

31 July 2017

Pioneer Briefing: Key Amendments Introduced in the Public Procurement Legislations of Nepal.

1. Background:

The Public Procurement Act 2007 (2063) (the “PPA”) and Public Procurement Rules 2008 (2064) (the “PPR”) deal with the requirements and procedures relating to public procurement in Nepal. The First Amendment to the PPA has been introduced on July 14, 2016 (2073-03-30 B.S) (the “**First Amendment**”). Subsequent to the First Amendment, certain provisions of the PPR have also been amended notably by-(a) Fourth Amendment dated December 19, 2016 (2073-09-04), and (b) Fifth Amendment dated 09 March 2017 (2073-11-26) (collectively the “**PPR Amendments**”).

2. Scope of the First Amendment:

2.1. The material amendments introduced by the First Amendment can broadly be grouped into following three headings: (a) *Procurement routes*: The First Amendment has included additional routes that the public entities can utilize for the public procurement; (b) *Exemption from Applicability of the PPA*: The First Amendment has also expanded the scope of exemption where the public entities can undertake direct procurement without following the detailed public procurement process as set out in the PPA, and (c) *Detailed Provisions relating to the contractual terms*: The First Amendment has also made certain amendments to the conditions that form part of the public procurement contract.

2.2. The major amendments introduced by the First Amendment and elaborated by the PPR Amendments in each of the headings are set out in the subsequent paragraphs.

3. Procurement Route/Methods (Section 41 of the PPA):

3.1. As a matter of general rule, the PPA has recognized competitive bidding process for public procurement. Prior to the First Amendment, Section 41 of the PPA had included following grounds for direct procurement without following the public procurement process: (i) certain low-value procurement as prescribed in the PPR; (ii) procurement in a situation where a sole vendor has technical capacity to meet the conditions of the procurement, (iii) procurement in a situation where a sole vendor has exclusive rights to supply goods/services, (iv) purchase of additional goods or services of proprietary nature within the prescribed limit from the existing vendors, etc.

3.2. The First Amendment has expanded the scope of the procurement through direct procurement by amending Section 41 of the PPA. The key amendments are set out in the paragraphs below.

3.3 *Purchases by one public entity from another public entity*: Pursuant to this amendment, one public entity can directly procure the goods or services from another public entity.

3.4 *Purchase of goods or services from international inter-governmental entities at the price / rate prescribed by such entities*:

- (a) The term “Inter-governmental Entities” has not been defined in the PPA, PPR and First Amendment. However, the PPA has defined “Donor Party” as any foreign country or international or foreign organization, which provides foreign assistance in the form of loan or grant to the Government of Nepal under a bilateral or multilateral agreement. Therefore, Inter-Governmental Entities should include regional organizations, foreign government as well as multilateral agencies such as International Finance Corporation, Asian Development Bank etc.
- (b) The PPR Amendments appear to have extended the scope by also including the procurement from foreign government or public entity of such foreign government.
- (c) The requirement of obtaining prior approval of the Council of Ministers is not applicable for such procurement and hence, the concerned public entity can make decision on its own for such procurement.
- (d) The PPA has provided the requirement of prior approval of the *Council of Ministers* for the direct procurement if: (i) sole vendor has only technical capacity to fulfill the procurement requirement; (ii) any services (not included in the initial contract due to unforeseen reasons) have to be procured within the prescribed limitation due to the financial and technical difficulties, and (ii) immediate service from the vendor having unique qualification is required.
- (e) With the reference to the above mentioned provisions of PPA, the First Amendment appears to be "open" and "broad" in this regard which does not impose any qualification criteria and only execution of the agreement with sufficient corporate decision by the relevant public entity is made sufficient for the direct procurement.

3.5 *Purchases required to be made in special circumstances:*

The First Amendment has made the provision of direct procurement in the "special circumstances". The "special circumstances" as defined under PPA includes force majeure events such as drought, no rainfall, deluge, earthquake, flood, landslide and firing, war or internal conflict.

4. Additional Procurement Methods (Section 8)

- 4.1 The key methods under of procurement the PPA prior to the First Amendment include the following: (i) through competitive bidding at national or international level, (ii) through direct procurement, and (iii) through participation of users' committee or beneficiary group, etc.
- 4.2 The First Amendment has provided following 4 additional procurement methods:
 - (a) ***Through Lump sum piece rate:*** In this method, a single lump sum price for the procurement of any goods and services is agreed before the works begins. Generally the tender is submitted with the details of how and on what basis the work is going to be performed. For

- example, the minimum and maximum extent of increase and decrease of the cost (if any) than the total estimated cost is specified before the work begins.
- (b) ***Through Catalogue Shopping:*** The procurement is made on the rate prescribed by the manufacturer or authorized dealer. Manufacturing companies prescribe the sale price of their products on the basis of specialty, quality and benefits and publish the sale price on its website/brochure. After the publication of such sale price, the competitive procurement is made on the price prescribed by other manufacturing company of similar nature.
 - (c) ***Through Limited Tendering:*** This method allows limited bidders for the procurement. If there are limited service providers/vendors for procurement of any services, the competition for the procurement is made only between and among the limited Bidders.
 - (d) ***Through Buy Back Method:*** The new procurement is made by returning the machinery and equipment to the related manufacturer or importer if such the machinery and equipment is to be of no use after certain period of time. This method of procurement also applies if there are any machinery which cannot be auctioned or stored from the view point of public health and environment. The new procurement is made without valuation of the old machineries.

The PPR Amendments have set out requirements and procedures for the public entities to procure the goods or services through the stated additional procurement methods.

5. Exemptions from the Applicability of the PPA and PPR (Section 67):

- 5.1.** The PPA has also provided exemptions from the applicability of its mandatory provisions to certain procurements. These exemptions include the followings: (a) if the Government of Nepal (GON) decides that it is not appropriate from the perspective of the national security or defense to follow the procurement procedures as defined under the PPA in case of the procurement relating to security, strategic or defense; (ii) if certain procurement is to be made in accordance with the procurement guidelines of the donor pursuant to the agreement entered between the GON and such donor.
- 5.2.** The First Amendment has set out 4 additional exemptions. Out of the said 4 exemptions, 2 exemptions which are important for the private sectors are briefly set out in subsequent paragraphs.
- 5.3** ***Exemption for the public entity conducting commercial transactions:***
 - (a) Public entities which compete with private sectors for business are exempted from procurement process. The Fourth Amendment to the PPR has listed the following public entities for the purpose of such exemption (Schedule 5A. of the Fourth Amendment to the PPR) (the “**Exempted Entities**”) : (i) Nepal Doorsanchar Company Limited, (ii) Nepal Khadya Sansthan, (iii) National Trading Limited, (iv) Nepal Airlines Corporation, (v) Janak Shikshya Samagri Kendra Limited, (vi) Nepal Aaushadhi Limited, (vii) Singhadurbar Baidyakhana Bikas Samiti, (viii) Jadibuti Utpadan Tatha Prasodhan Company Limited. The Government of Nepal has also power to expand the list by publishing Gazette notification.
 - (b) Following 2 requirements will still be applicable to the Exempted Entities pursuant to the First Amendment and PPR Amendments: (i) such Exempted Entities will be required to

prepare their own public procurement guidelines and approval from Public Procurement Monitoring Office, a government office competent to regulate and monitor the public procurement will be required prior to implementation of such guideline.; and (ii) Public procurement guidelines should be consistent with the key principles of public procurement (scope of this requirement appears to be open leaving room for interpretation).

5.4 Exemption for the public entity engaged in the aviation business:

- (a) This exemption applies to the public entities licensed to operate aviation service and when such public entities are required to procure aviation or equipment relating to aircraft. For example, Nepal Airlines Corporation (NAC) which is a statutory body may not be required to follow mandatory procurement provisions as per this new provision. However, such exemption will be applicable to procurement of the aviation and aircraft equipment only and will not be applicable to other procurements.
- (b) NAC is also required to prepare the procurement guidelines and obtain approval from Public Procurement Monitoring Office.

6. Contractual Terms:

6.1. Dispute Settlement (Section 58)

- (a) The PPA had given flexibility to the contracting parties to choose the means of dispute settlement by providing necessary provisions in the procurement contract. The arbitration was not provided as a mandatory means of dispute settlement.
- (b) The First Amendment provides that in case the dispute cannot be resolved amicably, it should be stated in the procurement contract that the dispute shall be resolved through arbitration pursuant to the prevailing laws. Further, the First Amendment has also removed the provisions relating to dispute settlement through adjudication or dispute resolution panel/board.
- (c) Section 3 and Section 16 of the Arbitration Act 1999 (2055) provides flexibilities to choose the arbitration procedures and governing law. However, the First Amendment has not made specifically clear as to whether the parties would be free to choose the governing law, venue/seat of arbitration and arbitration procedures.

6.2. Termination (Section 59)

- (a) The First Amendment has expanded the right of the public entity to terminate the procurement contract. Pursuant to the amendments, the public entity will have right to terminate the procurement contract if the vendor-(i) misuses the advance money, (ii) breaches of any codes of conduct of the vendor as set out in Section 62 of the PPA, (iii) fails to commence the work or abandons the works after commencement or fails to achieve the progress as per the procurement contract. In case the contract is terminated for the reason set out in (iii) above, the public entity will have right to forfeit the guarantee and will also have right to recover the amount from such defaulting vendor as may be required to complete the remaining work.

- (b) The First Amendment has also prevented the vendor not to terminate the procurement contract without first notifying to the public entity.

6.3. Variation Order (Section 54)

- (a) The First Amendment has replaced Section 54 of the PPA in its entirety. As per the First Amendment, following issuing authorities will have the right to approve the variation order on the basis of the percentage of the variation claimed:

S. N	Variation Order (%)	Issuing Authority
1.	Up to 5	Gazetted 2 nd Class Officer or equivalent official of the concerned public entity. However, if the project cost has been approved by the higher authority, the authority to issue the variation order should also not be lower authority.
2.	Up to 10	Gazetted 1 st Class Officer or equivalent official of public entity. However, if the project cost has been approved by the higher authority, the authority to issue the variation order should also not be lower authority.
3.	Up to 15	Departmental Head
4.	From 15 to 25	Secretary of Ministry or equivalent head of the public entity
5.	Above 25 (for the Public Entities prescribed in Section 2(b) (1) of PPA) ¹	Council of Ministers, Government of Nepal
6.	Above 15 (for the Public Entities prescribed in Section 2(b) (2) of PPA) ²	Supreme Executive Authority. For example, Governor of Nepal Rastra Bank, Managing Director of Nepal Oil Corporation etc.

- (b) However, the Departmental Head will have authority to issue the variation order of more than 15% if the total procurement value is up to 6 million Rupees.

6.4. Advance (Section 52)

The First Amendment has regulated the payment and utilization of the advance given under the procurement contract and has added specific provision in this regard.

(a) Limitation

¹ This includes: (a) Constitutional organ or body, b) Court, Ministry, (c) Secretariat, (d) Commission, (e) Department of the Government of Nepal or any other Governmental Entity or Office.

² This includes (a) Corporation, Company, Bank or Board owned or controlled fully or in majority by the Government of Nepal; (b) Commission, Institute, Authority, Corporation, Academy, Board, Center, and Council established at the public level or formed by the Government of Nepal under the laws in force and (c) other corporate body of a similar nature.

Pursuant to the First Amendment, the advance amount is limited to 20 (twenty) percent of the procurement value which is released only against the submission of a bank guarantee. The distribution mechanism of the total (20 percent) advance is specified as follows: (i) half (10 percent) of the approved advance amount for the first time, and (ii) remaining (10 percent) on the basis of work progress. However, it is not clarified that if the remaining 10 percent is provided as a whole for second time or that percent is also breakable while providing the advance amount.

(b) *Payment:*

The payment of advance amount is made through the separate bank account for the work for which procurement contract is concluded. However no separate bank account is required to be opened for the procurement of a construction work whose cost estimation is less than 20 Million rupees.

(c) *Work Commencement Period:*

The vendor is required to commence the work within 30 (thirty) days from the date of receipt of advance.

(d) *Update Requirement and Confiscation:*

The First Amendment has made the vendor liable for providing the update to the related public entity regarding the purpose of expenses. It has further provided to invoke the Bank Guarantee if the advance has not been spent on the purpose for which the advance amount was provided.

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