection of exclusive intellectual property rights and authorizes the procuring entities to negotiate the particular supplier for supplies of

⁶⁰ <https://www.ppra.org.pk/downloads.asp>, last accessed on 18-11-2024 at 03:05 pm.

products manufactured by the particular supplier, Clause (c) (ii) of the same rule allow direct contracting with the supplier being the only manufacturer of required object(s) of procurement subject to the condition that an appropriate forum shall authorize the procurement of such proprietary object from the respective supplier.

3.4.2 Unsolicited Proposal for Protection of IP Rights and Proprietary Information

Rule 37-A of the Public Procurement Rules 2004 introduces and propagates the idea of an unsolicited proposal received by the procuring entity from any project proponent in his capacity as an individual or a government or private entity. Such a proposal if aligned with the mission the procuring entity (to whom it is offered) shall be assessed to ascertain the (technical and commercial) viability of the project. Subject to a viable proposal, the procuring entity shall advertise (the functional output of) proposal for broader competition without disclosing the name of the project proponent and without disclosing his proprietary information. The Project proponent shall be exempted from the prequalification process and award five percent additional marks in a combined evaluation (i.e. technical and financial evaluation). In case of no competition, he will be awarded the contract otherwise in case of open competition if the project proponent doesn't emerge as most advantageous, he will be provided with an opportunity to make his proposal at par with the most advantageous bid. If he doesn't accept the challenge, he will have the right to withdraw his proposal without forfeiture of bid security. During the whole process, the procuring entity shall be responsible for confidentiality of the proprietary information as per sub-rule (4) of the same rule. Despite the provision of sub rule (4), the sub rule (5) exempts the procuring entity from its responsibility for protection of the intellectual property rights accruing to the proposal of the project proponent. This is not only contradiction within the different provisions of the same rule but also in contradiction of domestic laws for protection of intellectual property rights.

From the comparative analysis of the WTO GPA and Public Procurement Framework of Pakistan regarding provisions of intellectual property it reveals that although the later encompass more provisions especially the idea of unsolicited proposal. However, the former sets a principle that such procurement of the prototype or the first development of its own kind shall not be for commercial purpose or to recover the cost of research and development. Whereas the idea of unsolicited proposal being aligned with the mission of the procuring agency indicates that such innovation shall be utilized as the basis for further research or commercial utilization of the invention or the design.

3.5 E-Procurement System of Pakistan

Pakistan signed an agreement with the International Development Association in December 2017 to strengthen the public financial management of Pakistan wherein 50 million Dollars were attributed to the electronic procurement system of Pakistan. The Federal PPRA floated an advertisement in the international print media for shortlisting qualified firms having such expertise to build a Centralized e-Procurement System. Out of four (04) shortlisted firms, three submitted their proposals and one of them emerged as the most advantageous bidder with a thin margin of 0.01 % after the Two Stage Two Envelop Bidding Procedure and adopting Quality Cost based Selection (QCBS) Technique. The proposed e-Procurement System known as E-Pak Acquisition System was composed of the following sub-systems and modules:

- E-Registration System
- E-Procurement Planning System
- E-Notification System
- E-Documents Generation System
- Encrypted Tender Submission System
- E-Evaluation Matrix

- E-Past Performance Information & Retrieval System (linked with E-Evaluation Matrix)
- E-Excluded Party List System (linked with E-Evaluation Matrix)
- E-Grievance Redressal System
- E-Contract Award System
- E-Contract Management System (& E-Payment System)

The above-mentioned features of the e-Procurement System suffice to build a strong foundation, however despite such essential features the e-Procurement System could be matured to achieve its intended objectives. As per the requirements of the system, all the documents were to be published through filling the standard entries by the respective procurement officials, and in response the tenders were to be submitted in the same manner by filling the standards entries by the prospective bidders. The participation requirements were to be evaluated by the E-Evaluation Matrix at its own having linkage with the Past Performance Information and Retrieval System and Excluded Party List System. Most of the technical features were to be evaluated by the E-Evaluation Matrix in linkage with the prescribed conformity assessment parameters except where human intervention was inevitable to determine the quality parameters. However, still the objective couldn't be achieved; and even the system is limited to downloading of the standard bidding documents and online submission of the tenders without filling any standard entries without which no e-evaluation can be made. Moreover, Past Performance Information Retrieval Systems, Contract Award Systems and many essential features couldn't be matured due to poor monitoring mechanism and lack of effective coordination between the Federal PPRA and the Software Development Firm. Change of Management, especially the Managing Directors and the officials supervising the project, is also the major reason for such a huge deviation from the functional requirements of the intended e-procurement System and the obligations of the e-Procurement Contract.

3.6 Sustainable Public Procurement

Sustainable procurement may be defined as the procurement whereby the procuring entities set and achieve the objectives of their procurements while acquiring the goods and services in a manner that ensure value for money on a life cycle basis while addressing equity principles for sustainable development to benefit both the users and the society at large as well as the environment. The United Nations Environment Program has published comprehensive guidelines for implementation of sustainable procurement.⁶¹

3.6.1 South Korea and Sustainable Procurement

South Korea is the pioneer of the Sustainable Procurement by adding the concept of green procurement by enacting a legislation requiring all the governmental organizations to buy the green products with the objective of preventing the waste of resources and environmental pollution and effectively contributing towards the reduction of emissions of greenhouse gases for the sustainable development of the national economy. The Act provided the scope and parameters determining the green products in terms of certification requirements under the Korean Ecolabel System and Good Recycled Marks. Responsibilities for implementation and awareness regarding green products were defined. Initially, the public institutions were required to create an annual Green Public Procurement implementation plan with voluntary pre-defined targets as well as a performance record of meeting the targets. The outcomes of the Green Public Procurements were estimated in terms of reduction in Carbon dioxide (CO₂) equivalent emissions, economic benefits and creation of new jobs.

⁶¹ United Nations Environmental Program, “Sustainable Public Procurement Implementation Guidelines, Introducing UNEP Approach”, (2012).

In addition to the primary enactment, Seoul Metropolitan Government (SMG) promulgated Seoul Metropolitan Government Ordinance on the Promotion of Purchase of Green Products. By the end of 2017, forty-two percent of all the products were green representing over one hundred million dollars. The Mayor of SMG launched the Global Lead City Network (GLCN) on Sustainable Procurement in 2015. Series of key sectors were identified to promote green products and reduce energy consumption through energy efficient architecture and promoting such buildings having energy efficient certification. The public transport system was planned to be shifted towards electric vehicles (EVs) with the requirement that all the newly purchased vehicles should be EVs. Environmentally friendly Free Meal Programs and eco-friendly agricultural products were introduced in elementary and middle schools to promote the physical and mental development of the children. Sustainable Procurement is also strongly supported by national level online procurement system and database managed by KEITI, and it has become mandatory for all the public intuitions to procure eco-friendly products through the system from 2025 and onwards.⁶²

3.6.2 Sustainable Procurement in Pakistan

From the above refereed definition of the sustainable procurement, it reveals that the basic elements for sustainable procurement include ‘Value for Money’ and “Sustainable Development both for the procuring entity and society as well as the environment”. The existing procurement legislation of Pakistan doesn’t incorporate the concept of sustainable procurement keeping in view all the aspects, however “Value for Money” is the basic principles of procurement which requires best return of money in terms of quality, timeliness, reliability, after sales service, upgrade ability, price. Source, and whole life cost. Upgrading ability is one of the essential aspects which supports

⁶² <https://glcn-on-sp.org/cities/seoul/>, last accessed on 31-12-2024 at 10:00 pm.

green procurement by upgrading the equipment or machinery in terms of enhanced efficiency and reduction of emissions.

Xu, Shengguo (2016) emphasizes the need for identification of green products which seems to be the biggest obstacle of green purchases.⁶³ In pursuance of the obligations of the Paris Agreement on Climate Change, Pakistan has submitted its “National Determined Contribution (NDC) Report-2021” to the depository of the Paris Agreement according to which Pakistan has committed in terms of quantifiable targets to reduce its environmental emissions by transiting from conventional energy to renewable energy and introducing large number of Eclectic Vehicles by the end of 2030. Such an obligation will become the foundation for sustainable procurement in general and green procurement in particular in the fields of energy and transport system.⁶⁴

Government green purchase is widely considered to be an effective means of promoting sustainable consumption. However, how to identify the greener product is the biggest obstacle of government green purchase and it has not been well solved.

⁶³ Xu, Shengguo, Chunli Chu, Meiting Ju, and Chaofeng Shao. "System establishment and method application for quantitatively evaluating the green degree of the products in green public procurement." *Sustainability* 8, no. 9 (2016): 941.

⁶⁴ Government of Pakistan, “Pakistan- Updated Nationally Determined Contributions 2021”, (2021)

Chapter 4

Public Procurement Regulatory Framework of Pakistan & WTO GPA – Comparative Analysis

4.1 Monitoring & Enforcement

As per Zaidi (2023), a comprehensive monitoring mechanism, periodic audits and regular assessment of the public procurement processes is essential to align the procurement activities with national goals and priorities.⁶⁵ Monitoring and Enforcement are the essential tools for effective implementation of the laws, rules and regulations. Monitoring is a continuous phenomenon to check the compliance of the laws, regulations, standards and allied procedures, and the same is normally supplemented by periodic evaluations. Through effective evaluation, not only the performance of the functionaries can be evaluated but the applicability of laws, regulations and standards is also evaluated to recommend any revision or amendments thereof. The presence of an independent and autonomous regulatory body is essential for effective monitoring and enforcement. However, WTO GPA doesn't require the member states to constitute any regulatory body to regulate and enforce the procurement laws. Whereas Pakistan established its Public Procurement Regulatory Authority in May 2002 which contains a monitoring and evaluation mechanism, however without any (effective) enforcement powers to the PPRA. Section-5(1) of the PPRA Ordinance 2002 generally empowers the Federal PPRA to take such measures and exercise such power as may be necessary for improving the governance, management, transparency, accountability and quality of public procurement. The sub-section (2) of the same section explicitly empowers the Federal PPRA to monitor the application, evaluation and

⁶⁵ Zaidi, Syed Ali Mujtaba, Swera Ashraf, and Syed Asad Ali Shah. "The Public Procurement System in Pakistan: A Critical Analysis." (2023).

implementation of laws, rules, regulations, policies and procedures in respect of or relating to inspection of quality of procurement and recommend reformulation or revision thereof. It also empowers the PPRA to monitor the procurement practices and make recommendations to improve the governance, accountability and quality of procurement in addition to improvement in the institutional set ups.

4.2 Scope and Coverage

While determining the scope and coverage of the public procurement to be dealt in accordance with the provisions of the WTO GPA, the GPA doesn't leave the definition of the covered procurement to be described by some definition clause, but there is a dedicated article to describe the scope and coverage of the public procurement. Article-2 of the WTO GPA requires the member states to provide information regarding all the central, sub central and other government entities whose procurement is covered by the GPA in addition to providing the details of goods, services and construction services covered by the GPA.

Article II of the WTO GPA is very comprehensive in nature for determining the scope and coverage of the public procurement. The same article very explicitly defines the categories of the goods and services included or excluded from the ambit of public procurement. First, it excludes any goods, services and any combination thereof from the ambit of procurement which are procured by the governments with an objective of commercial sale or resale or for the use in the production of supply of goods or services for commercial sale or resale. The acquisition of any immovable property by the government is also excluded from the scope of public procurement. It also excludes the acquiring of all such instruments related to cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives. It further excludes the acquisition of fiscal agency or depository services, liquidation, management services for regulated financial institutions

or services related to the sale, redemption and distribution of public debt and securities. The procurement for specific purposes of international assistance or related to the stationing of troops for joint implementation of a project of the countries is also included. The article also allows the exclusion of procurements made under the procedures and conditions of the international organizations or funded by international grants, loans or assistance where there is inconsistency of the procedures and conditions of that international organization with the provisions of the GPA. Hence, all those goods and services (including construction services or so-called works) which are not excluded as stated above are included in the scope of public procurement. It also includes the procurement of goods and services, or any combination thereof acquired by any contractual means including purchase, lease and rental or hire purchase (of movable assets and property), with or without an option to buy.

PPRA Ordinance, 2002 doesn't have any devoted section to define the scope and coverage of the public procurement, but the same is covered in the preamble and definition clauses of the ordinance. Before discussing the scope of public procurement, it would be more appropriate to define the scope of the entities falling under the ambit of procuring agency and associated public fund. While defining the procuring agency, section 2(j) of the PPRA Ordinance, in addition to Ministries, Divisions and Departments includes authorities, corporations established by or under a federal law, or which are owned or controlled by the Federal Government. In 2020, the phrase "owned and controlled" was replaced with "owned or controlled". While deciding a case of well known oil refinery "Pak Arab Refinery Company (PARCO) being a public limited company having voting share of the Federal Government of Pakistan, Lahore High Court declared that the PARCO despite having government shares is not a public sector company and doesn't fall under the definition of procuring agency as the same is being owned and controlled by its Board of Director, and no sovereign powers of the Federal Government are being exercised by the

company.⁶⁶ The Lahore High Court also referred the judgement of the Supreme Court of Pakistan where three (03) tests were to be qualified to be declared as body corporate performing its functions in connection with the affairs of the Federation. The first test includes the performance of state functions involving sovereign powers. The second test includes whether the control vests with the Federal Government in a substantial manner. The third test requires the bulk of funds to be provided by the State.⁶⁷

After the amendments made in the PPRA Ordinance on 7th July 2020 through an ordinance and later by the PPRA Amendment Act 2023 (Act II of 2023), disposal of public assets was included in the preamble as well as in the definition clauses of the ordinance, whereas the goods, services and works (i.e. construction services) were already included in the scope. From the comprehensive review of the PPRA Ordinance, it transpires that the scope of the public procurement which was very broad earlier from the inception of the PPRA since, 2002, the same has become further broader not just due to inclusion of the disposal of public asset but also by insertion or amendments in the definition clauses of the Ordinance, and more particularly by amending the definition of ‘public procurement’ and ‘goods’ in addition to inserting the broader definition of public asset.

The earlier definition of the ‘Public Procurement’ included the acquisition of goods, services or construction of any works financed wholly or partly out of the public fund unless excluded otherwise by the Federal Government. The same definition was amended with the exclusion of the power of the Federal Government to exclude anything from the scope of public procurement. The new definition has made the scope of the public procurement more and more broader by adding the disposal of public assets and commercial transactions b/w the procuring agency and the private party in terms of which the private party is allowed to perform a procuring agency’s assigned

⁶⁶ "Ms. Ghani Gases Limited v. Federation of Pakistan and Two Others." *PLD 2016 Lahore 207*.

⁶⁷ "Pakistan International Airlines and Others v. Tanveer ur Rehman and Others." *PLD 2010 SC 676 (Supreme Court of Pakistan)*.

functions including operation and management on its behalf or the private party assumes the use of public asset or receives a benefit either from the budget or revenue of the federal government or from fee or charges to be collected by the private party for performing the procuring agency's function.

The earlier definition of the 'goods' in the PPRA Ordinance was already very broad and included articles and objects of every kind and description including raw materials, products, equipment, machinery, spares and commodities in any form and includes services incidental to installation, transport, maintenance and similar obligations related to the supply of goods if the value of services doesn't exceed the value of these goods. With the amendment made on 7th July 2020, the definition was made broader and broader by further adding scraps, waste material and commodities in any form, all types of assets and immovable property, physical objects in any form or matter, intangible assets, good will, intellectual property and proprietary rights as well allied services. The definition of 'works' included construction work including allied engineering works and incidental services. The definition of 'services' makes the scope of services very vast and ambiguous as the same includes any object of procurement other than goods and services.

From the comparative analysis of the scope and coverage of the public procurement in the context of the contents of the WTO GPA and PPRA Ordinance, it transpires that the scope of public procurement is extremely broader and unlimited in nature in Pakistan and includes either explicitly or implicitly each and every thing to be acquired by the federal government from the public fund, whereas the scope and coverage defined by the WTO GPA is comparatively very clear and limited in nature. WTO GPA explicitly excludes various types of services and goods and makes distinction both with respect to the material object of procurement and the purpose for which the same is to be acquired, whereas there is no such distinction provided in the PPRA Ordinance. The difference in the scope of public procurement can be viewed as follows:

- I. The construction services are considered as part of the services in the WTO GPA, whereas construction services are separately categorized as works (and more precisely as construction works and allied engineering works and services) in the PPRA Ordinance.
- II. As far as definition of ‘services’ is considered the scope of services is neither precisely defined in the definition clauses of WTO GPA nor in the same of PPRA Ordinance, however, the scope of services in the context of public procurement can be explicitly determined from the contents of the paragraph 3 of the Article-II of the GPA which help in defining the scope of public procurement services by exclusion of various type of services as defined above in this section, whereas there exists no such provision(s) in the PPRA Ordinance or any sub-ordinate legislation. Further, as per paragraph 2(a) of Article -II of the GPA it especially excludes all categories of services if the same are to be acquired with the objective of utilization of the same for commercial sale or resale or as part of the production process leading to commercial sale or resale. Hence, it excludes many of the financial instruments and services such as reinsurance services. Whereas there are no such excluding causes in the PPRA Ordinance or allied (subordinate) legislation.
- III. The definition clause “construction service” of WTO GPA defines the construction services as civil or building works with reference to Division 51 of the UN Provisional Central Product Classification (CPC), whereas PPRA Ordinance treats the construction services as distinct category of procurement and defines the works without any reference to the respective clauses of Pakistan Engineering Council.
- IV. There is no definition of goods in the WTO GPA, however, explicitly excludes such goods which are acquired either for commercial purpose and resale or to be utilized for the production process with the objective of commercial sale or resale. Hence, it excludes all those goods which are procured by the federal government either through import or

national purchasing for the purpose of resale e.g. petroleum products including LNG etc. It further excludes any raw material acquired to produce such goods which are to be produced for the purpose of commercial sale or resale, for example raw materials for the Heavy Mechanical Complex or steel mills. There is no such exclusion in the PPRA Ordinance, rather it explicitly includes raw material.

- V. WTO GPA includes purchases; lease; and rental or hire purchase, with or without an option to buy, however, explicitly excludes such acquisition or rental for land, existing building or other immovable property, whereas definition of ‘goods in PPRA Ordinance explicitly includes the acquisition of immovable property.
- VI. WTO GPA doesn’t refer any intangible assets, goodwill, intellectual property and proprietary rights in the scope and coverage of the public procurement, however intellectual property has been covered in general exceptions referred Article-III of the same by allowing the governments to take any measures to protect the intellectual property rights, whereas definition of ‘goods in PPRA Ordinance (especially after the amendment made in the respective definition clause in the year 2020) explicitly includes all these things. It is pertinent to mention that the intangible assets also implicitly include electricity for which there exists an independent regulatory body which determines the tariff of the electricity based on various inputs both for commercial purchase of the electricity units as well as for resale to the consumers through distribution companies.

From the above referred comparative analysis of the scope of public procurement in the context of WTO GPA and PPRA Ordinance, it can be easily concluded that PPRA has unnecessarily enhanced the scope and coverage of the public procurement both through the scope defined earlier from the inception of the PPRA and later through insertion of definition clause of public asset and by amendment in the preamble of the PPRA Ordinance as well as through amendments in the

definitions of ‘public procurement’ and ‘goods’. Considering such enhanced scope of the public procurement the ministries and allied organizations frequently rush towards PPRA either for clarification or exemption from the applicability of procurement laws and regulations considering the practical difficulties to be faced in such applications. The Government owned Insurance Companies and Banks are facing these difficulties during procurement of financial instruments, products and services (including reinsurance services) which are to be acquired as part of commercial sale or resale to the consumers of these insurance companies and banks. The Ministry of Petroleum rushed to the PPRA Board to grant partial exemptions from the applicability of some provisions of the procurement rules for the purchase of petroleum products including LNG. In the same way, Trading Corporation of Pakistan through Ministry of Industries and Production repeatedly forwarded the partial exemption cases from the applicability of the respective provisions of procurement rules for the import of various commodities such as sugar, urea and wheat etc. to be acquired through import to meet the difference of demand and supply for the welfare of the public. Utility Corporation of Pakistan contacted the Federal PPRA many a times for clarification regarding purchase of the goods from the whole sale market for the commercial purpose or further resale.

4.3 Security and General Exceptions

Article-III of the WTO GPA contains the provisions regarding security and general exceptions. Paragraph-1 of the same article allows the member states (or the parties) to take any measures or actions not to disclose any information for the protection of essential security interests linked with the procurement of arms, ammunition, war material or procurement of any indispensable (goods or services) to meet the objective of national security and defense.

Paragraph-2 of the Article-3 of the GPA allows the member states to take measures necessary to protect the public morals, orders or safety, to protect the human, animal or plant life or health, to protect the intellectual property rights, or to ensure the functioning of the disabled persons, prison labor and philanthropic institutions in a manner that wouldn't constitute a means of arbitrary or unjustifiable discrimination between the parties (to the GPA) where the same measures and condition are construed to be the explicit or disguised form of the restrictions or barriers to the international trade.

On the contrast the parent statute or the primary legislation of the public procurement i.e. PPRA Ordinance doesn't include any such exceptions except exemption to be granted in the national interest by the Federal Government on the recommendation of the PPRA Board in terms of the provision of the section 21 of the PPRA Ordinance. As defined above, the authority of the federal government to exclude any object from the scope of public procurement was excluded through an amendment in the definition clause of the 'public procurement' in July 2020. Despite no such provision in the primary legislation, Rules 5 and 14 of the Public Procurement Rules, 2004 provide such exceptions in case of international and intergovernmental commitments, and to protect the national security and intellectual property rights. Intellectual property rights and proprietary information's are further projected in terms of the provisions of Rule 37(A) Rule 42(d)(i) & (ii) to promote the project proponent of the unsolicited proposal, and through negotiated tendering to promote research and development and to protect the intellectual property rights. Rule-5 of the Public Procurement Rules 2004 allows to prevail the international and intergovernmental commitments of the federal government with the States or any international financial institution in the form of agreement to the extent of conflict between the rules and obligations arisen from such commitments. If the loans are obtained from International Financial Institutions like IDA, the same comes coupled with conditionalities, which includes the modes and methods of the awards

of the contract for the projects and the processes of pre-qualification of bidders, such cordialities are also catered in the law, as is evident from Rule 5 of Public Procurement Rules, 2004.⁶⁸

Clause (a) of Rule-14 of the Public Procurement Rules 2004 allows the deviation from the publication of the procurement advertisement or notice if the same could jeopardize the national security objectives, however with the prior approval of the Authority. In fact, such deviation not only exempts from the applicability of the publication of procurement notice but this is a general exception from the applicability of all other rules and regulations. As far as intellectual property rights are concerned, compressive discussion on these aspects is part of the separate chapter. Although the emergency and extreme urgency procurements referred to in different clauses in Rule 42 of Public Procurement Rules can be construed as exceptions, however those have been treated as alternate methods of procurement.

Comparative analysis of the WTO GPA and PPRA Ordinance in the context of general exceptions suggests that the scope of general exceptions provided in Article-III of the GPA is broader in nature. It encompasses national security, public morality, public order, public safety, ecological aspects including biosphere, intellectual property, facilitating disability, prisons and philanthropy in addition to exceptions referred in the Article-II of the GPA, whereas Pakistan Public Procurement Rules provide general exception to the extent of international commitments, national security, national interest, intellectual property, emergencies and extreme urgencies. Moreover, the general exceptions in the public procurement regime are linked with the exemption from the PPRA except international commitments, emergency or extreme urgency which shall prevail by default.

⁶⁸ Messer Power Construction Corporation of China Ltd. Through Authorized Representative v. Pakistan Water and Power Development Authority through Chairman WAPDA and Two Others, 2017 PLD 83 (Supreme Court of Pakistan, 2017).

Keeping in view the above referred analysis, it can be safely concluded that the provisions of the WTO GPA regarding general exception are broader as compared to those provided in the Public Procurement Regulatory Framework of Pakistan, and the general exceptions of Pakistan are the subset of those of the GPA. Further, the GPA requires assurance that any such provisions shall not be the disguised form of intended barriers to international trade.

4.4 Principles of Procurement

Article-IV of the WTO GPA contains the general principles of procurement. The first most and the core principle of procurement is “Non-Discrimination” followed by the second most important principle of “Transparency and Impartiality” during the conduct of procurement irrespective of open competitive tendering or selective tendering or limited tendering in a manner by avoiding ‘conflict of interest’ and without indulging in corrupt practices. The said article though allows the rule of origin, however, to some extent restricts the Parties to apply the rules of origin for each other. To accomplish the procurement processes in an integral manner, use of electronic means is suggested. On the other hand, Rule-4 of the Public Procurement Rules, 2004 defines the three (03) major principles of procurement which can be applied and implemented in conjunction with the provisions of some other rules such as Rule-10 regarding specifications, Rule-24 regarding reservations and preferences and Rule-32 to prevent discriminatory and difficult conditions. Rule-4 envisages the three (03) principles of procurement as “Fairness and Transparency” during the conduct of procurement; “efficient and economical procurement processes”; and to ensure the “Value for Money”. For comparative analysis of the above referred principles of procurement we

split them in below paragraphs. According to Zaidi, procurement specifications should be generic and non-discriminatory to ensure equal opportunities for all suppliers.⁶⁹

4.4.1 Non-Discrimination in Terms of Principles of National Treatment and Most Favored Nations & Rule of Origin

Non-discrimination is the core principle of procurement which is comprehensively defined in the paragraphs 1 and 2 of Article-IV of the WTO GPA. Article-IV of the GPA devises non-discrimination in two parts. Firstly, the said article requires that each Party (including its procuring entities) shall accord unconditionally not less favorable treatment with the suppliers of the other Party as well as to their goods and services as it treats the domestic supplier and the suppliers of any other Party and their goods and services. Secondly the said article requires that each Party (including its procuring entities) should not discriminate against the locally established suppliers because of a degree of foreign affiliation or ownership or since the goods and services offered for the procurement are the goods and services of the other party. In this way, the WTO GPA ensures the application of the principles of “National Treatment” and “Most Favored Nation” like other WTO instruments. Further, Para-5 of the same article supplements Para-1 & 2 by defining the extent of application of the ‘Rule of Origin’. As per the respective Para of the same article, a Party (to the GPA) shall not apply the rules of origin to goods or services imported from another Party that are different from the rules of origin the Party applied at the same time in normal course of trade to imports or supplies of the same goods or services from the same Party.

The principles of procurement defined in Rule-4 of the Public Procurement Rules, 2004 doesn't encompass the same principle either explicitly or implicitly as the “Fairness” referred in the Rule-4 doesn't attribute to non-discrimination rather it is closer to the impartiality during the

⁶⁹Zaidi, Syed Ali Mujtaba, Swera Ashraf, and Syed Asad Ali Shah. "The Public Procurement System in Pakistan: A Critical Analysis." (2023).

procurement process. Despite absence of the ‘non-discrimination principle’ in the respective rule, there are a lot of other provisions which explicitly prohibit any such non-discrimination such as Rule-32 of the PP Rules restricts the procuring agencies to introduce any such conditions which discriminate amongst the bidders or that is met with difficulty. To determine the nature of discrimination and difficulty index, reference shall be made to the ordinary practices of that trade, manufacturing or construction industry, or the related services. Rule-10 of the PP Rules, 2004 also binds the procuring agency to allow the widest possible competition by defining such generic features, characteristics and specifications without reference to any brand name or origin of the country or similar classification that favors any single contractor or supplier by putting others at a disadvantage. In case where brand name or design specifications are inevitable to complete an otherwise incomplete specifications, the word ‘equivalent’ with proper justification along with defining the parameters of equivalence is essential to be mentioned in the tendering documents.

Critical analysis of the respective provisions of the WTO GPA and Public Procurement Regulatory Framework of Pakistan reveals that despite no explicit principle of procurement in the later, the requirements of non-discrimination are more stringent in the later as compared to the former, because the non-discrimination referred in the Public Procurement Rules of Pakistan encompasses the suppliers and their goods and services from the whole world, whereas the non-discrimination prescribed in the WTO GPA encompasses the Parties (to the GPA).

As far as the applicability of the rule of origin during the procurement in the respective provision of GPA is limited to the extent of normal course of trade to imports or supplies of the same products from the same party. The Rule of origin is not narrated in the Public Procurement Rules, 2004 in the same context as that of GPA, however, it restricts the reference to the origin for the supply of any products of the procurement. To further extend the applicability of rule of origin can be determined and suggested by comprehensively analyzing the FBR tariff for the taxes and duties

for the various countries or regions in conjunction with the study of the preferential treatment agreements (PTAs) of Pakistan with various countries.

4.4.2 Fairness, Impartiality and Transparency

Paragraph 4 of Article-IV of the WTO GPA requires the conduct of covered procurement in a transparent and impartial manner in open, selective and limited tendering through avoiding ‘conflict of interest’ and preventing the corrupt practices during procurement processes. Articles XVI and XVII of the GPA supplements the principle of Transparency.

Paragraph 1 of Article-XVI requires the procuring entity to promptly inform the participant suppliers regarding the decision of the award of the contract, and on requests of a supplier in writing as well. Subject to some restrictions referred in Paragraphs 2 and 3 of the Article-XVII (such as information prejudicial to the fair competition (in future) or legitimate commercial interests of particular person including intellectual property, impeding law enforcement or contrary to public interest), the procuring entity shall provide the successful supplier the reason of his rejection and relative advantages of the successful supplier, on the request of the unsuccessful supplier. Within 72 days of the award of the contract, the procuring entity shall also publish the essential information for the public record and the same will remain there for a reasonable time. The procuring entity shall also maintain the record of the tendering for at least three (03) years from the date of the award in a manner that is easily traceable electronically. The Party (i.e. the member state) shall also collect the data and report on the statistics of the contracts covered by the GPA to the GPA Committee to be deposited on a yearly basis within the two years following the year of reporting in the form of report or through providing a link of the database statistics. Paragraph 1 of Article XVII further requires a Party (i.e. member State) to promptly provide information to any other Party (i.e. member Party) to determine impartiality and fairness subject to the restriction of non-disclosure in case such information may prejudice the future competition.

Despite referring to the prevention of corrupt practice during the procurement proceedings, the GPA doesn't further elaborate such practices and the measures to prevent these practices, instead requires the member state to provide the information regarding transparency and curbing corrupt practices.

'Fairness and Transparency' in the procurement processes is the first principle enshrined in Rule-4 of Public Procurement Rules, 2004. While deciding a case, Islamabad High Court declared that principles of fairness, transparency, efficiency and economy lie at the heart of the Public Procurement Regulatory Framework. It requires that all the prospective bidders should have equal and similar access to the information regarding tendering and an equal opportunity to compete.⁷⁰ Sub-rule (2) of Rule 28 requires the procuring agency to open the bids publicly in the presence of the bidders or their representatives who may choose to be present at the time and place announced prior to the bidding. Rule 31 allows the procuring agency to seek any clarification without changing the substance of the bid, however in writing (to maintain the record). After an amendment in Rules 35 and 48 made in June 2021, the procuring agency to announce the result of bid evaluation in the form of final evaluation report giving justification for acceptance or rejection fifteen (15) days prior to awarding the contract provided that in case where technical proposal is to be evaluated separately, the same shall be announced before the opening of financial proposal. As per the recently amended Rule-48 allows the (potential) participant bidders to challenge the eligibility parameters, evaluation criteria and any other terms and conditions if found contrary to the provisions of procurement regulatory framework and the same shall be addressed by the grievance redressal committee well before the bid submission deadline. The challenge to the evaluation process is further split in case of separate technical and financial evaluations. These amendments have made the procurement process fairer and more transparent. In addition to

⁷⁰ ⁷⁰ "Muhammad Hanif and Company v. Chief Engineer North, PWD." 2023 CLC 443 (Islamabad High Court).

ensuring fairness and transparency during the procurement process Rule-46 of the Public Procurement Rules, 2004 requires the procuring agencies to maintain the record of the procurement proceedings and all associated documents for a minimum period of five (05) years. Regulation 4 of the Public Procurement Regulations, 2008 provides the comprehensive list of the record to be maintained for the above referred defined time. Regulation 5 of the same Regulations also allows the provisions of the whole record referred above after the acceptance of the bids or termination of the procurement proceedings to the participant bidders, however, limited information to any person. The same complete record shall also be available to the PPRA as well as the Auditor General of Pakistan. Amended definition clause (f) of the Public Procurement Rules comprehensively elaborate the 'corrupt and fraudulent practices by splitting them as coercive practices, collusive practices, corrupt practices, fraudulent practices and obstructive practices. Rule-19 of the same Rules requires the procuring agencies to devise a comprehensive mechanism for backlisting and debarment of bidders for cross debarment up to the period of ten (10) years for the bidders indulged in corrupt and fraudulent practices.

Federal PPRA also developed an E-Procurement System namely EPADS (i.e. E-Pak Acquisition and Disposal System). The basic features of the system were as follows through all the features couldn't be activated yet now:

- I. E-Procurement Planning System
- II. E-Document Generation System
- III. E-Tendering System including Encrypted Tender Submission System
- IV. E-Past Performance Information and Retrieval System (PPIRS)
- V. E-Excluded Party List System
- VI. E-Evaluation Matrix System
- VII. E-Grievance Redressal System

- VIII. E-Contract Award System
- IX. E-Contract Management System
- X. E-Monitoring & Evaluation System

From the comparative analysis of the provisions of the WTO GPA and the Public Procurement Regulatory Framework of Pakistan, it reveals that sufficient measures have been taken by the Pakistan to ensure the fairness and transparency during the procurement proceedings as well as after the award of the contract including providing fair opportunity to challenge the discriminatory terms and conditions and to challenge the procurement decision well in time, in addition to public opening the bids and timely publication of evaluation reports and procurement record accessible to the bidders and the public. After the promulgation of the E-Procurement System and its complete functioning, fairness and transparency shall be enhanced in addition to the access of the record of the procurement more traceable and accessible to the supplier, public at large and to the international development partners.

4.4.3 Efficient and Economical Procurement Processes

There is no explicit provision in the general principles of the WTO regarding efficient and economical procurement processes, however the requirement of the procurement through electronic means is a helpful tool to make the processes more efficient. After the payback period to recover the capital cost for electronic procurement (by revenue generation in terms of registration and application processing fee), the procurement through electronic means will be proved to be economical if the variable cost in terms of resources and maintenance is less than the revenue generated.

Rule-4 of the Public Procurement Rules, 2004 introduces the principle of ‘Efficiency and Economy’ and requires the procurement processes to be efficient and economical, though the term

is not defined or elaborated anywhere in the regulatory framework. PPRA Letter No. 1(5)/M&E/PPRA/2018/61 dated 15-02-2021 tilted as “General Clarification Regarding Award of Contract to Second Most Advantageous Bidder” referring the ‘principle of efficiency and economy in the procurement processes’ allows to award the contract to second highest bidder (with some conditions) in case of escape of first highly ranked bidder. Moreover, Federal PPRA has developed a centralized e-procurement system to ensure the efficiency and economy of the procurement process and to enhance fairness and transparency during the procurement proceedings. As stated above, though the system has not yet been fully functional as per the predefined sub-systems and modules, however, still it will be helpful in reducing the unnecessary delays in the procurement proceedings.

4.4.4 Value for Money (VfM)

Most of the developing countries lack the required infrastructure to provide support for sustainability in public sector developments.⁷¹ Comprehensive study of the WTO GPA reveals that the GPA is much more tilted towards reduction in the discrimination and international trade barrier for which it has focused on the principles of “National Treatment” and ‘Most Favored Nation’ in addition to restricted application of the ‘Rule of Origin’ like other WTO instruments. Neither Article-IV nor any other provisions of the GPA focus on the value for money for the procuring entities, which could be the main focal point to meet the objectives of the procurement. The WTO Committee on the Government Procurement on 30th March 2012, decided to initiate a “Work program on sustainable procurement”, wherein the ways shall be explored in which sustainable

⁷¹ Zaidi, Syed Anees Haider, Faisal Mehmood Mirza, Fujun Hou, and Rana Umair Ashraf. "Addressing the sustainable development through sustainable procurement: what factors resist the implementation of sustainable procurement in Pakistan." *Socio-Economic Planning Sciences* 68 (2019): 100671.

procurement can be practiced in a manner consistent with the principle of ‘Best Value for Money’, and consequently the report shall be prepared containing the list of the best practices in this regard.

Rule-4 of the Public Procurement Rules, 2004 identifies the “Value for Money” as the principle of procurement and requires ensuring that the object of procurement brings value for money to the procuring agency. The ‘Value for Money’ is defined in definition clause (l) of the said rules according to which it is the best return for each rupee spent in terms of quality, timeliness, reliability, after sale service, upgrade ability, source and the combination of whole life cost and quality to meet the requirements of the procuring agency. This is a very comprehensive definition which includes payback period and the concept of sustainable procurement in terms of reliability as well as upgrading ability in a timely manner which are the basic elements of sustainable procurement or sustainable development. Upgrade ability implicitly includes and should include the requirements to enhance the efficiency of the mechanical equipment and ultimate reduction in the emissions of the criteria air pollutants and greenhouse gases to reduce the air and noise pollution and to mitigate the contributors to the climate change.

From the comparative analysis of the WTO GPA and Public Procurement Regulatory Framework of Pakistan, it transpires that Pakistan focused on the basic element of procurement ‘value for money’ while promulgating the procurement rules since its inception and defining the same terms in such a comprehensive manner which paves the way for sustainable procurement. Although it couldn’t be claimed that the objective is achieved by including such explicit provision, however, with comprehensive and effective training sessions on sustainable procurement by the expert engineers and scientists, the procurement sections of the procuring agencies, awareness on such aspects can be delivered for effective application and implementation of the respective provisions.

4.5 Selection Techniques

In paragraph 5 of Article XV of the WTO GPA refers to the term ‘most advantageous tender’ and ‘price as the sole criteria for award of contract, however, nowhere in the GPA these terms are defined or elaborated. Whereas in Public Procurement Regulatory Framework of Pakistan explicitly elaborate the term ‘most advantageous bid’ which is substitute of the term ‘lowest evaluated bid’ and the same term was adopted after an amendment made in May 2020 in definition clause h of the Public Procurement Rules, 2004 along with allied respective changes in other rules. After such an amendment ‘highly ranked bid’ shall be treated as most advantageous based on cost or quality or qualification or any combination thereof. It means the bid can be evaluated based on five (05) different selection techniques i.e. cost; quality; qualification; quality and cost; and qualification and cost. PPRA Letters No. 11(110)/M&E/PPRA/2019/204 dated 21-08-2020 titled as “Explanation of Rule 2(1)(h) regarding Most Advantageous Bid” provides comprehensive explanation regarding applicability of all these selection techniques.⁷² PPRA Letter No. 1(5)/M&E/PPRA/2018/61 dated 15-02-2021 titled as “General Clarification Regarding Award of Contract to Second Most Advantageous Bidder” referring the ‘principle of efficiency and economy in the procurement processes’ allows to award the contract to second highest bidder (with some conditions) in case of escape of first highly ranked bidder.⁷³

⁷² Public Procurement Regulatory Authority (PPRA). *Letter No. 11(110)/M&E/PPRA/2019/204*, dated August 21, 2020. "Explanation of Rule 2(1)(h) regarding Most Advantageous Bid."

⁷³ Public Procurement Regulatory Authority (PPRA). *Letter No. 1(5)/M&E/PPRA/2018/61*, dated February 15, 2021. "General Clarification Regarding Award of Contract to Second Most Advantageous Bidder."

4.6 Methods of Procurement and Allied Procedures

Three methods of procurement are identified from the study of the WTO GPA and Public Procurement Regulatory Framework of Pakistan. These are namely Open Tendering or Open Competitive Bidding, Selective Tendering and Limited Tendering.

4.6.1 Open Tendering or Open Competitive Bidding

The priority mode of procurement is open tendering (as per the WTO GPA) and open competitive bidding as per the Public Procurement Regulatory Framework of Pakistan. The GPA doesn't prescribe any substantial procedures for open tendering.

Rule (20) of the Public Procurement Rules 2004 explicitly declares the 'Open Competitive Bidding' as the principal method of the procurement in case of goods, service and works. Rule (21) requires the procuring agencies to adopt the open competitive bidding if the cost of the object exceeds the defined threshold. Rules 22 to 37 describe the substantial and procedural requirements for adopting the subject method. Rule 36 prescribes four (04) procedures for the open competitive bidding and Rule-37 prescribes the conditions to adopt the respective procedures as follows:

- I. **Single Stage – One Envelope Procedure** is adopted as the main procedure for procurement of normal goods, wherein both the technical and financial proposals shall be submitted simultaneously in a single envelop, and hence both shall be opened simultaneously. Though not clearly define, this method is normally used for the procurement of homogenous products or such differentiated products having a broad monopolistic competition due to slight variations in the design, packaging or functions etc. and every supplier shall offer its own price considering the capital and variable cost and the marginal revenue.

- II. **Single Stage – Two Envelope Procedure** is also the most common method and the same is adopted where the price is considered after technical evaluation of the bid. Here both the envelopes are submitted simultaneously, however the envelope containing technical proposal is opened first, and the financial proposal is opened only for those bidders who qualify in terms of technical aspects.
- III. **Two Stage Bidding Procedure** is adopted in large and complex contracts where technically unequal proposals are expected because two or more equally acceptable solutions are available in the (oligopoly) market with a given set of performance requirements. The required set of performance and main parameters are published in the procurement notice and/or bidding documents. At the first stage only, the technical proposals are submitted and the same are discussed with the procuring agency for any revision or modification in the technical specifications or the requirement. Based on the feedback, the procuring agency requires the willing bidders to submit the revised technical proposal as per the newly established revised requirement and/or revised evaluation criteria along with the financial proposal as the second stage of the subject bidding. The same shall be opened simultaneously and be evaluated as per the (revised) evaluation criteria and the most advantageous bid shall be declared as successful.
- IV. **Two Stage – Two envelop Bidding Procedure** is adopted in large and complex contracts where alternate technical proposals are possible in the (oligopoly) market (with a given set of performance requirements) such as certain type of machinery or equipment or manufacturing plant. Here both the technical and financial proposals are submitted simultaneously in two separate envelopes. Only technical proposals are opened and discussed with the bidders with reference to the required technicalities and any gaps thereof. Those bidders willing to meet the negotiated technical requirements are allowed

to revise their technical proposals along with supplementary financial proposals at the second stage of the bonding procedure. Both the proposals are opened at the respective time and evaluated as per the evaluation criteria to determine the most advantageous bids.

From the above discussion, it can be analyzed that Pakistan has adopted comprehensive procedure to tackle the normal and complex procurements, however, from the above analysis, it seems that the last two procedures are redundant in nature and only the Two Stage Bidding Procedure could suffice to meet the requirements of the procuring agency in an effective manner.

4.6.2 Selective Tendering

The term ‘Selective Tendering’ is elaborated in the Article-IX of the WO GPA under the ambit of “Qualification of Supplier” and the same concept is adopted by the Public Procurement Regulatory Framework of Pakistan as “Prequalification of Suppliers and Contractors’ along with “Framework Agreements”.

Article IX of the GPA comprehensively addresses the selective tendering and registration of suppliers and subsequent qualifications by emphasizing the need for minimizing the differences between the procuring entities regarding their registration and qualification procedures. It restricts the procuring entity from creating unnecessary obstacles to the participation of the foreign suppliers. The said article comprehensively identifies the comprehensive requisite set of information to be available to the potential participants before and after their qualification. Either all the suppliers meeting the minimum requirements can be declared as qualified to proceed further or only the predefined limited number of highly ranked suppliers may be declare so to participate in the subsequent bidding process. The same article also allows the procuring entities to use the multi-use list of suppliers to be published annually. Nowhere does the GPA define any conditions under which the procuring entities are allowed to proceed with the selective tendering.

Rules 15 and 16 of Public Procurement Rules, 2004 allows the procuring agencies to engage in prequalification of suppliers (without any reference to the selective tendering) in case of services, civil works, turnkey projects and in case of procurement of expensive and technically complex equipment to ensure the technical, financial and managerial capacity of the participant firms in a manner to be capable of performing the requisite tasks and assignments, hence both the objective and allied condition for engaging in the selective tendering have been defined. All the qualified and non-qualified firms shall be promptly intimated along with reasons for their qualification or disqualification.

Rules 16 (A) and 16(B) allows the procuring entities to enter into the framework agreements with the prequalified suppliers with the intent and understanding to either allow them to participate in a mini-competition or issue them call off order in accordance with the nature of the framework agreements in case of procurement of common-use items, services including maintenance services and those commodities whose prices fluctuate. The procuring agency may prequalify new suppliers during continuity of framework agreement with the previously prequalified suppliers.

From the comparative analysis of the WTO GPA and Public Procurement Regulatory Framework of Pakistan, it transpires that the later more precisely define the objective of prequalification and specifically identifies the categories or sub-categories of procurement for which selective tendering or prequalification can be adopted, whereas the GPA leaves the same on the option of the procuring entities, and just emphasizes to reduce the differences between the procedures of prequalification amongst various procuring entities or we can say requires standard procedure for qualification along with the timely available information for the participant suppliers. Pakistan Rules also require to promptly notify the prequalified suppliers and convey the reasons of rejection to the unqualified suppliers. Hence, the provisions of the Pakistan Public Procurement Framework are clearer and more concise than those of WTO GPA.

4.6.3 Limited Tendering

Limited tendering is considered as the alternate method of public procurement, wherein the substantial requirement of advertisement or procurement notice can be eliminated in addition to leaving behind some other essential requirements on a case-to-case basis. Article XIII of the WTO GPA allows the deviation from the open tendering or selective tendering owing to various reasons and circumstances subject to the condition that the same shall not be used to avoid competition or as a tool for discrimination. Public Procurement Regulatory Framework of Pakistan also introduces various modes of limited tendering under the title of alternate methods of procurement. Although petty cash; request for quotation; purchase of motor vehicle from original manufacturer; and procurement of such goods, services and works having process fixed by government authority, have also been treated as the alternate methods of procurement in the procurement framework of Pakistan, however those cannot be treated as limited tendering considering the value of procurement below the prescribed threshold or nature of procurement as direct purchases without fixing any terms and conditions at the option of the procuring entity. Considering the diversity of reasons and circumstances, the comparative analysis is split under various sub-headings referring to the respective mode of limited tendering.

4.6.3.1 Non-Responsiveness or Collusion

Paragraph-1 (a) of Article XII of the GPA allows limited tendering in case where either no response was received at all, or the bids were non-responsive owing to not meeting the requirements of participation (i.e. qualification parameters) or those of tender documents subject to the conditions that while adopting limited tendering the tender documents shall not be substantially modified. The GPA also allows limited tendering in case tenders submitted are the result of collusion amongst the participants. There is no such provision in Public Procurement Regulatory Framework of Pakistan to adopt the option of limited tendering rather the same

provides the way forward in such circumstances. Rule-33 allows to reject all bids or proposals at any time prior to the acceptance of a bid or proposal by communicating the grounds of rejection (i.e. non responsiveness or indication of collusion or any other grounds whatsoever) without any justification for such ground and further allows to call for a re-bidding after assessing the reason for rejection and revision of specifications, evaluation criteria or any other conditions. Such an iteration is good practice and will obviously help to improve the tender documents keeping in view the experience feedback and market conditions.

From the comparative analysis of the above discussion, the approach of Pakistan Procurement Framework seems to be more justified which encompasses self-assessment and a way forward without avoiding the competition by advertising the same procurement once again. Prima-facie it seems to be the violation of the principle of ‘efficiency and economy’ in procurement processes; however, this is a lesson learned from the self-assessment and experience feedback which paves the way forward to make future procurements more efficient and economical. The deficiency and flaws in the tendering documents leading to no response or non-responsive bids should be rectified rather than using the same as a tool for avoiding competition. Moreover, as the respective provision of GPA restricts to make substantial changes in tender documents before using the option of limited tendering is a useless exercise even because, if the earlier tender had had so responsive requirements the same wouldn’t have been non-responsive, so not to effectively amend them is not a wise option and hence the same must be substantially amended before proceeding further both in case of retendering or opting limited tendering. Otherwise, the limited tendering wouldn’t be able to bring value for money to the procuring entity because of negotiating with the selective supplier(s) on their terms and conditions.

4.6.3.2 No Substitute Owing to Artistic Reasons or Intellectual Property Rights

Paragraph-1 (b) of Article XII of the GPA allows limited tendering in case of work of art; the protection of patents, copyrights or exclusive rights; or due to absence of competition for technical reasons. Paragraph 1 (h) of the same article of the GPA also allows the contract to award the winner of a design contest organized in a competitive manner and assessed by the independent jury to decide the winner. Rule 42 (d)(ii) of the Public Procurement Rules, 2004 also allows negotiated tendering owing to technical or artistic reasons; protection of intellectual property; and where the supplies are manufactured or delivered only by a particular supplier (lacking competition).

4.6.3.3 Research, Experiments and First Development

Paragraph-1 (d) of Article XII of the GPA allows limited tendering in case of procurement of a prototype or first good or service at the request of procuring entity and for the particular contract for research, experiment study or original development with limited production and not with the objective of commercial production or to recover the cost of research and development. Rule 42 (d)(i) of the Public Procurement Rules also provides the option of negotiated tendering to meet the above objective, however, doesn't elaborate the development in terms of avoiding the commercial development. Rule 42(c)(ii) also allows limited tendering in case only one supplier exists for the procurement of the proprietary object.

4.6.3.4 Exploiting short term opportunity

Paragraph-1 (g) of Article XII of the GPA allows limited tendering to exploit such short-term opportunities arisen from unusual disposal such liquidation, receivership or bankruptcy. No such provision exists in the Public Procurement Regulatory Framework of Pakistan. Pakistan International Airlines (PIA) presented its case for exemption from the applicability of the procurement rules for the procurement of old aircrafts, however the same couldn't be allowed

considering expected safety related issues in the old aircrafts. However, the PPRA Board observed that the PIA may present its rationale demand instead of general exception and may exploit such an opportunity arising from the disposal of new aircraft at low prices due to cancellation of the earlier order. It is pertinent to mention that since PIA purchases aircraft for commercial objectives, hence the same couldn't be covered in the scope of public procurement if the same would have been compatible with that of WTO GPA.

4.6.3.5 Extreme Urgency and Emergency

Paragraph-1 (d) of Article XII of the GPA allows limited tendering for reasons of extreme urgency brought about by unforeseeable events, and adopting the open or selective tendering would cause sufficient delay and the object of procurement couldn't be achieved in a timely manner. The same provision exists in Rule 42(d)(iii) of the Public Procurement Rules, 2004 with more stringent condition that such urgency shouldn't be attributed to procuring agency (in terms of poor planning). Further, Rule 42(c)(v) allows direct contracting in case of emergency provided that the emergency is declared by an appropriate forum. COVID-19 Vaccination could be procured in terms of any of these provisions, however the Health Ministry requested the PPRA Board to recommend for granting exemption from the applicability of procurement laws and rules to on the safer side to avoid any audit observations or NAB queries.

4.6.3.6 Commodities

Paragraph-1 (e) of the Article XII of the GPA allows limited tendering in case of procurement of commodities (considering the nearly homogeneous nature and nearly perfect competition market of most of the commodities), however there is no such provision in Public Procurement Regulatory Framework, and the commodities (being recurrent in nature) shall have to be procured either through open or selective competition through framework agreements.

4.6.3.7 Force Account

Rule 42 (e) of the Public Procurement Rules, 2004 allows the procurement not exceeding a defined value of PKR 200 million for small, scattered or remotely located works; works to be carried out without disrupting on-going operations; urgent repairs, rehabilitation, extreme urgencies and remodeling of national heritage requiring prompt action to prevent further damage; to better borne the unaidable risk by the SOE; and the project having sensitive nature and information not to be disclosed to the private sector. WTO GPA doesn't have any provision either under the execution clauses or in limited tendering.

6.6.3.8 Direct Contracting with SOEs

Rule 42 (f) inserted in the Public Procurement Rules, 2004 in June 2021 allows the procuring agencies to engage in direct contracting with the state-owned entities for such works and services which are time sensitive and in public interest. This is an extreme degree of discrimination not only as a barrier to international trade but also a barrier and restriction for local (construction) industry. Moreover, the conditions to invoke the rule are very ambiguous since each project is time sensitive and of public interest. The proposal of such an ambiguous and discriminatory rule by the PPRA Board is one of the strongest types of evidence of broader conflict of interest among the members of the PPRA Board being the Secretaries of the Federal Government and civil servants. The representatives of the Construction Association of Pakistan showed serious reservation on the promulgation of such discriminatory rule having adverse effect on the construction industry including consultant firms.

4.7 Technical Specifications

Paragraph 1-5 of Article X of the WTO GPA narrates the provisions related to technical specifications with a focus on restriction of such conditions creating barriers to international trade.

GPA requires to specify outcome based technical specifications with focus on performance and functional parameters rather than design or descriptive characteristics. More such specifications should be based on international standards where they exist, otherwise they may be based on national codes and standards. In cases where design or descriptive characteristics are used while prescribing technical features, the option of acceptance of the equivalent goods or services must be present in the tenders' documents. Moreover, it restricts the procuring entities to refer to trademark, patent, copy right, design, type, specific origin, producer or supplier unless there is no precise or intelligible way of description, however even in such case the word 'or equivalent' shall be used. While preparing such technical specifications, GPA restricts the services of such consultants or advisors having commercial interest in the procurement of those goods or services. It further requires promoting the conservation of natural resources or protection of environment.

Public Procurement Regulatory Framework of Pakistan also requires all these provisions for the purpose of ensuring broader competition. Rule-10 of the Public Procurement Rules, 2004 is rather more stringent and requires defining the justification of any such reference to brand name or catalogue number along with defining the parameters of equivalence. Though the phrase 'parameters of equivalence' is not elaborated, obviously it requires such an explanation helping the potential participants and technical experts to understand the desired performance parameters and functional parameters. Regulation-4 of the Consultancy Services Regulations, 2010 addresses the requirement of avoiding conflict of interest' while hiring the consultants to engage in the procurement of goods or works or any other such succeeding consultancy assignment.

From the comparative analysis of both the GPA and Public Procurement Regulatory Framework of Pakistan, it reveals that the requirements of reference to the international standards is missing in the respective section of Pakistan framework, otherwise remaining requirements seems to be

more stringent and mandatory in nature and allows conditional deviation with proper justification and elaboration of acceptance of the equivalent goods or services.

Both the WTO GPA and Pakistan Procurement Regulatory Framework have ignored the safety aspects of the procurement of such complex machinery, industrial units or power plants where safety is the over-riding priority and hence redundancy and diversity of the equipment, instrumentation and machinery is essential to ensure the safe and sustainable operation or safe shut down. In such cases, the technical experts must focus on the diversity of designs in addition to performance outcome. For example, where continuous supply of water is essential, two types of pumps having diverse (or different) design features may be required in two (02) or more trains of water supply to eliminate the possibility of the same type of design failure at the same time to ensure the uninterrupted water supply. Both the centrifugal charging pump or reciprocating pump may have the same functional or performance parameters, but the deterministic and probabilistic safety analysis may suggest different types of performance failure. Hence, any such industrial units or the civil aviation or marine industry should have the option to refer to the design specifications in addition to performance parameters to ensure safety and quality.

4.8 Procurement Planning and Procurement Notices

Procurement planning is an essential aspect of procurement management. The procurement plans contain essential information regarding the proposed future procurements including tentative timelines; nature and category of procurement; essential description, scope and quantity of goods and services; estimated cost; procurement methods and selection techniques. Hence an effective procurement plan requires various inputs such as collection of demand by the central procurement unit of the procuring entity from various sections, rationalizing the procurement demand with respect to financial resources, market analysis to determine the estimated cost, cost benefit analysis

(for large and/or complex procurements) for sustainable procurement, identifying the most suitable section techniques and procurement methods. In addition to proper management, another objective of timely publication of the procurement plans is healthy and broader competition and to build the healthy relationship between the procuring entities and the potential suppliers in terms of timely preparation for participation in the upcoming future procurements. Hence, the more information a procurement plan contains, the more competition there will be amongst suppliers, putting both the suppliers and procuring entity at advantageous position.

Despite above referred advantages of the timely preparation and publication of the procurement plan, paragraph 4 of Article VII of the WTO GPA regarding procurement planning is not mandatory and just suggestive in nature. The article suggests that the procuring entities are encouraged to publish (through appropriate medium) a notice of planned procurement well in advance before the start of each fiscal year. Irrespective of publication of procurement plan for upcoming procurements, Paragraphs 1 & 2 of the same article of GPA require the procuring entities to publish a notice of all the intended procurements in appropriate language (except limited tendering) at appropriate print and electronic media for wide dissemination to the suppliers in a manner readily accessible to the public for the period till tender submission deadline. The same article also defines the essential contents of the intended notice including description of nature, and estimated quantity; essential terms and conditions; procurement method, bid submission deadline, conditions for participation and delivery schedule, etc. Paragraph-3 of the same article also requires the publication of summary notice with limited information at the same time.

Rule 8 of the Public Procurement Rules 2004 requires the procuring agencies to devise a detailed mechanism for procurement planning for realistically determining the requirements of the procuring agency within its resources, delivery time and benefits likely to be accrued from the procurement. Rule 9 of the same rules requires the procuring agency to announce and publish in

advance the procurement plan for each financial year on the websites of the Authority and the respective procuring agency to proceed accordingly without any splitting or regrouping of the procurements so planned. Rule 12 requires the procuring agency to advertise the intended procurements on widespread print media as well as on the PPRA website. Rule-13 requires to define the appropriate response time keeping in view the complexity of the procurement, however not less than 15 and 30 days for national and international tendering respectively.

From the above comparison, it transpires that the requirements of procurement planning are more stringent in Public Procurement Regulatory Framework of Pakistan and doesn't allow any subsequent splitting or regrouping of procurement so planned, however doesn't provide any restriction on unnecessary splitting in advance to the publication of procurement plan. The requirements of intended procurement notice (or so-called advertisement) are more elaborative in the GPA that contains the essential contents both for the intended procurement notice and the allied summary notice.

4.9 National and International Tendering

In the WTO GPA, the core principle of procurement is “Non-Discrimination” and almost all the provision emphasis on measures to promoting the international trade in the government procurements by eliminating the barriers to international trade. The decision of GPA committee dated 30-03-2012 refers to international procurement while deciding on initiating the program of safety standards in international procurement, which depicts that both the terms national procurement and international procurement exist on the background level. However, there are nowhere defined any mandatory or guiding principles based on which differentiation may be made between the two terms

Rule 39A was inserted on 15th May 2020 in the public procurement Rule which introduces the provisions of ‘letter of credit’ and incoterms of the International Chamber of Commerce to promote international trade. Rules 10 of the Public Procurement Rules, 2same rules restrict the procuring agency to refer the name of origin or the country while devising specifications. Rule-13 contains the provision of extended response time for international competitive bidding and Rule-24(1) of the same rules requires the procuring agencies to allow prospective bidders to participate in procurements without regard to nationality except where some policy of Federal Government exists in this regard. Rule 24(2) allows preference to domestic suppliers or contractors while competing with the international bidders in accordance with the policy of the federal government or regulations made by the Authority. Despite above referred provisions, no mandatory or guiding principle exists in Pakistan for opting national or international tendering. The careful analysis of the above rules, especially Rule 24(1) and Rule 10, reveal that both the rules allow the broader competition to the extent of both the participation of international suppliers and offering goods and services of any origin without any reference to national or international tendering. Hence, it establishes that each open complete bidding doesn’t restrict international trade in any manner. However, the provisions of different timelines for response times from the prospective bidders for national and international competitive bidding create ambiguity whether each competitive bidding can be treated as international procurement. However, it further establishes that irrespective of the decision of the procuring agency to opt national or international tendering, the outcome of the procurement may be international procurement in case the successful bidder or firm is an international supplier. Superior judiciary although understands that an international procurement or tender should be floated for large and complex projects, however there is no such decision which distinguishes between national international procurement. In a Suo moto case, the Supreme Court of Pakistan was of the view “In compliance to decision of Lahore High Court dated 21-01-2011,

the tender for procurement of 150 D.E locomotives will be advertised through international competitive bidding, wherein all the international manufacturers of locomotives will be invited to make offers for supply of locomotives as per the specifications of Pakistan Railways through a transparent method.”⁷⁴

From the comparative and isolated analysis of both the WTO GPA and Public Procurement Regulatory Framework of Pakistan, it reveals that both the instruments despite repeated emphasis on cross border international competition don't have any guiding principles to opt the national or international complete process and don't define any difference in procurement proceedings in both the cases except the difference in the response time.

4.10 Tender Documentation

Paragraphs 7-11 of Article X of the WTO GPA addresses the requirements of the tender documents in terms of timely provision of tender documents to the prospective suppliers for timely submission of a responsive tender, and essential contents of these documents as a pre-requisite to submit a responsive tender or bid. These contents include description, nature and true or estimated quantity of the goods or services; technical specifications, conformity assessment certificates, plans, drawing or instructional materials; condition of participation; comprehensive evaluation criteria based on quality or cost or any combination thereof including any environmental standards and delivery requirements; authentication and encrypted requirements in case of electronic submissions or electronic reverse auction; time, place and representative requirements for opening of tenders; any other terms and conditions; and realistic delivery schedule keeping in view the complexity of the procurement. Any of the amendments made in the terms and conditions

⁷⁴ *Non-Transparent Procedure for Purchase of 150 Locomotives by Ministry of Railways Resultantly Causing 40 billion Losses to the Public Exchequer*. 2012 SCMR 226.

prescribed in the intended procurement notice and tender documents shall be communicated in the same manner as those of original notice or documents along with adequate extension of time to submit the same.

Rules 20 to 37 of the Public Procurement Rules, 2004 define the mandatory or directory requirements regarding tender or bidding documents and submission of the tenders or bids by the prospective bidders for open competitive bidding in addition to the prequalification and qualification requirements in Rules 15 to 18 of the same rules. Rule 23 of the PP Rules, 2004 requires the timely provision of standard bidding (or tender) documents to the prospective bidders on equal opportunity basis at nominal cost. The contents of the bidding documents include invitation to bid; instructions to the bidders; form of bid; form of contract; general or special conditions of contract; specifications and drawings or performance criteria; list of goods or bill of materials; delivery time or completion schedule; qualification criteria (i.e., participant requirements; an appropriate and unambiguous bid evaluation criteria (in terms of Rule-29); format of all securities (i.e. bid security in terms of the provisions of Rules 25 and 26 and performance guarantee in terms of provisions of Rule 39); details of standards for assessing the quality of goods, works or services etc. While deciding a case regarding the deviation from the standard form of bid security issued by the Bank, the Karachi High Court Sindh declined the previously granted interim injunction and dismissed the Writ Petition and declared that the Petitioner challenged the awarding of contract in question merely on minor technicalities and procedural irregularities in the procurement proceedings.⁷⁵

Rule-26 regarding bid validity allows the procuring agencies an extension in the bid validity period (and allied extension in the bid validity bond or bid security) in exceptional circumstances for a

⁷⁵ Xiamen Golden Dragon Bus Company Limited v. Sindh Infrastructure Development Company, 2021 YLR 1886 (Karachi High Court Sindh).

period not exceeding the time duration of the original bid validly. This provision was being exploited to repeatedly extend the bid validity period by the procuring agency, however, Federal PPRA issued a comprehensive explanation in this regard vide PPRA Letter No. 1(5)/M&E/PPRA/2018/40 dated 25th January, 2021 titled as “Explanation of Rule-26 regarding Extensions of Bid Validity Period” based on the letter of the respective rule and keeping in view the principle of ‘unjust enrichment’ to the procuring agency on the cost of the bidder in case of unreasonable delay and increasing prices of the products. This letter also issues guiding principles for determining the original period of bid validity to avoid unnecessary extensions.⁷⁶ While explaining the letter and spirit of Rule-26 regarding bid validity period and its extension Supreme Court of Pakistan declared that the participant bidder who once consented to the extension in the bid validity period, is estopped by his conduct of requesting any increase in the bid price (attributing to any exponential increase in the prices). In case of deviation to sign the contract (in case of declaring as most advantageous bidder), the procuring agency was compelled to forfeit the bid security.⁷⁷

Rule-27 requires the procuring agency for timely communication of any extension in the bid submission deadline in an equal opportunity manner and same mode of publication as that of original advertisement.

From the above comparative analysis, it reveals that the provisions regarding tender documentation in the Public Procurement Regulatory Framework suffice to submit a responsive tender as required in the WTO GPA. Moreover, the GPA is silent regarding the bid security and bid validity period which are essential for efficiency and economy of the procurement processes

⁷⁶ Public Procurement Regulatory Authority (PPRA), Letter No. 1(5)/M&E/PPRA/2018/40, dated January 25, 2021, "Explanation of Rule-26 regarding Extensions of Bid Validity Period."

⁷⁷ ICC Private Ltd. v. Ministry of Energy (Petroleum Division) through Secretary Civil Secretariat Islamabad, 2023 SCMR 360 (Supreme Court of Pakistan)

prima-facie because the same is not principle of procurement as per the GPA; whereas Pakistan defines these requirements for which comprehensive explanations are also issued by the Federal PPRA to eliminate any ambiguities.

4.11 Treatment of Tenders

‘Farness and Transparency in the procurement processes is the second most important principle of procurement as per article-IV of the WTO GPA; hence it further dedicates Articles XV to XVII to the treatment of tenders in an imperial manner and transparency in procurement processes with specific reference to dissemination of timely information and maintenance of procurement record in an accessible and traceable manner.

Article XV is specifically attributed to treatment of tenders in a fair and impartial manner in terms of receiving, opening, clarifications regarding submitted tenders, confidential requirements and evaluation. Delay in submission of tenders if attributed solely to the procuring entity shall not be disadvantageous for the supplier. Where an opportunity to rectify an unintentional error in submitted tenders is provided to someone, the same shall be provided to all the suppliers. This requirement of GPA can be improved in a clear manner to eliminate the possibility of exploitation of the provisions not linking the rectification of such unintentional error with others because this provision is against the wisdom owing to the scenario that someone may be deprived from the selection on merit attributing to such obvious unintentional error on the pretext that no one was provided such an opportunity (owing to no such unintentional error in their tenders). The article further requires that the bid should be evaluated in terms of already prescribed participatory requirements and predefined terms and conditions, and the contract shall be awarded to the most advantageous tenderer unless it is not in the public interest to award the contract. In the case of

bids containing abnormally low prices, the procuring entity may determine whether it meets the conditions of participation and is capable to fulfill the terms of the contract.

Rules 28 to 35 and Rule 38 of the Public Procurement Rules 2004 deal with the treatment of tenders in a fair and transparent manner. Rule 28 requires the procuring agencies to open the tenders publicly in the presence of bidders or their representatives to ensure their attendance at the predefined time and place of opening. Rule 29 is the core rule regarding the evaluation and treatment of tenders in a fair and impartial manner that requires that any inappropriate and ambiguous evaluation criteria is tantamount to mis procurement hence there is no compromise on the appropriate and unambiguous evaluation or selection criteria. Rule-30 requires to evaluate the tenders in as per the predefined evaluation criteria. Rule 31 allows the procuring agency to seek and accept clarification in writing in a manner that does not allow to change the substance of the bid. While explaining the spirit of Rule-31, Islamabad High Court declared that allowing negligent bidder to make amendments in his bid would amount to conferring an undue advantage and preferential treatment and reciprocal disadvantage to other participants.⁷⁸

Rule-33 allows the procuring agency to reject all the bids by simply defining the grounds for rejection without any need to justify these grounds, however, in case of rebidding Rule-34 requires to assess the reasons of rejection and subsequent revision in specifications, evaluation criteria and any other terms and conditions. Islamabad High Court in its decision clarified that Rule-33 can only be invoked if no firm has been declared successful, and once the decision regarding successful bidder is made, Rule-33 cannot be invoked.⁷⁹

Rule-35 requires the procuring agency to announce the technical or financial or combined evaluation reports by giving justification of acceptance or rejection at least fifteen (15) days prior to the award

⁷⁸ Hafeez Ullah Lehri v. National Highway Authority, 2024 CLC 1370 (Islamabad).

⁷⁹ Ahmar Iqbal v. Ministry of Energy (Petroleum Division), 2020 MLD 1849 (Islamabad).

of contract. Rule 38 allows the procuring agency to award the contract to the most advantageous bidder if not in conflict with any other laws, rules, regulations and policy of the Federal Government. Rule-41 deals with the confidentiality requirements regarding the bid evaluation process until the announcement of the evaluation report.

From the comparative analysis of the respective provisions of the WTO GPA and Public Procurement Regulatory Framework regarding the fair treatment of tenders in terms of receiving; opening; evaluation; announcement of evaluation; acceptance and rejection; and awarding the contract in public interest, it reveals that the provisions of the later or clearer and more comprehensive in terms of ensuring fairness in the procurement proceedings.

4.12 Negotiations

Article XII of the WTO GPA deals with the negotiations in case no tenders are responsive in the sense to be declared as most advantageous in terms of predefined specific evaluation criteria subject to the conditions that any such negotiations and their scope was earlier specified in the bidding documents (with a positive intent and not to eliminate the suppliers from participating in the expected negotiations). In the event of successful negotiations (with nearly the most advantageous bidders), provide all the (remaining) participant supplier to resubmit a reverse tender.

Rule-40 of the Public Procurement Rules 2004 allows the procuring agency to negotiate with the successful bidders with a view to streamline the work or task execution at the time of contract finalization) on the methodology, work plan, staffing and special conditions of contract without changing the scope of work and services. Hence the scope of negotiation is to the extent of works and services only and the same is no with the intent to reinvoke the bidders to submit a revise tender. Two stage bidding procedures prescribed in Rule 36 (c) and (d) provide the option of negotiation

and discussion with a view to improving the technical parameters and evaluation criteria and their terms and conditions in such large and complex assignments where alternate and equally acceptable solutions are available in (oligopoly) market.

4.13 Preferential Treatment for Domestic Suppliers and SMEs

While discussing Chinese economy, Cordoza (2015) explains identifies that despite significant contribution of SMES to China's social and economic development, very little literature is available regarding the influence that public policies may have on the first stage of international expansion of Chinese SMEs.⁸⁰ It means SMEs need attention even in the developed countries. Article V of the WTO GPA addresses the constraints of the developing countries in terms of their varying circumstance and trade needs as part of negotiation on accession for implementation and administration of the GPA. It provides a transition period to the developing countries for delayed applications of any specific obligations of the GPA for defined period of five (05) years for least developed countries and three (03) years for other developing countries and allows them to take such measures to fulfill their development needs during this transition period in terms of inter-alia price preference program.

The price preference program of the GPA allows the developing countries to incorporate price preference for goods or services originating in the same country or the goods and services originating in such other developing countries to whom the country has Preferential Treatment Agreement (PTA) having the obligation of national treatment subject to the condition that both the countries are the parties to the GPA.

⁸⁰ Cardoza, Guillermo, Gaston Fornes, Ping Li, Ning Xu, and Song Xu. "China goes global: public policies' influence on small-and medium-sized enterprises' international expansion." *Asia Pacific Business Review* 21, no. 2 (2015): 188-210.

Presently there is no article of the GPA that addresses the promotion of the Small and Medium Enterprise (SMEs) of the developing or developed countries. However, the WTO GPA Committee in its decision on 30-03-2012 recognizing the importance of facilitating the SMEs in a manner that does not prejudice to the core principle of ‘non-discrimination’. As per the decision, the work program was to be initiated to assist, promote, encourage or facilitate the participation of SMEs in government procurements. The decision of the committee requires non-discrimination amongst the SMEs at domestic level and those of other member states. The committee further decided to make an international survey to collect worldwide data of SMEs, and the measures taken by the states to promote SMEs keeping in view the various aspects such as economic and social goals of the member states; how the member states define the SMEs; level of participation of SMEs in terms of value of procurement and number of contracts including sub-contracting, simplifying the participation requirements and reducing the contract sizes etc. Based on the results of surveys, best practices shall be identified in facilitating the participation of SMEs in government procurement without compromising the core principle of non-discrimination.

Rue 24(2) of the Public Procurement Rules 2004 requires the procuring agencies to allow the preferential treatment (without any reference to price preference) of domestic suppliers and contractors while competing with the international counterparts in accordance with the policies of the Federal Government and PPRA Regulations for works projects; certain goods manufactured, mined, extracted and grown in Pakistan; and disposal of certain assets having potential impact on national security. The above referred rule is broader in nature to the extent of works projects and domestic goods though completely excludes any such preference in case of services. The Rule doesn’t identify the works projects or certain goods for whom such preferential treatment must be ensured and hence opens the way for discrimination and seems to be inconsistent with the spirit of broader competition which is emphasized in Rules 10 and 24(1) regarding the broad scope of

specifications without any reference to the origin or country and no restrictions on any nationality. Moreover, this rule doesn't prescribe any guiding principle to invoke such provision with reference to the economy of the scale or to the extent of SMEs. Since the preferential treatment is general in nature, hence the same may be granted both in terms of price preference or additional marks in the technical or financial or combined evaluation. Such type of preferential treatment is also referred to in the newly inserted Rule 37A to promote intellectual people, being the project proponent of unsolicited proposals aligned with the mission of the agencies to whom such proposal is offered. From the comparative analysis of both the GPA and Public Procurement Rules, 2004, it transpires that GPA only provides price preference to the extent of transition period of few years without establishing any guiding principles both for the domestic goods and services and national treatment to the goods and services of the member states to whom PTA is signed by the respective states. The provisions of the domestic preference program of Public Procurement Regulatory Framework are very broad in nature both for domestic goods and all works projects and hence a discriminatory provision against the principle of broader competition and fair play. Since no policies and regulations have been issued by the Federal Government or Federal PPRA respectively, the same provisions haven't been invoked yet.

4.14 Domestic Review Procedure

Article XVII of the WTO GPA is dedicated to the challenge of the procurement proceedings and domestic review procedure. The article requires the member states to establish at least one impartial and independent administrative or judicial authority to receive and review a challenge by a supplier. In case the first tier of review forum is not completely impartial and independent, the supplier may have the right to appeal before the second tier to a completely impartial and independent administrative or judicial appellant forum. In the case of administrative review or appellant forum, comprehensive review mechanism should be in place. The respective review and

appellate forum should have the power to grant interim relief in terms of suspension of procurement proceedings and the power to grant compensation for litigation cost and the damage caused to the party suffered from the failure or breach of respective provisions of the procurement laws.

After an amendment in Rule-48 of the Public Procurement Rules, 2004, PPRA was declared as 2nd tier appellant forum for the party (supplier or the procuring agency as the case may be) aggrieved from the decision of 1st tier review forum within thirty (30) days of communication of the decisions subject to depositing the prescribed fee and in accordance with the procedure issued by the Authority. First tier review was also split in three stages i.e. challenge to the participation requirements, evaluation criteria and other terms and conditions contrary to procurement laws to be decided before bid submission deadline; challenge to the technical evaluation process; and finally, the challenge to the final evaluation subject not to raising any objection on the technical evaluation part of the final report in case of issuance of separate technical evaluation earlier. Moreover, if the challenge is at the stage of (separate) technical evaluation, the procurement proceedings shall remain suspended. While explaining the scope of the Rule-48 read with Rule-33 of the Public Procurement Rules, Islamabad High Court declared that where all the bids are rejected in terms of the provision of Rule-33 (which allows annulment of procurement process by rejecting all the bids without justifying the reason of rejection), no bidder (even deemed to be most advantageous) is allowed to file the grievance in terms of Rule-48.⁸¹

Through an amendment in Rule 19 of the Public Procurement Rules, PPRA was also declared the review forum to decide about the decision of blacklisting of the suppliers and bidders by the

⁸¹ KAC-RMS (Joint Venture) v. National Highway Authority, 2024 PLD 213 (Islamabad).

procuring agencies. PPRA Board was also declared authorized to review and examine the cases of Pakistani suppliers blacklisted or debarred by the international bodies or foreign countries.

From the comparative analysis of the review procedures prescribed both in the WTO GPA and Public Procurement Regulatory Framework of Pakistan, it reveals that Pakistani laws also provide appropriate two tier remedy (where the 2nd tier is impartial and independent quasi-judicial authority) not just in case of grievances regarding non-discriminatory actions and evaluations but also provide another impartial and independent forum to review address the unfair treatment in case of blacklisting and debarment. Whereas the GPA requires neither any blacklisting mechanism nor provides any remedies in case of any such unfair treatment.

4.15 Contact Management

No provision in the WTO GPA addresses the contract management and the whole instrument revolves around the procurement proceeding from planning to award of the contract. Whereas only four (04) rules of the Public Procurement Rules, 2004, i.e. Rule 39, and Rules 43-45 address a very few provisions related to the contract award and its execution or closure. Rule-39 requires the successful bidder to submit performance security or guarantee, while remaining rules include and address the entry into enforcement of the procurement contract; prompt running bill payments; work completion or overall delivery certificate, defect liability certificate; and final timely payment on closure of contract in a very concise manner. As discussed earlier, section 8(p) of the Pakistan Engineering Council (PEC) Act 1975 empowers the PEC to establish the standards of engineering contracts, and the same provision is also the reason of conflict arisen between Federal PPRA and the PEC leading to a case in the Islamabad High Court. Pakistan Engineering Council normally adopt the standards engineering contracts of the FIDIC including General and Special Conditions of the Contract. Considering the above-mentioned clause in PEC Act, the PEC

considers that PEC should also be authorized to develop Standard Bidding Documents for engineering goods, services and work that must include the conditions of the contract. Since section 8(p) of the PEC Act allows the PEC to establish the standards of engineering contract and doesn't authorize the formulation of engineering contracts, hence the same should be the responsibility of the PPRA to formulate such engineering contract based on the standards set by the PEC. While deciding a procurement case, Islamabad High Court declared that no sanctity was attached to the contract which was the product of the illegal procurement process.⁸² Hence before signing and executing the contract, it is the utmost responsibility of the Principal Accounting Officer to ensure that the contract was an output of legal and valid proceedings.

From the conceptual analysis of the WTO GPA it transpires that the reason for not addressing the contract management is because of the priorities of the WTO towards fairness, transparency and non-discrimination to promote international trade only without any emphasis on the best value for money that can only be ensured by effective contract execution in addition to other essential measures (during procurement planning and procurement proceedings) in terms of market analysis, determining the specifications and selection of the best supplier.

4.16 DISPUTE RESOLUTION OR ARBITRATION

Although there is a dedicated article (XIX) and allied comprehensive mechanism of arbitration arising from the disputes regarding the application of the various provisions regarding accession, negotiations and objections of the parties to the proposed amendments in the GPA or allied instruments; however, there are no requirements for arbitration regarding any disputes that arise during the execution of procurement contract. As stated earlier, since there is no focus of the WTO

⁸² Muhammad Hanif & Co. v. Chief Engineer North, Pak PWD, 2023 CLC 443 (Islamabad High Court).

GPA towards contract management, there are no such measures introduced for arbitration during the execution of procurement contracts.

Rule 49 of the Public Procurement Rules, 2004 focuses on the dispute resolution to the extent of introducing the provision that the method of arbitration shouldn't be inconsistent with the laws of Pakistan. The fact has been ignored that the procurement contracts are quite sensitive in nature involving huge amounts of public money and comprehensive guiding principles might be invoked to resolving such disputes both in case of national and international contracts rather than relying on conventional domestic laws of the state which when promulgated, there was no efficient procurement regime that existed at that time.

Chapter 5

Conclusive Findings and Recommendations

5.1 Conclusive Findings and Observations

5.1.1 Findings Related to Research Questions

Q-1: Whether the WTO Agreement on Government Procurement (GPA) is a comprehensive international instrument developed considering the national constraints of developing countries.

From the comprehensive study and analysis of the WTO GPA, it reveals that the focus of the GPA is to eliminate those technical barriers to international trade which couldn't either be addressed in other WTO instruments such as GATT and GATS due to the scope of those instruments or the allied exceptions for government procurement. The most essential feature of the GPA encompasses the principles of non-discrimination, fairness and impartiality, and transparency with the main objective of elimination of trade barriers to pave the way for enhanced markets for developed nations to further strengthen their economies. Prima-facie Article V of the GPA is incorporated to address the constraints of least developed or developing, however scope of the article is to the extent of transition period and transitional measures for the developing countries (in terms of delayed application of some obligation and limited price preference program for the domestic industry or PTA associated countries if they are Party to the GPA) after accession of the GPA; and the same is the tool for attraction and nothing more. Value for Money is the first objective of government procurement both in terms of durable and effective utilization of the benefits arising from the procurement and as a part of sustainable development, however, surprisingly there exist no provisions to ensure value for money in the public procurement through national and intimation tendering. There are no such provisions in the GPA for technology transfer as part of the government procurement which is a basic constraint of the developing countries and

barrier to the technological advancements for the growth of local industry at par with developed nations. Recently after a decade of enforcement of the Revised GPA-2012, the GPA Committee has taken the decision for promoting the SMEs at a global level and not for the domestic SMEs as the respective provisions of GPA don't allow discrimination between domestic SMEs or those of any other country. No decisions regarding sustainable procurement have yet been taken by the GPA Committee and until unless the framework of sustainable procurement is formed the value for money cannot be addressed. Hence, it can be safely concluded that the present form of the WTO GPA doesn't address the constraints of the developing countries in terms of their economic growth, industrial growth, technology transfer and meeting the basic objective of procurement in terms of value for money.

Q-2: Whether the WTO Agreement on Government Procurement (GPA) and the Federal Public Procurement Regulatory Framework of Pakistan addresses the needs and provides the guiding principles for sustainable procurement.

The existing revised WTO GPA-2012 only shows its intention as a future program to initiate work on the sustainable procurement, and the allied decisions of the GPA Committee dated 30th March 2012 refers the linkage of sustainable development with the value for money and emphasizes the need of imitating work program for sustainable procurement in a manner consistent the international trade obligations of the Parties (to the GPA), however after a lapse of twelve years, neither any such decision was made by the GPA Committee nor any such report is published. Hence the existing WTO GPA neither defines sustainable procurement nor succeeds in establishing any principles on sustainable procurement. Same is the status of the Public Procurement Regulator Framework of Pakistan though it contains a comprehensive definition of "Value for Money" an essential part of sustainable procurement. Government of Pakistan has submitted its Report on "National Determined Contributions (NDC) Report-2021" as part of the

obligation of Paris Agreement to reduce the greenhouse gas emissions which is not possible without enhancing the efficiency of energy production and consumption facilities and without introducing the need for purchasing green products both by the society at large and through government procurements.

Q-3: Whether the Federal Public Procurement Regulatory Framework of Pakistan is comprehensive enough in defining the substantial parameters and guiding principles to distinguish the national and international competitive bidding.

Neither the WTO GPA nor the Public Procurement Regulatory Framework of Pakistan distinguishes between the national and international tendering in terms of circumstances, categories of procurement, scale or size of the procurement or the nature and complexities of the object of procurement. Since there is no distinction between national and international tendering in both the frameworks, and hence there are no mandatory or guiding principles established for this purpose, and the same is left (at default) at the option of the procuring entities to adopt any mode of tendering. Moreover, since there is an obligation in the Pakistani framework not to restrict any nationals for participation in the bidding process unless prohibited in accordance with the policy of the federal government from which it transpires that each tendering process is international tendering unless specified otherwise. However, a contradiction exists here where a provision regarding response time distinguishes between the national and international tendering without any guiding principle to identifying such distinction.

Q-4: Whether the measure taken by the Federal PPRA for elimination of non-discriminatory conditions and defining the principle of domestic preference are effectively applicable in defining the technical specifications of the object of procurement.

The provisions regarding specifications and non-discriminatory conditions seems comprehensive in nature for the conventional procurement but doesn't address the safety related aspects of the procurement where in addition to functional requirements and performance parameters, diversified design features have their own importance, and reference to design requirements becomes essential especially in industrial safety to ensure the redundant and diversified equipment's to avoid the probability of same kind of failure owing to same design features. Moreover, the provisions regarding domestic preference are very broad in nature and don't categorize the goods and works for which such preferences must be applicable to promote such deserving industries which may not compete owing to economy of scale and lack of sufficient resources. Such preference may not be utilized just for ousting the international counterpart which may result in deviation from the principle of "value for money" and unjust enrichment of suppliers at the cost of the procuring entities. Moreover, neither the Federal Government nor the Federal PPRA have issued any policy or regulation for invoking the principle of domestic preference as required in the respective provisions of the procurement rules. Hence it can be concluded that the measures taken by the Federal PRA don't suffice for effective application of the principle of domestic preference and the same may be exploited at the cost to the procuring entities.

Q-5: Whether the Federal Public Procurement Regulatory Framework of Pakistan presents effective dispute resolution mechanism both before and after the award of the procurement contracts.

The Federal Public Procurement Regulatory Framework of Pakistan after a recent amendment provides a two-tier grievance redressal mechanism by splitting the procurement proceedings in three parts i.e. firstly at the time of floating of tender (before bid submission deadline) to address the objections to inappropriate evaluation criteria and other (discriminatory and difficult) terms and conditions; secondly at the time of issuance of technical evaluation report; and finally at the

time of issuance of final evaluation report (subject to restriction of raising any objection on technical evaluation except for single stage single envelop bidding procedure). In case of grievances against participation requirements, the same shall be addressed before bid submission line, and in case of grievance against technical evaluation, the procurement proceedings shall be suspended till the decisions of the first-tier committee. The first tier requires the procuring agency to formulate an odd number committee to address the grievances, whereas the second tier is an independent (quasi-judicial) forum at PPRA level sufficing the provisions of the WTO GPA for domestic review procedure.

Federal Procurement Regulatory Framework of Pakistan also provides a review forum at PPRA Level to address the grievance regarding unfair blacklisting or debarment by the procuring entity in addition to special provision of examining the case by the PPRA Board in case of debarment by the international organization or (the procuring entity of) the foreign country. However, there is no effective arbitration mechanism as required by the PPRA Rule, and existing old arbitration laws of Pakistan are not sufficient to address the special contractual obligations in case of national and international contracts.

Q-6: Whether the Federal Public Procurement Regulatory Framework of Pakistan contains the effectively applicable provisions for the protection of intellectual property rights of the project proponents.

The Public Procurement Regulatory Framework of Pakistan allows negotiated tendering or direct contracting in case of acquiring the goods or services wherein there is limited or single option for such supplies or to support the piece of research experiment or (first) development) attributing the same to the proprietary information or intellectual rights, however like WTO GPA it doesn't establish any such principles how to protect the IP rights of such suppliers. Moreover, there is a

contradiction between the two different provisions of the rule regarding unsolicited proposal where one sub rule ensures the protection of proprietary information of the project proponent and the other exempts the procuring agency from any such responsibility regarding IP rights. Moreover, there are no regulations or procurement guidelines to invoke such limited tendering involving IP rights.

5.1.2 Other General Findings

5.1.2.1 WTO GPA Related Findings

1. The WTO GPA doesn't have any demonstrative set up except the GPA Committee responsible to Director General WTO, and it seems that GPA is a transitory plurilateral arrangement paving the ways for multilateral agreement on government procurement like those of GATT and GATS.
2. Since the focus of the WTO GPA is the Parties (to the GPA), hence any such principles of non-discrimination fairness and impartiality are to the extent Parties, and hence this is again a source of discrimination depriving those nations from equal opportunity and level playing field who are not the Party to the GPA.
3. While collecting statistical data of any kind regarding government procurements in general or even for specific purposes (like facilitating SMEs or sustainable development program), the focus of the WTO GPA is the Parties (to the GPA) rather than collecting worldwide data to address the constraints of all the countries across the globe.
4. WTO GPA rather than defining the comprehensive provisions for sustainable procurement, facilitating SMEs and Safety Standards in Procurement, leaves the same at the option of the GPA committee to decide after the outcome of various work programs.
5. The WTO GPA neither distinguishes between the open tendering and selective tendering nor provides any guiding principles to invoke any of these and only focuses the scenarios

of limited tendering; whereas Public Procurement Regulatory Framework of Pakistan provides the guiding principle to invoking the selective tendering (including prequalification process and framework agreement) in addition to scenarios of limited tendering (including direct contracting and negotiated tendering).

6. The whole emphasis of the WTO GPA is on the process of procurement before the award of the contract without any reference to the post award contract management which is the sole outcome of the procurement proceedings, and the effective contract management is a tool for meeting the objective of sustainable procurement. Hence also there are no provisions for arbitral proceedings to resolve the disputes between the procuring entity and the supplier in case of national and international contracts and disputes.
7. There are no provisions in the WTO GPA for effective national level monitoring and evaluation mechanism or requirements of regulatory infrastructure to ensure the compliance of domestic procurement laws and international obligations.

5.1.2.2 Findings Related to Public Procurement Framework of Pakistan

1. The Primary Procurement Legislation of the Federal PPRA doesn't contain any broader provisions or principles of procurement and just relies on the few definitions such as public procurement, goods, works and services without any reference of these definitions to the main body or contents of the same legislation, and any such laws and regulations are at the option of the Federal Government or the Federal PPRA in contrary to other such regulatory legislations that contains the main parameters of the respective regulatory field.
2. The constitution of the Regulatory Authority is an example of broader conflict of interest, where seven out of ten members are the Federal Secretaries (being the Principal Accounting Officers of various procuring entities). The seats of the private board members have remained vacant throughout the last more than two decades except for a few months.

The legislation allows the appointment of the Managing Director from the Government Sector which is again a conflict of interest and meanwhile the instant legislation requires him to submit the disclosure of no conflict of interest. No Managing Director from the private sector has been appointed yet since the inception of PPRA.

3. Section 21 of the PPRA Ordinance allows the PPRA Board to recommend to the Federal Government exemption from applicability of procurement laws in national interest, and any such exemptions are recommended frequently due to the presence of Federal Secretaries on the Board without discussing the legal aspects and scope of national interest.
4. Some rules regarding exceptions from the applicability of procurement laws are though in conformity with the international practices but have no vires with the parent statutes.
5. Public Procurement Rules 2004 is a concise piece of legislation encompassing all the essential areas of public procurement; however, it is not complemented with such regulations, procurement guidelines and allied procedures. Hence, PPRA management often issues explanations and clarifications to explain and clarify the concise provisions of these rules.
6. The language of some of the rules is not very clear and hence leads to violations. Consequently, PPRA has issues explanations for true application of the rules.
7. The E-Procurement System of Federal PPRA couldn't be matured as per the expectations and predefined features to reduce human intervention.
8. Like WTO GPA Public Procurement Regulatory Framework of Pakistan doesn't focus on the contract management which is an essential tool for sustainable procurement.
9. Despite stringent features in the public procurement rules, there are lot of issues of non-compliance and deviation from the respective provisions due to the absence of resource

persons having interdisciplinary knowledge required to implement the procurement laws in general and defining the specifications in particular.

5.1.2 Observation

1. The provision of Public Procurement Rules of Pakistan is more stringent than those of the WTO GPA.
2. The scope and coverage of the public procurement was earlier very vast, however with the recent amendments in the definition of public procurement and goods have further enlarged the scope unnecessarily by including the acquisition of immovable property and intangible goods, whereas the definition of services was already unlimited.
3. Two Stage Bidding Procedure and Two Stage Two Envelop Bidding Procedure of Federal PPRA are redundant in nature with a significant difference of time of submission of financial proposal during both stages in the later.

5.2 Recommendations

5.2.1 Recommendations for WTO GPA

1. The WTO should make efforts for transition from the plurilateral agreements towards multilateral agreement on governmental procurements, addressing the constraints of developing countries, especially reducing the trade deficit through economic growth, technology transfer and enhanced industrial growth. Such a multilateral instrument shall eliminate all kinds of non-discrimination (subject to special measures to address the needs and circumstances of developing countries) for all the WTO members rather than restricting the same to the extent of Parties acceding to the GPA.
2. WTO should include in the GPA or any equivalent international agreement the principle of sustainable procurement as the core principle at par with the principle of non-

discrimination. Hence, the WTO should introduce mandatory and guiding principles for sustainable procurement in linkage with attaining the objectives of ‘value for money; welfare of society at large; and protection of the planet (by reducing air pollution and emissions of greenhouse gases). To meet the objective, the WTO should launch a team of interdisciplinary experts having diverse knowledge of engineering and scientific disciplines in addition to understanding of the worldly and national economics, and international trade law.

3. The WTO should introduce the requirement of an effective national level procurement regulatory infrastructure and monitoring mechanism through an autonomous regulatory body completely independent of governmental influence.
4. The WTO should improve the various provisions of the GPA or any equivalent international instruments for distinguishing any modes of procurement such as open and selective tendering and formulate the mandatory and guiding principles to invoke the same.
5. The WTO should improve the requirements of contents of tendering documents by incorporating the provision an appropriate and unambiguous evaluation criterion, financial security requirements, and the provisions related to efficient procurement processes by eliminating the delays due to conventional bureaucratic hurdles and any hurdles attributing to lack of competence.
6. The WTO should improve the provisions related to technical specifications by incorporating the provisions of safety standards in the international procurements and should formulate comprehensive guiding principles to develop the technical specifications.
7. The WTO should introduce an effective contract management system to ensure the obligations of sustainable procurement along with an effective dispute resolution mechanism regarding disputes arising during the execution of procurement contract.

8. WTO should formulate the feature of electronic procurement system in a manner to reduce the human intervention to the extent possible particularly for quantitatively evaluating the participation conditions and conformity assessment of the mandatory technical features in linkage with past performance information retrieval systems database and national or international conformity assessment standards.
9. The WTO should introduce an effective accountability mechanism for the personnel of the procuring entities who intentionally or unintentionally deviate from the WTO and domestic mandatory provisions during the procurement proceedings or during the execution of procurement contracts.
10. The WTO should formulate mandatory and guiding principles to ensure the confidentiality of proprietary information and to protect the IP rights of the suppliers to whom procurement contracts are negotiated and signed.

5.2.2 Recommendations for Pakistan

1. The Government of Pakistan should revise the primary procurement legislation at par with the other national legislations of the regulatory bodies having its full-time chairman and members with no representation from the government of Pakistan.
2. The Government of Pakistan should incorporate the main provisions and general principles of the public procurement in the primary legislation in addition to defining the rationale scope and coverage along with general and specific exceptions from the applicability of these rules.
3. The Government of Pakistan should incorporate in the primary procurement legislation the provision of a strong monitoring mechanisms allied with effective enforcement measures and an effective training program.

4. In line with the obligations of “Pakistan National Determined Contributions (NDCs) Report-2021” the Government of Pakistan should make legislation for the purchase of energy efficient and green products at large, medium and small scale both for general consumption by the society at large as well as for governmental purpose. The South Korea Model of Green Procurement may be proved as a guide for the federal government to fulfilling its determined contribution in reduction of greenhouse gas emissions. In addition to general legislation, the requirement of sustainable procurement should be incorporated in the primary procurement legislation.
5. The Federal PPRA should promulgate a comprehensive set of regulations and procurement guidelines to fulfill the purpose of the above-mentioned requirements of the primary legislation in addition to incorporating recommendations (4 to 10) made for the WTO.

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