

OLD RULES, NEW REALITIES:

Are existing Public Procurement Systems addressing current and future needs?

Joao N. Veiga Malta, Paul Schapper,
Oscar Calvo-Gonzalez and Diomedes Berroa

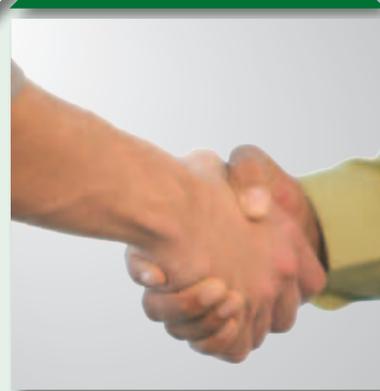
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1. INTRODUCTION

Public procurement is a key aspect of public administration that links the public financial system with economic and social outcomes, and as such is a major determinant of the quality of community services and infrastructure, and the effectiveness of government. This function cuts across almost all areas of planning, programme management, and budgeting.

The OECD (2002) estimated that total procurement accounted for 14.48% to 19.96% of Gross Domestic Product.

Similar estimates have been made for the European Union (EU): “Total public procurement in the EU is estimated at about 16% of the Union’s GDP or €1500 billion in 2002. The amount varies significantly between member states, ranging between 11% and 20% of GDP, but is increasingly recognized as a key driver for Europe’s competitiveness. The need to develop a stronger internal market in public procurement was recently included in the re-vamped version of the Lisbon Agenda for Growth and Jobs in April 2005.” (Binks 2006).

Poor procurement practices invariably reduce development outcomes and are likely to reduce foreign direct investment. These effects have been noted for emerging economies by the International Monetary Fund (IMF) (1998), which has identified national consequences in terms of (i) over-spending on capital, (ii) under spending on asset maintenance, (iii) poor quality infrastructure, and (iv) reduced government revenues. Similarly, the OECD (2007) reported that “public procurement is the government activity most vulnerable to waste, fraud and corruption due to its complexity, the size of the financial flows it generates and the close interaction between the public and the private sectors”.

Increasing demands from civil societies for greater results from government, and the emergence of a culture of performance are key drivers for strategic reforms to procurement management to more effectively deliver economic and social outcomes. These issues are critical in developing nations given the role that infrastructure development plays in economic and social development: the World Bank (1994) noted that the provision of infrastructure services to meet the demands of businesses, households and other users was “one of the major challenges of economic development.”

For these reasons public procurement is ultimately a priority target for efficiency and productivity strengthening in many governments.

However, while public procurement is often a priority, it has become less certain as to how this should be managed to deliver these efficiency and productivity outcomes. The governance structure for public procurement has traditionally been procedures-based, with a focus on integrity in the selection process. Procurement procedures have been reasonably simple and largely define the issues only in terms of whether the value of the transaction is expected to be small (less than US\$20,000), medium (up to US\$100,000) or large. The characteristics of the supply markets themselves are generally not acknowledged. These procurement procedures have remained essentially unchanged for decades, even though government procurement, such as for economic infrastructure, has become far more complex.



This discussion paper provides a critical analysis of the traditional public procurement management model and presents alternatives that may be more appropriate for the complex procurement requirements for today's economic infrastructure.

2. BACKGROUND

A century ago in many countries, relatively few in the community would have felt a strong connection with their governments. Today the state has expanded dramatically with an array of publicly provided services and infrastructure, and recent generations are therefore “likely to be much more concerned than their ancestors were about the effectiveness of government and the checks and balances on its decisions. And they are likely to be much more aware of how their own government’s performance compares with others” (World Bank 1997).

The evolution of public procurement in many countries has been intrinsically linked to this development of modern government, both in scale and complexity: “In the UK total government expenditure as a percentage of GNP increased from 11% in 1792 to 52% in 1979, [44.54% in 2009] “the main reason for this great, long-term, increase has been the expansion in economic and welfare services, expenditure on which has risen at nearly twice the rate of government activity” (Greenleaf 1983, p34). Great as it has been, the growth in this expenditure has been exceeded by the rate of growth in public procurement. Initially much of this expansion was to provide for internally generated services and construction, many of which have now been outsourced, thereby being transformed from functions of public administration to public contracts.

In its early era, government procurement focused primarily on basic goods and military equipment. As a general rule infrastructure (works) was undertaken by government departments, be they central or local government, that operated in a standing manner. During that time, procurement was by nature a simple activity that operated with reasonable efficiency within the patronage or clerical appointment systems of governments of the day.

However, the rate of expansion of procurement transactions within an increasingly political economy meant that the traditional governance framework gave way to a wave of reforms that focused on developing policies and regulations aimed essentially at removing the element of patronage in expenditure by eliminating discretion as far as possible from the procurement process.

Commonly these policies and regulations have sought to identify the vulnerable steps in the procurement process and standardize their application. However, these reformed procurement regulations increasingly impacted on contract development, contract management and productivity, and also became litigious. “The emphasis became how to prevent the recurrence of the problem rather than how to repeat the success, focusing more on the process of acquisition than on the product of acquisitions. As a result the process had become adversarial” (Nagle 1986).

The ongoing rise in demands on government put pressure on more than just the governance structure around procurement. It also resulted in a need for increasingly complex infrastructure and services, and greater productivity from existing resources addressing these demands. The value and complexity of the procurement of goods, services and infrastructure, which had come to represent a large part of the National economy, required new methods of engagement that would address the efficiency and productivity of this activity.

New techniques were developed such as outsourcing and PPPs, which would have been unrecognizable in the early context of traditional simple procurement. However, in the modern context of complex high

value/high risk contracting these are common tools that include all of the key procurement steps including needs analysis and definition, market research, expressions of interest, specifications, risk and value-for-money analysis, contract and risk management design and monitoring, and grievance handling¹.

Hand-in-hand with these new techniques, there was also a necessity for the public sector to engage higher levels of expertise including that residing in the private sector.

The need for greater productivity and the shift to outsourcing led to a further wave of procurement reforms, referred to as ‘Managerialism’, that sought to draw on private sector business methods to undertake public procurement, and often resulted in transferring government functions to the private sector.

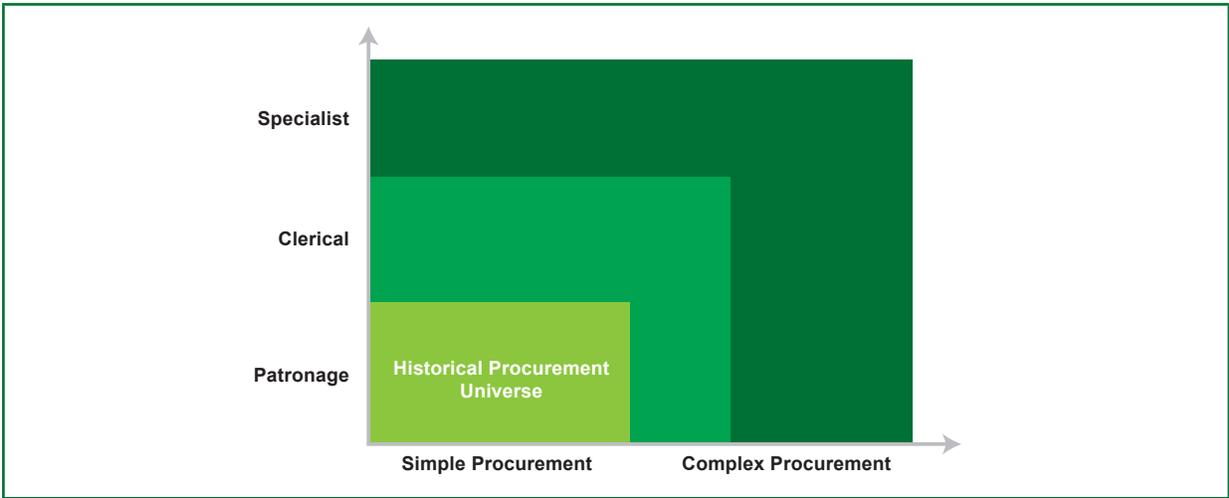
Managerialism swept away the centralist approach, and replaced it with a ‘let the managers manage’ ethic based on the Harvard MBA model of administration with its heavy focus on quantification of outputs. This approach gave centre stage to performance benchmarking of public functions, the most common of which was the cost of private sector provision of the equivalent activity.

Market testing became the norm for establishing reform proposals and resulted in traditional civil service activities being transferred to the private sector under contract – outsourcing shifted many administrative functions to the procurement arena.

Today’s complex procurement environment is now quite different from that of a few decades ago: frequently the required solutions are not fully identifiable and the optimum solution is not fully known. The procurement specialist now needs professional knowledge and a capacity for judgement in the decision-making process. These new requirements describe the professionalization of the procurement process.

The transformation is illustrated in Figure 1.

Figure 1
Skill Base vs Procurement Complexity



¹ Jurisdictions such as the EU, Australia, New Zealand, South Africa, India, etc., define PPPs as procurement, usually for which Departments of Finance establish some accounting rules or policies to assist the cost benefit analyses.

The transition from patronage, to bureaucratic, to professionalism has not been uniform, with some jurisdictions having bypassed the clerical stage whilst others have remained with patronage and clerical bureaucracy. Many jurisdictions contain at least some elements of all three.

United States

The development of procurement in the US federal government had many elements common to the above. Initial attempts to address unemployment through public works can be traced back to the Public Works Act of 1863 and the policies of the 1880s, thus cementing the role of infrastructure as a tool of public policy, a role that has further strengthened throughout the post war period.

From 1956 to 1970 the perception of procurement regulations changed dramatically from being solely for the government's benefit, to the view that the regulations could benefit either party.

United States – Federal Procurement Development

- 1792 - Post Office Law – procurement process
- 1825 - General regulations – Secretary of War – process detailed
- 1836 - Modifications to Post Office regulations, 1842 extended to rest of Government
- 1890 - Request for 8-hour day in government contracts, formalised in 1906
- 1921 - First Civilian Procurement
- 1938 - First code of Federal Regulation promulgated
- 1947 - Changes to civilian procurement law
- 1950 - Comptroller's office enters the realm of procurement
- 1951 - The ASPR was "established with the idea of being a concise statement of principles to guide contracting officers in exercising the powers and judgement granted to them by the armed services procurement act"
- 1951 - Government contracting had grown to a proportion that a substantial number of America's major industries employing at least one third of the nation's workforce were involved
- 1956 - Changes to promote small business through procurement
- 1978 - Major change, public participation in the development of procurement regulations through consultative committees, this created a tension between the existing prevailing views.

The 1970s saw an explosion of procurement regulations greatly reducing the discretion of procurement officers while enhancing the policy role for procurement. "The tremendous economic leveraged procurement was now routinely used to advance national, social, economic, or political goals ranging from small business to contracting in Soviet controlled areas, and the humane slaughter of livestock" (Nagle 1986).

There was also a process to delegate many decisions to the head of Department; these officials were tasked with implementing government policy within the existing framework.

Latin America

The development of procurement in the Latin America and the Caribbean (LAC) region has deviated from the path set out above. Traditionally infrastructure in this region in telecommunications, rail, ports

as well as water has been developed by the private sector, albeit with government concessions and subsidies, and the project management skills, which have often formed the skill-base for complex procurement, were not developed inside the government. In the 1950s, as a result of nationalization, much of this infrastructure was transferred to the State. In the 1950s and 1960s a new round of state-led infrastructure development began to occur, much of it financed initially by the World Bank and then other financing institutions. This development continued until the 1980s. The development of complex procurement from the outsourcing of high-value infrastructure projects has not occurred. Instead, procurement has remained in the patronage – clerical phase but is increasingly being imposed on complex activities.

The governance structure of these activities in LAC is being imposed in some cases by the rules of the Multilateral Development Banks, while in others there is the application of clerical processes to complex procurement. Where there has been an in-house labour activity the options to outsource have been limited, partly due to limited private sector capacity.

Infrastructure expenditure in LAC has also been characterized by weaknesses in the planning process. World Bank experience has been that “several countries in LAC habitually disburse less than their annually expected disbursements—typically around 75 percent of plan.”

Today the imposition of strategic/complex tasks on procurement systems that are still administered by patronage or clerical appointments has meant that processes designed for simple contracts are being applied to complex procurement. Simple procurement involves few of the requirements of strategic/complex procurement, and this application may result in poor planning and excessive processes with diminished productivity outcomes in the region.

Aligning Controls and Performance

There have been two threads in this evolution of public procurement. First has been the expansion of the volume of simple procurement, largely to support in-house service delivery to the community. To address the increasing governance risks, new rules have been developed that seek to codify this activity and eliminate the influence of patronage.

The second thread has been the great expansion in the value of procurement, which now typically accounts for 15-20% of GDP. This cost has demanded new management methods that focus on efficiency, effectiveness and productivity. New solutions sought through procurement have given rise to more complex procurement with higher risk/return profiles.

Today it is reasonable to revisit whether the needs of rapidly evolving governments, with complex service and financial requirements, can realistically be addressed by a schedule of clerical controls.

Whether the control and compliance rules applicable to simple procurement are appropriate for these complex and high value requirements is a key issue and, if not, whether an inappropriate governance model for acquisitions might also damage investment productivity and national growth. These are the questions that are the focus of the following discussion.

3. SIMPLE PROCUREMENT - THE EARLY REGULATORY MODEL

The procurement governance frameworks that prevail in many countries have defined procurement in terms of regulated procedures with an intention of minimizing or eliminating discretion, which has been identified as a key source of corruption. The conventional regulatory framework has been imposed as a risk management instrument that focuses on procedures per se rather than achievement of objectives.

To drive behaviour towards performance, this traditional procurement framework has sought to regulate for best practice procedures for various categories of acquisition, based on value thresholds and broad content.

This approach has generally been understandable, where public procurement has, for most of history, been only a little more complicated than personal expenditure, and where procurement personnel have been warehouse officials and accounts payable staff, and often unqualified. This simple-procurement context also typically relates to around 75% of all procurement transactions. Establishing the procedural rules for these officials has been a reasonable step to ensure against obvious avenues for patronage and corruption.

Against this background, it seems likely that these rules will be mostly focused on regulating the procedures that determine who wins a contract, and indeed this is generally the case. Most country regulatory frameworks have a heavy emphasis on the solicitation and selection processes, and similarly procurement policies are focused on the selection process itself with the objective of ensuring a merit-based rather than a patronage-driven outcome.

These procurement rules often define just three modes of supplier selection. Negotiations are generally locked out or narrowly defined, requiring requisitions to be specified as a one-off exercise with little opportunity for modification. Similarly, UNCITRAL Model Law 1994, Article 18, requires goods and construction contracting to be strictly defined via the tendering procedure with minimal interaction between buyer and seller.

The procurement rules in the LAC region almost universally reflect this approach, setting out the prescribed procedures for categories of tightly specified contractual requirements. Of ten country procurement reports reviewed², all discussed the rules around tendering and thresholds and the eligibility criteria.

There is very little in these rules that focuses on efficiency, value-for-money, risk management, productivity or other concepts that relate to gaining maximum economic or social return from a very large amount of money: concepts that are fundamental to prudent management of public funds.

In summary, this early regulatory concept of procurement governance is as a relatively simple rule-set for government acquisitions that have mostly been about basic goods (mostly off the shelf) and some basic services in competitive markets, and in this context have been mostly reasonable. However, over

² Colombia (2001), Costa Rica (2003), Dominican Republic (2003, 2005), Guatemala (2005), Honduras (2005), Mexico (2007), Nicaragua (2004), Panama (2006), Paraguay (2003), Peru (2005).

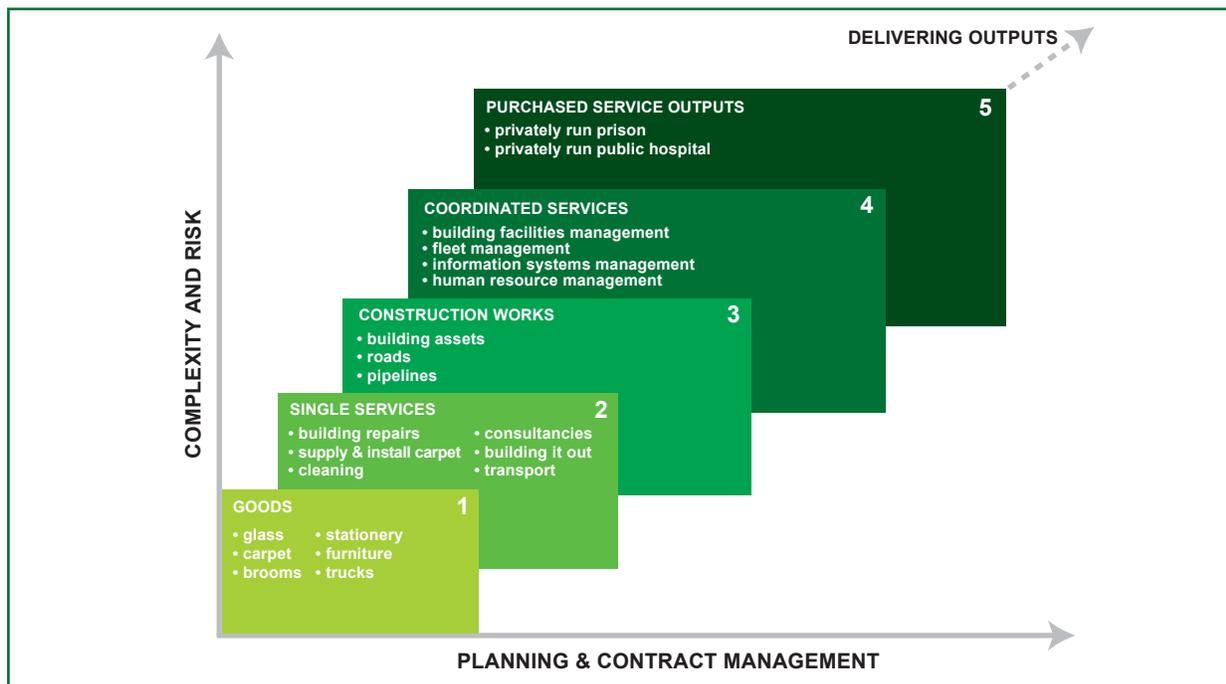
the past few decades this profile of the scope and functioning of public procurement has changed dramatically.

The Modern Context

Modern governments are now complex service organizations and major economic players. Figure 2 shows the features of this changing environment in which the clerical functions of the past are being overtaken by new professional skill sets and technology. Public procurement was previously concerned mostly with goods, where the main question was supplier selection. The exercise was largely low value and low risk, undertaken as a back-office function with a warehousing facility and requiring only basic skills.

Procurement has shifted to being more focused on complex infrastructure and services, often involving complete service solutions, high risk and high value, with just-in-time supply lines, and requiring high level skills in the specifications, market research, financing and contract management. Complex procurement typically accounts for about 75-80% of the value of public procurement.

Figure 2
The Transformation of the Nature of Public Procurement



There are important distinctions between the nature of traditional/simple procurement and modern requirements for strategic or complex procurement that may describe procedures for major infrastructure for example. These distinctions are more than simply matters of degree but rather describe very different procedures and requirements.

For traditional procurement for which the focus has been mostly on simple goods (for example, for photocopy paper) there is only a minor requirement for a needs analysis, market research, or a buying strategy, or even for defining the specifications. Instead the rules require that there be a competitive

process to gain the least-cost outcome. There is some contract management required to ensure that the purchase order was actually fulfilled but, other than that, often no significant follow-up is required.

These procedures are in contrast with those required for the construction of, for example, a major infrastructure project. In this case there are substantial needs analyses and planning issues to be addressed, while the contracting methods themselves, including financing, will be major considerations. The bidding parties will also have significant issues to deal with including sovereign risk.

For strategic or complex procurement there should also be significant planning of the asset management that will be required and so Total Cost of Ownership (TCO) should be a key element of the value-for-money analysis (TCO is not generally mentioned in the traditional rules). In modern management methods for procurement there will often be relatively little time or resources required for the selection process itself – often there is almost a self-selection process determined by the extensive foundation laid by the planning and specification stages.

For strategic/complex procurement, substantial specialist inputs are required at all stages: optimum value for money from high value, complex arrangements involves significant risk and it is necessary for the practitioner to understand the market dynamics. Similarly, judgment is required as to what kind of selection process should be used, what kind of contract, period of engagement, performance criteria that are contracted, whether there are alternative ways of addressing the needs analysis via leasing, subcontracting or outright purchase, or a framework contract, are all issues that require professional input. The selection and design of the contractual form to deliver best value for money will depend on the professional knowledge about the particular industry and its suppliers, and the ease with which a contractual arrangement can be monitored, evaluated and managed. Selection is made considering the nature of the supply market itself, common business practices, the maturity of suppliers to deliver complex packages, the length of supply chains, whether inventory is required or just-in-time supply is satisfactory, whether significant economies of scale are available, whether suppliers are required to tool-up, etc.

These requirements can apply for all types of procurement. For infrastructure there are additional issues such as multi-year financing and ownership such as in PPPs, BOO or BOOT schemes.

Current Procedures Not Delivering Effective Governance

The Colombian anticorruption commissioner (2010) indicated that “in 2009, bribes with a value of 3.9 billion pesos were paid to access public procurement contracts, not only exceeding the total generated by each of the last three tax reforms, but also exceeding direct foreign investment”.

Also, in 2008 the government awarded concessions to build roads to various private sector entities for a total cost of 6 billion pesos, it subsequently allowed contract modifications for a further 6.5 billion pesos. In other cases existing concessions were extended, two cases identified in particular, one where the concession was extended by 35 years, another by 20 years plus additional financing totalling four times the original contracted amount.

Examples of how the established regulated procedural model has been unable to address these more strategic requirements is found at all stages of the procurement cycle: for example in relation to the

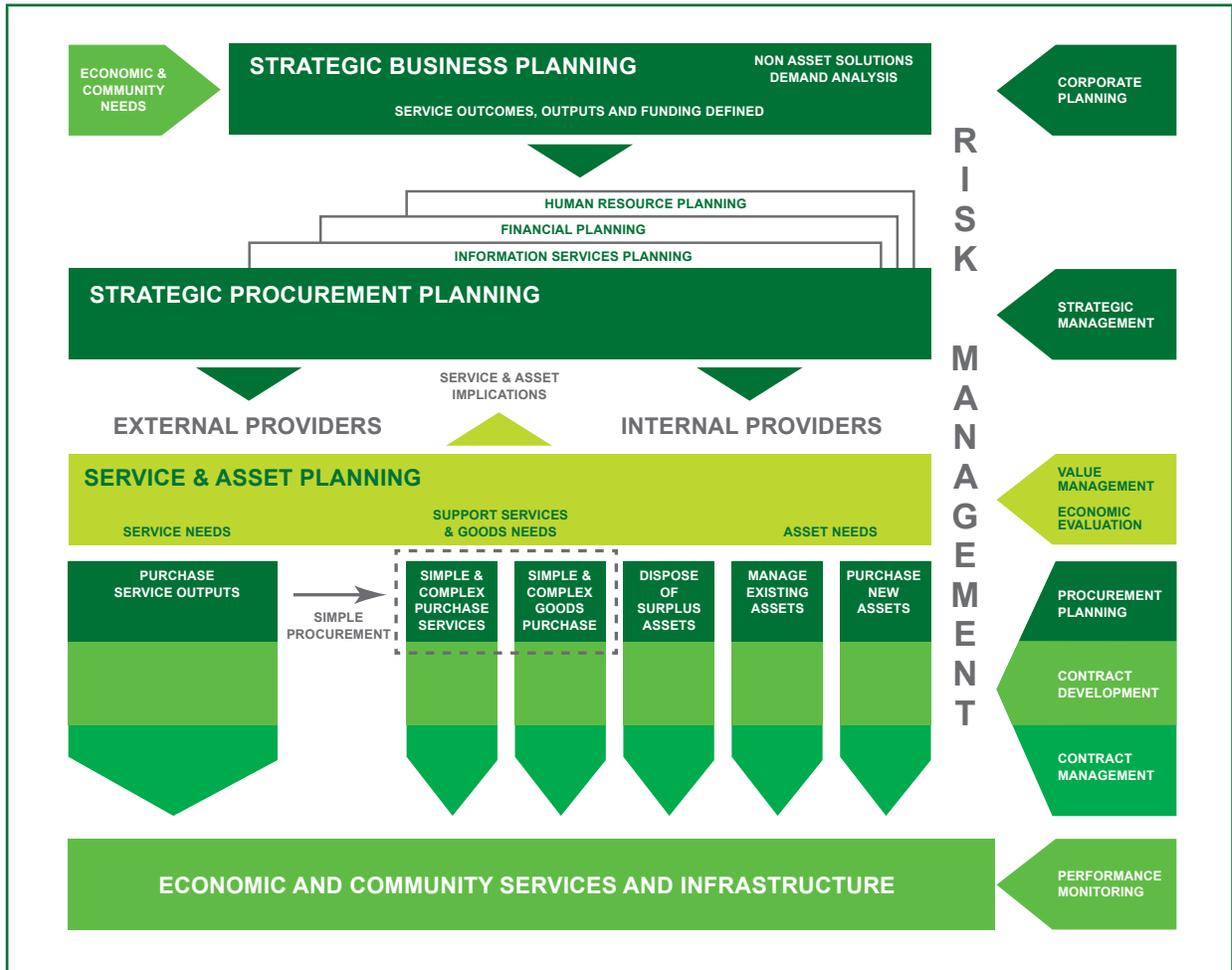
common prohibition on post-tender negotiations “contracting authorities that carry out particularly complex projects may without this being due to any fault on their part find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer” (Kruger 2009). Also “Arguments in favour of extensive post tender negotiations before the contract award could be based on the partial need of the contracting entity to adapt joint design and project schemes to the subsequent contract commitment. A strict procurement regime prohibiting flexibility in this respect may mean that the adaptation must be done after conclusion of the contract by variation orders or worse renegotiation of contents and scope” (Kruger 2009). Even for simple procurement it is sometimes difficult to entirely eliminate discretion, while for complex procurement the role of professional judgement or discretion is found throughout the supply chain as shown in Table 1.

**Table 1
Professionalization in Public Procurement**

Discretion in Public Procurement assuming good governance, integrity		
Procedural Step	Simple goods (e.g. office stationary)	Complex goods or services, civil works
Identification of need	Generally minimal – inventory accounting procedure	Extensive room for discretion. Subjectivity in identifying extent and characteristics of “need”.
Registration of suppliers	Minimal	Minimal (but may be discriminatory)
Specification of requirements	Some discretion	Extensive depending on complexity of objectives
Market research	Minimal	Extensive discretion in TORs of research
Contract planning	Some	Extensive discretion depending on market structure, needs analyses, supply chain management.
Contract design and methodology	Significant discretion between contracting types	Extensive discretion between contracting types
Costing and budgeting	Minimal	Extensive discretion
Pre-qualification	Minimal	Extensive discretion in the pre-qualification criteria
Quotes and catalogue search	Minimal	Minimal
Evaluation of bids	Some	Extensive interpretation of weightings and pre-requisites
Complaints and appeals management	Some	Some
Contract variations	Minimal	Extensive case-by-case
Verification and quality control	Minimal	Extensive case-by-case
Review and monitoring	Minimal	Extensive interpretation of technical standards
Audit and reporting	Minimal	Extensive interpretation of standards

The modern management context for complex infrastructure procurement practice is illustrated in Figure 3, which shows the procedures for planning in a strong administration. Many of the elements in Figure 3 are absent in the simple procurement processes such as in LAC, where the traditional procedures-based systems begin at the second or third last layer of these steps.

Figure 3
Complex Public Procurement



Source: NSW Department of Finance 2001.

Risk management within traditional procedures-based procurement is also narrow – focussing around the selection process itself, with virtually no risk identification around procedural efficiency or mismatching outputs and objectives, or more particularly on returns to investment. However, risk management in the contemporary strategic environment of Figure 3 is a pervasive discipline across all areas of activity.

4. FOCUS ON PERFORMANCE MANAGEMENT

The performance model for procurement is increasingly being proposed or adopted to address the mismatch between the traditional procedures-based procurement governance framework and strategic management requirements. The evidence for this goes beyond the LAC region. Some governments and NGOs³ have adapted their legislative frameworks to explicitly reflect the performance context, and to strengthen accountability in an environment in which professional skills rather than prescribed procedures may prevail. A standards approach has been developed by APEC (1999). The same direction has been proposed for the procurement environment established for the EU: “it is necessary to consider a more radical approach that moves away from laying down contract award procedures. This is because there are mechanisms other than detailed award procedures that can secure compliance with Community objectives⁴. Alternatives can concentrate either on the principles underlying the detailed rules, notably transparency, without specifying the means for implementing them, or can focus directly on the outcomes sought through these principles” (Arrowsmith 2002).

Instead of regulated procedures, the practice of all but the simplest procurement in these governments is undertaken in accordance with a set of regulated standards. The role of the legislation and regulations is then directed towards mandating performance and management standards rather than management procedures.

Also from the EC: “Alternative approaches can also avoid the considerable practical difficulties of devising and updating suitable detailed rules – another factor highlighted in the White Paper as justifying a more flexible approach⁵.

The role of the procurement principles under this approach is not just to define the intent of procurement legislation and regulation, but also to establish the basis for processes accountability and performance assessment for the conduct of procurement. The procurement principles guide the drafting of procurement legislation, the regulations, procurement policies and procurement guidelines applicable across ministries and within departments or organizations, and are generic and independent of the particular responsibilities of any department. Within this environment the legislation and regulations are focused on mandating core principles and standards for accountability against those principles (rather than administrative procedures).

Current Procedures Not Delivering Effective Management

Extensive bottlenecks are continuing to be experienced in Brazil. The IPEA has observed that if every step of the procurement process occurs within its normal timeframe infrastructure would, on average, take around 92 months to be completed - more than seven years. It also indicated that this timeframe did not include any intervention from the TCU, which is not bound by timeframes in delivering its decisions. Of this timeframe only 36 months are for the actual construction phase. IPEA (2011).

3 For example, Australia, New Zealand, UK, APEC, IAEA, UNDP; also see Chile discussed below.

4 Recognition of the possibility of effective alternatives to detailed rules is one reason why national governments have moved away from them.

5 European Commission, note 2 *supra*, at pp18-19 (in Arrowsmith 2002).

Innovation

The performance approach to procurement also seeks to positively encourage innovation from its suppliers. Invitations to tender or requests for proposals focus primarily on specifying what outcomes are being sought rather than strictly specifying inputs, solutions or processes. They seek to match needs, with objectives and solutions, such as to determine whether, for example, maintenance should be preferred over replacement. Invitations to bid can be couched in terms of the desired outcomes or results. The role of the ‘means’ of procurement in promoting R&D has been scarcely acknowledged even though it may easily exceed the contributions of all the business support policies that are commonly included in procurement regulations: Rothwell & Zegveld (1981) and Geroski (1990)⁶ found that procurement policy “is a far more efficient instrument to use in stimulating innovation than any of a wide range of frequently used R&D subsidies.”

Performance Assessment

Management performances in principles or results-based approaches are assessed by measures of management standards, results or outcomes rather than in terms of a simple one-dimensional concept such as ‘compliance’. Performance measures are developed in terms that directly target the standards and objectives and in formats consistent with other elements of public administration and financial management, such as: reporting the significant achievements from the year just finished, the opportunities and blockages encountered that impacted on performance, linked to the entity’s business objectives, and establishing targets for the forthcoming reporting period. Outcome measures can include quantitative and qualitative aspects. For example, simple measures of the basic concept of ‘efficiency’ include: transaction costs versus benchmarks, transaction types versus targets, buyer satisfaction index, savings and cost-avoidance targets versus actual, non-cost benefits targeted versus outcomes. Other performance measures can be adopted for ‘effectiveness’, ‘value-for-money’, ‘transparency’, etc. Such measures form the basis for accountability in a standards or results-based system. These measures should be able to address questions such as whether the objectives of the organization were met, or whether the organization received best value for money⁷ with appropriate governance standards.

These measures do not form the basis for accountability in a procedures-based approach, where accountability is to compliance, and where there is fundamentally the same approach applied to the management of each transaction regardless of the value, risk or context. Here there are no accountability measures for achieving results in terms of reduced cost, alignment with client objectives or, more broadly, best value for money. Under this regime the measure for efficiency improvement is simply to reduce the timelines for regulated procedures. This indeed is what has happened in several countries in the region (e.g. Peru, CPAR 2005), which have, *inter alia*, reduced the time required for tender advertising in ways that risk the prospects for high quality bids and transparency.

⁶ In Edler, J. Georghiou, L. (2007) “Public procurement and innovation—Resurrecting the demand side” PREST/Manchester Institute of Innovation Research, Manchester Business School, University of Manchester, P1.

⁷ These are a selection of measures from the IAEA 2010.

Performance should also be considered in terms of management integrity. There is little evidence to support a view that compliance with process improves transparency, efficiency, or value from the procurement system. On the contrary, there is evidence for the opposite result, given the reported experiences of private sector participants in many CPAR's (Brookings 2009), which included that excessive formalism was used to exclude and limit participation in public procurement activities.

The consequences of the procedures-based versus standards or results based options also impact on training and audit. The practice of procurement in the former is identified as an administrative task, the auditing of which is an audit of procedural compliance. The standards-based framework opens the door for professional judgement to be applied to the complex environment, with accountability and audit undertaken in terms of management standards and procurement outcomes, as is commonly the case for other professions.

Although the procedures-based framework does provide more easily defined proxy performance criteria (procedural compliance) for the purpose of audit, it is not sensible to adopt a poorly fitting accountability framework on the grounds that it is simpler to audit.

Efficiency vs. Compliance

The efficiency/compliance trade-off is another important consideration. The dimension of 'efficiency' needs encompass all aspects of procurement to include the concepts of outcome optimization and productivity of outcomes rather than simply whether the processes themselves are efficient.

Secondly the concept of compliance needs to be clarified: the issue is not compliance per se but rather whether compliance should be process-based versus standards, outcomes or results-based. The rules in LAC are almost entirely process-based as per the traditional / simple procurement model.

Compliance costs in the traditional regulated procedural framework are high. A multiplicity of procurement regimes and the diversity of detailed regulations at agency level are a common theme, which has had a detrimental impact on transparency, efficiency and costs, and result in market segmentation or reduced competition: suppliers find the regulatory environment too difficult to comprehend, and are also discouraged by the significant legal risks. For example, in 2003, 47% of Paraguayan businesses that did not do business with government cited process complexity as the primary reason (Paraguay, 2003) and in Costa Rica contractors indicated that it was easier for them to specialize in bidding for work at a single or a few agencies, the rules of which they knew well (Brookings 2009, para 24).

This issue is not unique to Latin America, and similar observations have been made in the case of the European Union (EU) directives and in the United States: "Further, the detailed nature of the rules is even counter-productive in some ways. It makes them more difficult to understand and apply, as well as requiring changes to existing practices. This may produce inconsistencies in application and also increase the hostility of purchasers. Lack of clarity may also deter firms from enforcement actions"⁸.

8 Braun, "The Practical Application of the EC Rules on PFI projects in the UK"; conference paper "Public Procurement: Global Revolution II", University of Nottingham 6-7 Sep., 2001 in Arrowsmith (2009).

Experience has also been that the bureaucracy of transparency rules, and the approach to the market can deter competitive firms from participating.

Even at the level of centralized national legislation, as shown in Table 2 the volumes of regulations are substantial. The statistics may significantly understate the number of regulations involved because there are, for some countries, additional special Acts addressing, for example, public-private partnerships. This Table also provides, by way of a benchmark, the situation in some OECD countries. Whilst the objective of the table is not to draw a direct correlation between the volumes of regulation and the Transparency International (TPI) ranking, it nevertheless may indicate that large numbers of regulation by themselves do not reduce corruption.

The procurement legal frameworks of Latin America and elsewhere frequently identify procurement principles in the legislative pre-ambles as objectives of the legislation. However, the body of the legislation, in focussing on procedures, is invariably unable to maintain a nexus with these principles, simply because principles, standards and results cannot be procedures. Indeed, deleting principles or objectives of procurement, such as transparency or efficiency, from the legislation would often have no consequences for the procurement legislation, regulations, governance or procedures, or indeed the outcomes. It also seems that the performance criteria of procurement management are largely unrelated to the principles or objectives of procurement itself, with the implicit assumption being that the achievement of one set of outcomes (compliance) will deliver another (performance).

Table 2
Procurement Regulation

Country	Gua	Hon	Salv	Nica	CR	Pan	Col	Ven	Ecu	Bol	Per	Chi	Au	Can	UK	NZ
Articles Law	108	158	174	115	113	133	114	138	117	210	83	50	1	9	1	1
Articles Reg	80	275	77	170	232	375	92	41	130	195	342	108	24	77	49	58
Total	188	433	251	285	345	508	206	179	247	405	425	158	25	83	50	59
TPI 2009 Ranking of 180 countries	84	130	84	130	43	84	75	162	146	120	75	25	8	8	17	1

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

The lack of nexus between the procurement objectives and the procedures also leads to conflicts between procedures and objectives without any mechanism to guide their resolution. For example, several governments of the region have, in seeking to increase the efficiency of the procurement process, reduced the necessity to go to tender and/or have reduced the open time for tendering: both of these initiatives are likely to reduce transparency, competition and value-for-money. Other efforts to improve

efficiency and reduce procurement bottlenecks have included the creation of secondary procedures to short-circuit the primary procedures through the use of special or emergency regulations: this is accomplished by seeking exemptions, which in a number of governments can only be awarded by the Congress. “In some LAC countries, as much as 50% of the total procurement is regulated under special regimes. Most of these special regimes were necessary because the existing national procurement laws were inadequate and lacked required speed and flexibility” (Brookings 2009, para 141).

5. OLD RULES, NEW REALITIES – THE NEED FOR A NEW PARADIGM?

Modern management of procurement seeks accountability in terms of principles such as ensuring a fully transparent process with the achievement of best value-for-money outcomes. Traditionally these core procurement principles have not been assigned a lead regulatory status or standard, and a consequence has been that every possible activity has had to be codified into law. The effect of this has been to multiply the number of regulations.

Accountability⁹ has been identified with procedural compliance rather than results or outcomes. Potential functions that cannot be treated in this way are likely, by the nature of the regulations, which define permissible procedures, to be eliminated as management options. Yet it is these very options that are increasingly being drawn on in some OECD countries in the quest for ever-greater value from their supply chains. A flexible, innovative and effective bureaucracy is unlikely to emerge under these circumstances, but rather, regulations can become, perversely, the means to legitimize behaviours that contradict the intent of the legislation. In no case in LAC, except for Chile (2004) and the Panama Canal Authority (PCA), were comprehensive procurement principles defined and applied in management terms.

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

The Standards and Results-based approaches¹⁰ have the scope and flexibility to drive many organizational goals as well as stronger governance, largely because of the ways in which accountability is formally included, developed and assigned.

Within a performance model for public procurement, the role of regulation is primarily to establish accountability for delivering management principles and objectives rather than to micro-manage the processes. In contrast to the UNCITRAL model law approach, the performance management approach advocated by the OECD/DAC Development Assistance Committee (2003) describes procurement and its governance in terms of strategic mainstream management. Representative of the management approach are the UK (Thai 2001), Australia (Commonwealth Procurement Guidelines 2008) and Chile (Brookings 2009).

Principles and results-based methodologies seek to drive behaviour towards the meeting of standards and outcomes that link procurement directly to agency objectives and government policy. Accountability is directly focused on performance, both for the ‘ends’ and the ‘means’. Outcomes-based accountability

⁹ A review of Auditors General in the region indicated that the primary focus continues to be compliance rather than results.

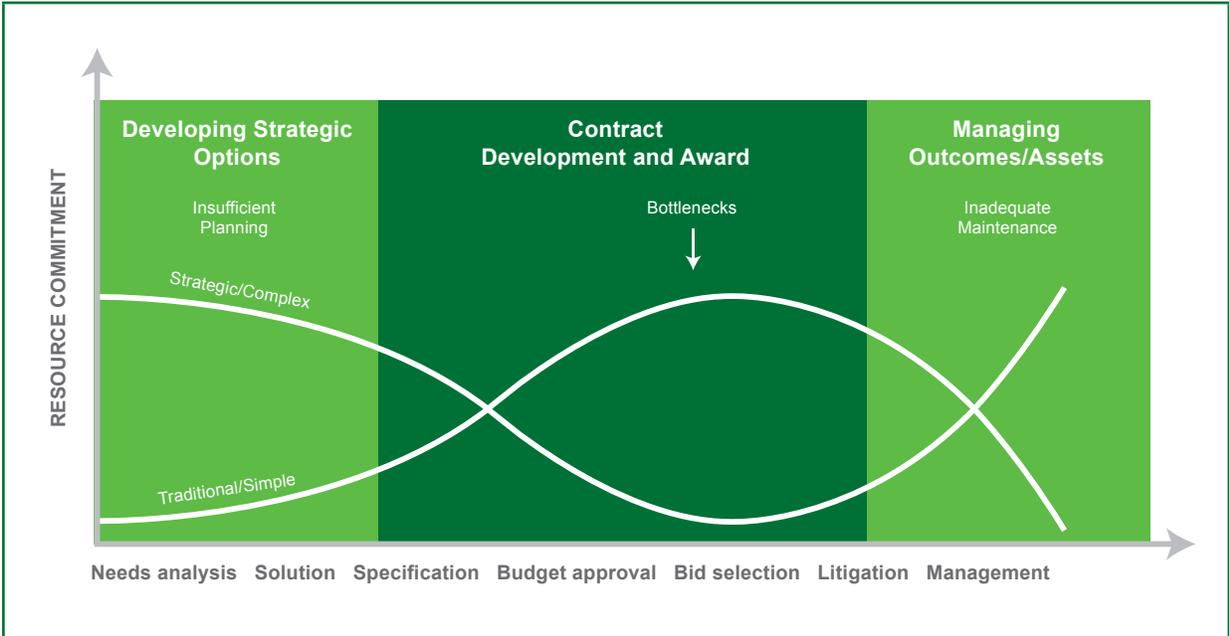
¹⁰ Such as in Chile, New Zealand, IAEA.

weighs the potential for added value against risk, and therefore requires professional skill sets involving, *inter alia*, knowledge, judgement and discretion. Professionalism and effective management information and reporting systems become key determinants of clear delegation of authority and corresponding accountabilities.

Procedures-based procurement methodologies on the other hand, drive behaviour towards procedural compliance. The connection between compliance with the procedural rules and any defined objectives in the legislation is largely irrelevant to behaviour. The connection between the procurement legislative preamble and the specific roles or objectives of a procuring agency is often even more tenuous. A procedures-based approach requires accountability for the process and none for whether the governance standards were actual outcomes: under this model the primary governance principles are neither monitored nor managerially relevant.

The application of traditional/simple procurement regulations and methods to the strategic/complex requirements of modern government has been associated with many of the planning and procedural difficulties in infrastructure development in the LAC region. A distinction between traditional/simple versus strategic/complex procurement is shown in Figure 4.

Figure 4
Traditional/Simple vs. Strategic/Complex Procurement



Source: CIPS Australia 2nd Annual Government Conference: Paul Hopkins (Deputy Director General Procurement) NSW Department of Commerce; World Bank.

Addressing national priorities within the context of Figures 3 and 4 seems implausible within a simple procurement framework. Such a framework that aims to maintain governance via procedural compliance is also at risk in its objectives, not least because professional judgement or discretion is inevitable anyway, but also because this approach restricts the scope of procurement such that key strategic

functions are either not addressed or are referred back to the political wing of government.

Where the rules for traditional procurement are applied to complex procurement tasks several consequences can be anticipated from Figure 4:

- There will be inadequate planning and needs analyses, which will flow through to the specifications themselves such that the contract specifications can be expected to be lacking or inappropriate.
- The lack of preparation and planning will, in turn, transfer many procurement issues to contract execution with budget and timeline over-runs, while others will not be addressed at all.
- There will be under-assessment of needs, TCO, and inadequate budget planning for maintenance. Insufficient resource will be allocated to managing outcomes or assets – there will be a bias towards building new rather than maintaining existing infrastructure.

All of these consequences are observed in LAC.

Peru Controller-General 2008

“The principal cause of cost overruns in infrastructure and works are the deficient or inappropriate bidding and contract specifications.”

Modifying Rules Delivers Small Results

A recent study on the Impact that Procurement Rules have on Infrastructure Investment, focused on assessing contractor price proposals before the technical evaluation of submitted bids in a procedure locally known as *inversão das fases*.

The study concluded that “The analysis finds that the reform is associated with a 24 day reduction in the duration of procurement processes for large projects and a 7 percentage point drop in the likelihood of court challenges irrespective of project size. Although both effects are economically important, only the latter is statistical significant. Finally, the paper finds no evidence of an effect of the procurement reform on prices paid.” (World Bank 2011)

Another foreseeable consequence of the procedures-based approach is that the scope for innovation will be all but non-existent, or will be occupied by the political wing of government. In this case it can be hypothesized that under this regime there will be an under-developed consulting services industry, both because there is little demand for innovation and because contracts are simple: this too is observed and the government of Colombia has sought a review of the weak engineering and management consulting sector in that country.

Similarly, within the simple framework, there is often fragmentation of the processes between concept development, programme planning, and contract management, such that the prospect of a learning process is diminished and the same errors are more likely to reoccur: without accountability for outcomes it really does not matter who is undertaking the procedures, provided the procedures are followed. However under a principles and results-based regime there is incentive to recognise the need for unified or coordinated management.

Reducing the Gap Between Contracted and Realized Outcomes

The New Zealand reforms are justified by a well-established public sector ethos, reasonable management information systems, and supporting institutions, including legal systems, to allow contract enforcement. These features increase the “monitorability” of certain services by reducing the gap between contracted and realized outcomes. These preconditions do not exist in many developing countries, so the template of these reforms cannot be used mechanically. If there is no good legal system and the civil service is subject to bribes (a form of clientelist politics), private sector contracts might be a major source of corruption. In these countries, government should perhaps be even more output-oriented—not as a means of tweaking a well-functioning system but as a way of getting the system to provide much greater improvements in services and generating new information (World Bank 2004).

Risk Management vs. Risk Avoidance

Much of the foregoing discussion can be modelled in terms of management and regulatory efforts to balance performance against risk. Traditional procurement regulation has been primarily concerned with what has been considered as governance risk – primarily risk of patronage in supplier selection. This consideration has imposed procedures that have affected procurement performance (as discussed above). This risk-performance could be regarded as a cost of maintaining integrity in procurement. However, this traditional approach has ignored a wider concept of risk management, which includes procurement performance and outcomes.

Also, while a procedures-based clerical/regulatory environment is ostensibly concerned primarily with governance in selection, evidence suggests that it often struggles even with this relatively narrow agenda. Perhaps it would have been simplistic to have expected that developing/amending procedural rules would by themselves change old practices and address patronage: public works have traditionally been used as a reward for political support that delivered infrastructure to those areas of most political significance.

Indeed, with the advent of outsourcing the patronage/clientelism framework became more strategic and powerful. Politicians now had, not one, but two tools to buy political support: the infrastructure as a reward to the community for its support, and money in the form of a contract, generally under the guise of “local jobs for the local economy”. This combination made traditional procedures-based procurement an attractive political tool with a weak record of achieving high quality governance.

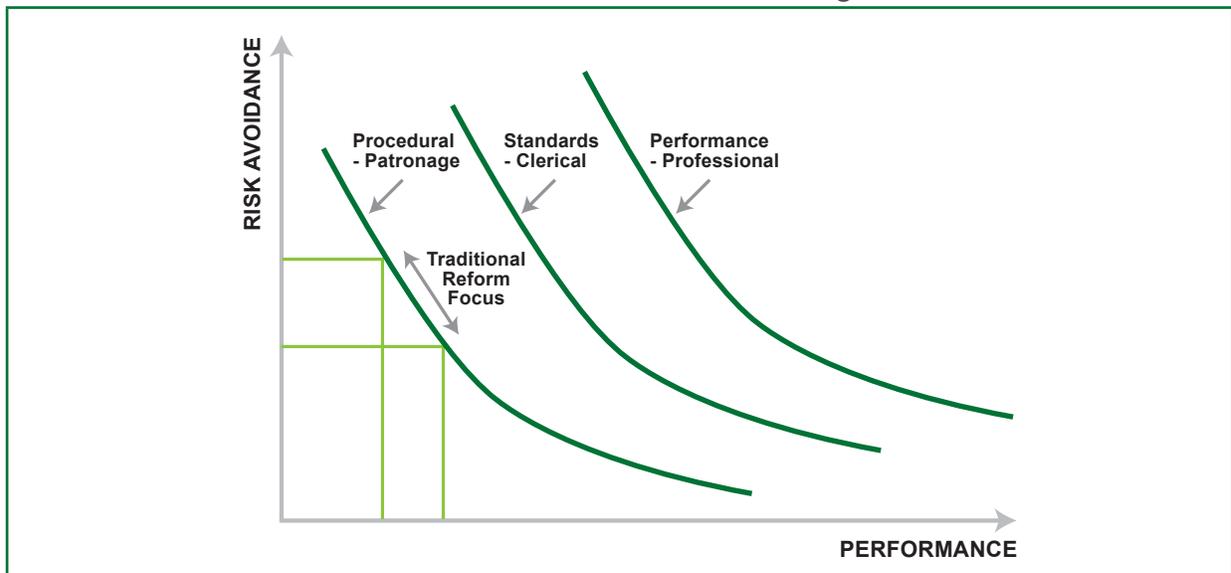
Current System Not Delivering in the Public Interest

The Colombian attorney general indicated that ‘the current legal framework needs to be reformed since the current procurement system is not delivering benefits that were in the public interest or that increase the community’s well-being... and that there are serious problems ranging from delays in execution of public works to overruns that impact the total value of works’. He also pointed out that five of the most important road concessions share the fact that, notwithstanding having received substantial additional finance from the government, had not been able to be completed within the planned delivery date (Colombian Attorney General, 2010).

Similarly IPEA noted recent Brazilian experience with major airport infrastructure projects. An example is the airport of Vitoria-ES: work on this project was initiated in February 2005 and stopped in June 2008 when the Brazilian Court of Audit (TCU) identified irregularities, at the end of 2009 Infraero cancelled the contract and a new bidding process would be undertaken in 2011. In 2006 an audit for a new airport of Goiania-GO by the TCU identified several deficiencies, and overruns of more than 73.5 million Reales, including payment for nonexistent engineering works (IPEA, 2011).

Alternative models are based on standards and performance management, which require greater levels of professionalism. These models can direct behaviour in ways that are not possible within the traditional model, and offer the possibility of shifting the performance frontier as shown in Figure 5.

Figure 5
Risk Avoidance vs. Performance Management



In Figure 5, the traditional reform program focus assumes that the balance between performance and risk is to be managed by fine-tuning procurement regulatory controls.

This discussion suggests that this fine-tuning is unlikely to address modern expectations, which may be better served by adopting a performance framework for procurement and developing the professionals to drive this.

6. RESEARCH

In an attempt to demonstrate the impact of the existing national procurement systems on the government's growing needs, performance data on infrastructure projects were targeted. The intention was to analyze the efficiency of infrastructure projects based on cost and timeliness. The quality dimension was not contemplated in this paper since this would have to be undertaken on a project-by-project basis.

This paper sought to correlate budget planning, bidding results and final costs as well as estimated and actual time to completion in order to identify inherent bottlenecks or planning deficiencies in the procurement system. This approach differs from the usual tools (CPARS and OECD/DAC MAPS) applied to review national procurement systems, as it goes beyond measuring process times.

Of the eight countries contacted, one indicated outright that it did not possess that information; four could only provide information on the budgeted amount and the contract amount, which did not allow any significant analysis. At the date of completion this report, the remaining three indicated that they were preparing the data since it resided in different systems and was not easily retrieved. It seems clear that many aspects of these issues remain open to further research, which should *inter alia*, guide countries on the development of effective management information systems for these activities.

7. SUMMARY AND CONCLUSIONS

In many modern administrations the growing complexity of government has led to a requirement for greater functional performance that extracts best value from limited financial resources. This performance push has led to broad and ongoing reforms that include market testing and outsourcing. Public sector contracting has in turn moved from minor simple supplies to complex high value and high-risk engagements. Public procurement has evolved from a routine clerical activity into a specialist function. With this change, procurement governance has also been undergoing reforms that have turned away from trading off performance and efficiency for integrity, and instead are shifting towards the alignment of these objectives.

Many countries have yet to initiate these reforms, yet they are also facing the same pressures for greater performance from limited resources, driven by changing financial environments and more influential middle classes. The result has been that these countries, especially in the LAC, are attempting to manage emerging new realities with old rules that were designed for very different circumstances.

The result is that public procurement in these countries is, by common measures, delivering neither good governance nor good outcomes. The need for reform is broadly understood. However, many reform proposals continue to cast procurement in the same context as a clerical function. Evidence suggests that as long as procurement reforms in Latin America remain focused on the legal and regulatory framework applicable to simple procurement, results will be at best marginal. They will remain in an environment of old rules and new realities.

Finally, one finding of this review has been the lack of available data from the various public procurement systems. This is symptomatic of the same issue: a modern public administration cannot expect to operate efficiently without access to information. Basic functions of planning, budgeting and expenditure management require available, up-to-date and trustworthy data.

This paper concludes that further work is required to assist countries in the development of research and monitoring tools in order to be able to analyze and plan infrastructure investment. It also suggests that procurement efficiency indicators be tracked along the lines of other development indicators, in order to assist clients develop more informed decision-making.

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