

د ادارى فساد پر وړاندې د څارنې او ارزونې
خپلواکه او گډه کمیټه



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Report on Conflicts of Interest

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I. Introduction

The purpose of this paper is to consider high-ranking officials' conflicts of interest, focusing on the procurement system. The significant flow of funds through the procurement system makes it one of the sectors most vulnerable to corruption.¹ The state-centric nature of the Afghan economy makes procurement an especially sensitive area, with the livelihoods of millions of citizens depending on it, either directly or indirectly. While Transparency International (TI) estimates procurement costs at about 15% of Afghanistan's GDP, the difficulty of measuring economic data in Afghanistan makes this, at best, a rough estimate.

The Afghan government's procurement system is riddled with corruption, leading President Ghani to centralize most procurement functions in the hopes that this change would result in greater transparency and less corruption. While a favored approach by many World Bank and IMF officials, centralized procurement offices are not without risk, for even if today's procurement officers are not corrupt, there is no guarantee that tomorrow's procurement officers will operate in this system in a transparent manner. Conversely, in a country with a limited number of skilled procurement professionals, such an approach may be the best way to utilize a small talent pool.

II. Background

Defining a Conflict of Interest

The term "conflict of interest" encompasses a broad array of activities and is the subject of some controversy. According to the OECD's definition, a conflict of interest is a situation where a conflict exists "between the public duty and private interests of public officials which could improperly influence the performance of their official duties and responsibilities." TI interprets conflict of interest as a "situation where an individual or the entity for which they work, whether a government, business, media outlet or civil society organization, is confronted with choosing between the duties and demands of their position and their own private interests." In simple terms, when an employee of an organization or a high ranking official use their legal and official authority for their own gain or personal interest, such practice is defined as a conflict of interest. This definition is very broad and covers different areas, but conflict of interest in the procurement sector is defined in the legislative documents of Afghanistan related to procurement.

MEC's research and interviews conducted for this paper have identified two sectors that are highly vulnerable to exploitation by parties with conflicts of interest: procurement and the recruitment process. As MEC has already done significant work on corruption in the recruitment process, this paper focuses on procurement issues.

¹According to Transparency International, the average cost of procurement around the world each year is estimated at between 13-20% of countries' gross domestic product (GDP). This means that, globally, approximately \$9.5 trillion is spent on state procurement each year. According to the Organization for Economic Cooperation and Development (OECD), about 20-25% of procurement budgets are wasted because of corruption, which is estimated at approximately \$2 trillion.

Conflicts of Interest in the Afghan Government

Numerous official and unofficial sources have reported that extensive embezzlement of state funds took place under the previous administration, with the procurement system serving as one of the main avenues for siphoning off state funds. In perhaps the clearest example of a conflict of interest, large numbers of government officials controlled companies that did business with the state. These officials used their influence to secure contracts for their firms and firms controlled by their political allies. This, despite former President Karzai's statement that, "no financial contract must be signed with the relatives of government officials," a statement that was honored mostly in its breach.

On one occasion, the former minister of the Ministry of Public Works (MOPW), Mr. Najibullah Ogene, stated that many of the companies that have been registered in the country are not real, and that "currently, just one family owns eight [major] companies²" that do business with the state. Even a High Office of Oversight (HOO) official said that, "if I say that over ten years how much money has been paid as bribes and how much [was] embezzled, perhaps the amount cannot be calculated by a computer."³ Although hyperbole, this statement illustrates the extent of conflicts of interest.

III. Challenges

Challenges encountered when researching this report included:

- The reluctance and/or inability of procurement staffers to provide evidence about the extent of the problem;
- the use of complex corporate arrangements (e.g., shell companies, subsidiaries, and so forth) to disguise who truly controls a company;
- concerns about well-connected mafias who operate within many ministries and limit the transparency of procurement operations;
- the chaotic system of business registration that is prevalent (involving several different ministries), with no centrally accessible, reliable database.

As an example of this chaos, in order to obtain an accurate picture of ownership interests in registered companies, one would have to review more than 150,000 registrations with the Ministry of Commerce and Industries (MOCI), including 42,000 registered companies with AISA, about 2,000 NGOs registered with Ministry of Economy (MOE), over 4,000 socio-cultural institutions registered with the Ministry of Justice (MOJ), and myriad other entities registered elsewhere.

² <http://www.jomhornews.com/prtcpqxq1.2bq0s8laa2.html>

³ <http://bokhdinews.af/social/14062>

IV. Legal Framework

The Constitution and Other Relevant Laws

The Constitution of Afghanistan addresses the conflicts of interest issue. Article 150 of the Constitution states that “the president, vice president, ministers, chair and members of the Supreme Court, Attorney General, heads of central banks and national security service, governors and mayors may not do any profitable business with the government during their term of office.”

The "Strategy and Procedures on Reforming Administration and Fight against Administrative Corruption" provides a definition for corruption similar, though not identical, to that which is in the Constitution. The Strategy defines administrative corruption as the abuse of public funds for personal benefit. If we analyze this definition of administrative corruption, it shows the relation between administrative corruption and conflict of interest. In both cases, abuse of one’s official position for personal interests occurs and that, functionally, conflict of interest means corruption and corruption means conflict of interest. If this linkage seems too definitive, then at a minimum it can be said that "conflicts of interest" are one of the most prominent examples of administrative corruption.

Although “The Law on Monitoring the Implementation of the Anti-Corruption Strategy” does not use the term “conflict of interest,” there are instances where it touches on related issues. Examples include:

- Article 3, which mentions 18 types of administrative corruption, each of which could involve a conflict of interest; and
- Article 12, which requires the HOO to register assets of certain officials and, if necessary, publish lists containing this information on an annual basis. If this were ever effectively implemented, it could deter and detect conflicts.

Presidential Decree No. 45 explicitly refers to the issue of conflicts of interest. Article 1, Paragraph 15 orders “all government agencies to avoid making contracts, construction and procurement agreements and services contract[s] with high-ranking government officials, their agents[,] and persons under their protection.” Such practices are described as administrative corruption and the perpetrators are subject to prosecution by the Attorney General’s Office.

The Law on Non-Governmental Organizations (NGOs) also mentions the conflicts issue. With regard to establishing an NGO, it states that “the President, Vice President, heads and members of the National Assembly, the chair and members of the Supreme Court, ministers, [the] leadership of the Attorney General’s Office, deputies, heads of commissions or independent departments and heads of political parties, do not have the right [to] establish [an] NGO . . .” Further, Article 22 requires NGOs to engage only in non-profit activities and NGOs may not distribute or spend their funds directly or indirectly for the personal benefit of their founders, authorities, members, board of directors, and other staff or donors. Notwithstanding this seemingly robust legal framework, there are a number of directors, members of Parliament (MPs), ministers and other high-ranking officials who have NGOs in their names, or indirectly have an ownership interest in them through which they illegally earn enormous amounts of money. Interviews carried out by MEC with the relevant entities demonstrate that, in recent years, the

majority of officials who had companies in their own names changed the names and registered them in the names of associates while, in fact, remaining the real owner of those companies. The name change paves the way for officials to obtain contracts and projects which are to their own advantage.

The Procurement Law

"Conflicts of interest" are discussed in the Procurement Law in several different instances:

- Article 17, Paragraph 3 obliges the bidder to have no conflict of interest. Furthermore, procurement staff shall not have any kinship relation or other connection with the bidder.
- Chapter 3 mandates that qualified bidders sign a document stating that they have no conflicts of interest that would prohibit them from participating in the process.
- Chapter 7 is dedicated to the issue of "transparency and accountability," which indirectly impacts on conflicts of interest.
- Article 68 requires procurement staff to ensure that all participants in the process are afforded an equal opportunity to participate. It also requires procurement staff to avoid profiting from any contract obtained by a relative, as defined in Article 17. Additional aspects of Article 68 include:
 - A requirement that no documents pertaining to the procurement process have been forged;
 - A requirement that all procurement-sensitive documents remain confidential with the identity of the bidders remaining secret; and
 - Measures aimed at punishing government procurement officials who violate the law.
- Under Article 70, a bidder cannot be excluded from participating in the procurement process, unless the bidder: (1) provided false information in the bidding or procurement process; (2) acted in collusion with bidders or with procurement staff with regard to the bidding documents; (3) interfered unfairly in the process of other bidders' participation; (4) engaged in corruption, collusion, and/or price fixing (for instance, by submitting the lowest bid based on insider information); (5) had a history of violating procurement regulations; (6) had a criminal conviction due to violations of a contract or subcontract; or (7) had a criminal conviction related to business or professional activities.

The Procurement Law also regulates the activities of government officials, requiring all officials with any link to the procurement process, including ministers, general directors, etc., (henceforth referred to as "covered government officials"), to sign a statement attesting that they: (a) have no blood-related relation or other material relationship with a bidder/tenderer, his or her legal advisors, or employees; (b) have not, in the past three years, had a financial interest in a bidder; and (c) are not engaged in discussions relating to future employment with the bidder. If a covered government official receives

information about any potential conflict, the Procurement Law requires him to report it to his superior and recuse himself (or demand the recusal of the conflicted party) from related procurement activities.

Recent changes to the procurement process will be formalized during the next revision of the Procurement Law. These changes include the establishment of the National Procurement Authority and the National Procurement Commission (chaired by the President); a generally more hands-on role for the President; and more limited roles for the Ministry of Economy's Afghanistan Reconstruction and Development Services (ARDS) Procurement Unit and the Ministry of Finance's Financial Intelligence Unit.

V. Procurement Vulnerabilities and Conflicts of Interest

Given the sums of money which are spent in the procurement sector, every phase of the procurement process, from needs assessment to advertising to contract implementation to monitoring, is vulnerable to corruption. According to the OECD, about 20-25% of countries' annual procurement budget is wasted because of corruption, and Afghanistan is a prime example. Even in the needs assessment phase, powerful officials often become improperly entangled in the procurement process by exerting their influence to alter the type of project, the number of beneficiaries, or the location of the project, frequently moving planned roads, schools, and other amenities closer to their personal power bases.

Similarly, in the advertising phase, the Procurement Law requires the contract to be advertised for a specific time. But according to interviews with several ministries' procurement officials, advertisements often only run for an abbreviated period of time to limit competition. After the "needs assessment" phase powerful officials can still coerce procurement staff to define the contract requirements in a way that results in a specific bidder with insider knowledge and influence winning the bid, rather than the most qualified offer. This can occur by raising the amount or value of a contract to restrict the number of companies who have the capacity to submit well-conceived bids.

Another aspect of conflicts of interest in the advertising phase is the presence of corrupt networks. For example, one common way that these networks interfere is to limit the time that a Request for Proposals is publicly listed. Similarly, in writing the contractual requirements, corrupt actors often collude to ensure that the requirements are drafted in such a way that makes it impossible for any but the pre-selected (and well-connected) company to win the award.

Examples of Pressure Tactics Employed by MPs and Other Senior Officials

MEC's findings indicate that the shortlisting, bid evaluation, awarding of contracts, implementation and monitoring phases are the most vulnerable to conflicts of interest and corruption. MPs are often some of the worst offenders. For example, after being informed that the Ministry of Education (MOE) would implement a project in his home district, an MP completely ignored all procurement rules and ordered the relevant MOE officials to award the contract to him. He reportedly managed to accomplish this—even though a winning bidder had already been selected—by physically beating the MOE procurement officer and then detaining the winning bidder in his guest house until he obtained the contract. The MP in question did not have a company and, realizing this was necessary, simply called a contact at AISA and obtained a business license within minutes.

Illicit intervention by politically influential persons most often occurs in the opening phases of the bid process when outside actors maneuver to best position their companies. Among the tactics employed are outright threats against procurement officials, more subtle “letters of recommendation” in support of their favored companies, or the dissemination of disparaging information about competitors. MPs and other senior officials have also resorted to sending their personal representatives to procurement offices to ensure they obtain the outcome they desire. Other MPs who do not control companies seeking government contracts still manage to enrich themselves by acting as brokers, and in this capacity steer contracts to companies that illegally paid them for this service. Such methods have even been employed by former ministers who, while they were in office, steered contracts to companies they controlled or in which they held an interest.

An official from the National Procurement Authority informed MEC that pilot studies indicate about 80% of bids and contracts during the past 13 years were affected by corruption. Multiple senior officials interviewed by MEC also indicated that contracts were either sold by a successful bidder to another bidder, or distributed among several bidders who were operating as part of a cartel. In the latter case, the successful bid was awarded in advance by the cartel, and they obtained a certain percentage of the contract, splitting the remaining payments with cartel members who did not win the contract. Other, more straightforward instances of improper collaboration involve contracts being awarded on the condition that subcontracts are given to specific companies, office rents billed to the contract are inflated, and/or salaries for “ghost employees” are charged and then diverted elsewhere.

VI. Summary

Prohibitions against conflicts of interest have been enshrined in several Afghan laws, particularly in procurement laws and regulations. However, there are legislative gaps. For this reason, the rules governing procurement are currently in the midst of being modified in response to the President making reform in this sector one of his top priorities. Nevertheless, this does not mean that all corruption and conflicts of interest are the result of gaps in the law. In fact, most problems appear to stem not from imperfectly written laws, but from a failure, or an unwillingness, to implement them.

Government contracts make up approximately 15% of annual public expenditures and remain vulnerable to myriad types of corruption that often involve conflicts of interest. Most commonly, influential officials, including MPs, AGO personnel, NDS officers, and cabinet ministers, exert pressure (up to and including death threats) on procurement officers to direct high-value contracts to favored companies. In return, these influential officials derive direct or indirect monetary benefits when the company secures the contract. This pressure can be brought to bear at any phase of the procurement process, from the initial needs-assessment phase to the post-award monitoring phase. That such irregularities occur is no secret, but the Afghan government currently lacks the investigative capacity to examine allegations of wrongdoing in the process.

The existence of corrupt networks is due, in part, to weaknesses in the recruiting process. It is often too easy for high-ranking officials to fill procurement offices with their relatives or political allies. By ignoring

the proper hiring process, these officials are able to build a web of associates whose advancement and financial future is dependent on doing what they are told when it comes to awarding contracts. Therefore, any effort to stamp out conflicts of interest must also include a renewed push for reform and transparency in government institutions' hiring processes.

VII. Recommendations

To address the deficiencies and ongoing challenges identified herein, MEC recommends the following courses of action:

Outcome	Indicator	Target	Baseline	Status
1. All government procurement is conducted via an electronic system.	1. Establishment of an effective and transparent electronic procurement system	1. Electronic procurement system developed by General Directorate of National Procurement	(1 Dec. 2015) no electronic system developed by General Directorate of National Procurement	
		2. Electronic procurement system implemented by General Directorate of National Procurement in all government institutions	(1 Dec. 2015) no electronic system implemented by General Directorate of National Procurement	
	3. Reform in recruitment process of procuring entities	3. The recruitment of procurement employees in a transparent process with all new hires and existing personnel subject to a thorough background and vetting process	(1 Dec. 2015) Reform in recruitment processes of procuring entities partially implemented.	
	4. Prevention of conflict of interest in public procurement	4. Identity of contractors and the owners of the companies publicized.	(1 Dec. 2015) Identities of the owners of the companies are not publicized.	

Sources

Laws and Documents

1. The Constitution of Afghanistan
2. Procurement Law
3. Public Procurement Procedure
4. Procurement Terms Dictionary
5. Law on Non-Governmental Institutions
6. Law on Social Organizations
7. Law on Monitoring the Implementation of Anti-Corruption Strategy
8. Law on Private Investment
9. *“Strategy and Procedure on Reforming Administration and Anti-Administrative Corruption”*
10. Presidential Decree 45
11. Anti-Corruption Convention
12. Transparency International, *“Curbing Corruption in Public Procurement”*
13. Conflict of Interest in Public Procurement, Anti-Corruption Help Desk
14. OECD Principles for Integrity in Public Procurement
15. Supplementary information from Afghan media

Interviews

16. Interview with the National Bureau of Procurement, OAA
17. Interview with the Procurement Policy Unit of MOF
18. Interview with ARDS, MOEC
19. Interview with the Department of NGOs of MOEC
20. Interview with AISA
21. Interview with the Department of Registration and Coordination of MOJ
22. Interview with the Department of Central Registration of Commercial Activities, Businesses and Intellectual Ownership of MOCI
23. Interview with the Department of Procurement of MOI
24. Interview with the Department of Procurement of the Ministry of Counter Narcotics
25. Interview with the Department of Procurement of MOE