

Legal Analysis of the Public Procurement Framework in Bhutan

Prospects for procuring green

September 2015

Green Public Procurement in Bhutan

ABOUT GPP BHUTAN

The Green Public Procurement in Bhutan project (GPP Bhutan) is an EU-funded project under the EuropeAid SWITCH-Asia Programme. It aims to establish a strategic approach to scaling-up public demand for environmentally and socially preferable goods, services and infrastructure in Bhutan. The project seeks to promote value-for-money across the asset life cycle rather than simply at the point of purchase, in order to reduce the negative environmental impacts and maximize social benefits.

The project is implemented by a consortium of two international and three national organizations, namely the International Institute for Sustainable Development (Project Lead, Canada), the Bhutan Chamber of Commerce and Industry (Bhutan), the Royal Institute of Management (Bhutan), the Royal Society for Protection of Nature (Bhutan), and the Collaborating Centre on Sustainable Consumption and Production (Germany).

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ABOUT THIS REPORT

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ACRONYMS

AAB	Audit Act of Bhutan
ACA	Anti-Corruption Act
ADB	Asian Development Bank
APLAC	Asia Pacific Laboratory Accreditation Cooperation
BIMSTEC	Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation
BSB	Bhutan Standards Bureau
BT	Bhutan Telecom
CCP	Community Contracting Protocol
CSMI	Cottage, Small and Medium Industries
DGPC	Druk Green Power Corporation
EA	Environmental Assessment
EC	European Commission
EDP	Economic Development Policy
EIA	Environment Impact Assessment
GNH	Gross National Happiness
GPP	Green Public Procurement
IEC	International Electrotechnical Commission
ISO	International Organization for Standardization
MOF	Ministry of Finance
NEC	National Environment Commission
NEPA	National Environment Protection Act
PFA	Public Finance Act
PPPD	Public Procurement Policy Division
PRR	Procurement Rules and Regulations
RAA	Royal Audit Authority
RGOB	Royal Government of Bhutan
SAARC	South Asian Association for Regional Cooperation
SAFTA	South Asian Free Trade Area
SAPTA	South Asian Preferential Trade Arrangement
SARSO	South Asian Regional Standards Organisation
SBD	Standard Bidding Document
SCP	Sustainable Consumption and Production
SME	Small and Medium Enterprise
SOE	State Owned Enterprise
WB	World Bank
WTO	World Trade Organization

EXECUTIVE SUMMARY

Since the Royal Government of Bhutan (RGOB) spends a large proportion of its annual budget on buying goods, works and services every year, it is advisable for public authorities to ensure that they leverage this on-going public function to support sustainable consumption and production (SCP) practices when making purchasing decisions. Green Public Procurement (GPP) is one method of promoting SCP in Bhutan. By systematically integrating environmental and social considerations into public procurement policy and practice, the RGOB can use its buying power to send a strong message about its commitment to sustainable development, to the Gross National Happiness (GNH) philosophy and, to promoting economic activity through generating demand for more sustainable goods, works and services.

The methodology used is a desk research of national procurement-specific documents as well as pertinent national laws, with the aim of assessing the extent of legal certainty for pursuing GPP in Bhutan. In addition, national policies and international and regional trade and commerce agreements are reviewed to assess the conduciveness of overall policy framework to buying green. The main focus for analysis is placed on legal interpretation of the national procurement rules and laws that directly govern public procurement in Bhutan.

The assessment of the existing legal, policy and regulatory documents in Bhutan pertinent to public procurement indicate that GPP criteria can be included within the current regulatory framework. There is space in the Procurement Rules and Regulations 2009 (PRR 2009) to allow for green procurement through the procurement cycle, namely when i) setting pre-qualification and qualification criteria for bidders, ii) specifying the scope of work, iii) evaluating bids, and iv) establishing contract conditions. Furthermore, a review of relevant laws, policies and regulations point to no significant conflict for pursuing GPP, and in fact show strong harmony in aims and objectives.

Indeed, practising GPP can be an effective tool for implementing existing policies and goals aimed at achieving equitable and sustainable economic development. The way forward within the current framework would be introduction of green procurement principles that could steer the standard procurement process towards the inclusion of environmentally preferable and socially beneficial criteria.

SECTION 1: INTRODUCTION

Public procurement by the Royal Government of Bhutan (RGOB) accounts for approximately 61 percent of the government budget annually¹. Since RGOB spends such a large proportion of its budget on buying goods, works and services every year, it would be advisable for Bhutanese authorities to ensure that sustainable consumption and production (SCP) practices are followed when making purchasing decisions. SCP practices are important to consider not only to ensure efficiency and cost-effectiveness, but also to put Bhutan's development philosophy of Gross National Happiness (GNH) into action.

Green Public Procurement (GPP) is one method of promoting SCP in Bhutan. GPP is defined by the European Commission (EC) as "a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured"². In broad terms, we define green public procurement as the process of procurement that assesses the cost of a product or service throughout its life cycle (manufacturing, use and disposal) that considers impacts on the environment (such as the energy, water, raw materials and hazardous materials used for manufacturing; energy use and other effects during use; and impacts when disposed) and purchases the option that provides the best value for public money. For the purpose of this project, it also includes the consideration of social impacts such as the wages of workers, working conditions, use of child labour, encouragement of domestic industries and so on. By systematically integrating environmental and social considerations into public procurement policy and practices, the RGOB can use its buying power to send a strong message about its commitment to the GNH philosophy. Simultaneously, GPP can promote economic activity by creating the demand for more sustainable goods, works and services.

In order to ensure that SCP practices become a norm in public procurement, it is key that environmental and social considerations are integrated both into hard (i.e. legally binding) and soft (i.e. non-legally binding) public procurement laws and regulations.³ This report assesses the existing laws, regulations and other instruments for procurement in Bhutan in order to understand if procurement laws and regulations allow for green and sustainable procurement. Beyond the Procurement Rules and Regulations (PRR), these include the overarching Constitution, the Public Finance Act (PFA) and Standard Bidding Documents (SBDs), as well as legislations regarding environmental and social considerations in Bhutan. It also briefly reviews other legal and policy documents which are of relevance to the Bhutanese procurement system in the implementation of GPP.

With the objective of systematically assessing the existing legal and policy framework for procurement in Bhutan, this report is structured as follows. First, an overview of international trade and commerce scenario that can affect Bhutanese procurement is provided. Then, national laws and regulations that directly apply to procurement are reviewed, followed by the most relevant national legislation and other policies. Finally, a comprehensive interpretation of the whole legal framework is developed in order to answer the question: Is it feasible to practice GPP under Bhutan's current legal framework for public procurement? Figure 1 below encapsulates the general overall approach of identifying and reviewing all documents relevant to this research.

1 GPPB (2015). Quantitative Mapping of Public Procurement in Bhutan. Thimphu

2 COM (2008) 400 Public procurement for a better environment.

3 Perera, O (2010, September). Procuring Green in the Public Sector: A checklist for getting started. A white paper from IISD. Winnipeg, MB: IISD.

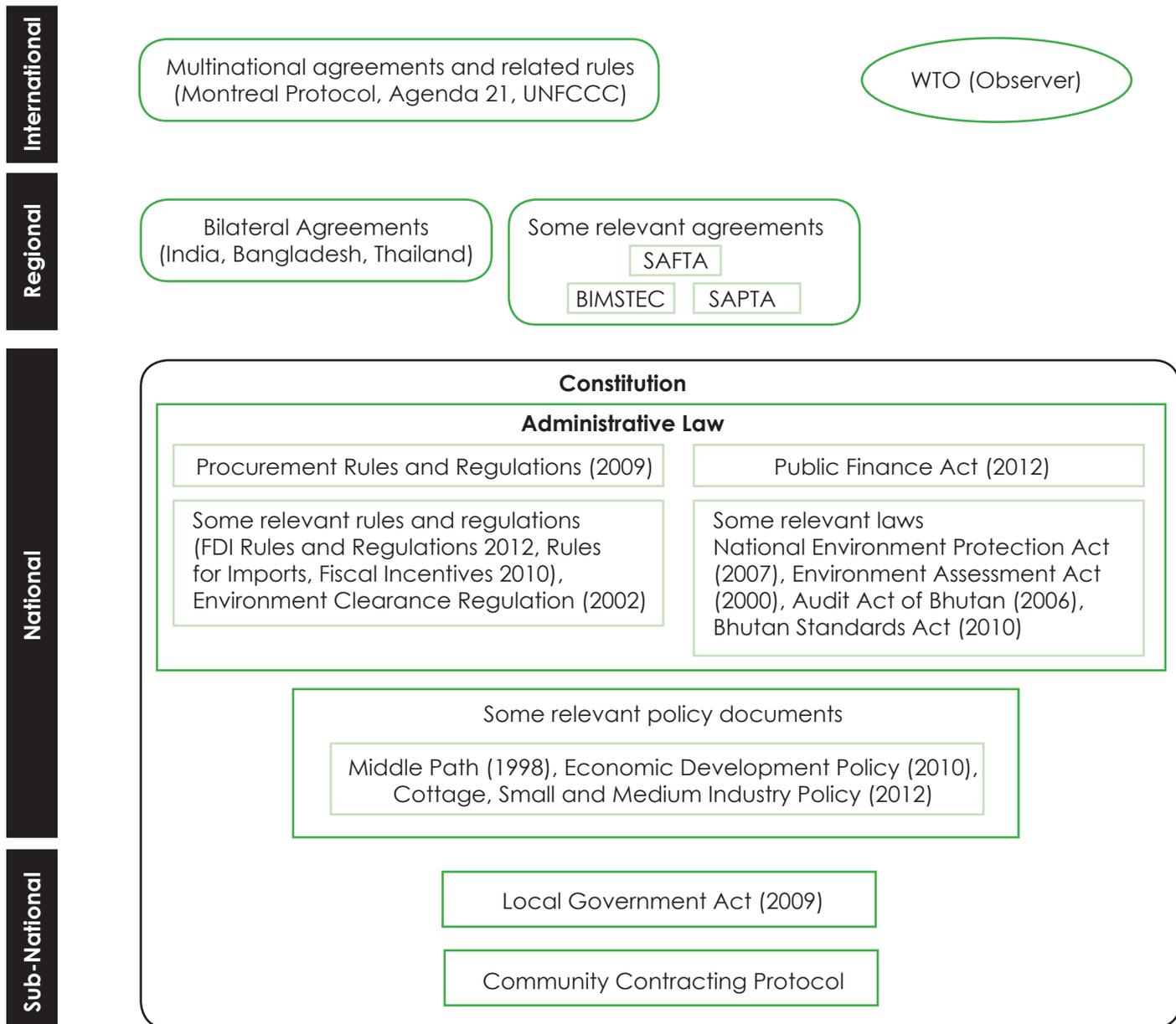


Figure 1: Overall approach of identifying and reviewing documents

SECTION 2: METHODOLOGY

The methodology used in this research is desk-based review of national procurement-specific documents as well as pertinent national laws with the aim of assessing the extent of legal certainty for pursuing GPP in Bhutan. In addition, national policies and international and regional trade and commerce agreements are reviewed to assess the conduciveness of overall policy framework to buying green. This approach was chosen because public procurement is governed by national regulations and laws and additionally influenced by national policy environment and international regulations and laws. Therefore, reviewing the legal framework for procurement in particular is necessary for interpretation of the current legislation on environmental and social sustainability criteria for inclusion in supplier pre-qualification requirements, technical specifications, award criteria and contract conditions.

While many policies, rules and laws could have indirect potential implication on procurement, this research is limited to those documents that have either direct or plausible relevance to public procurement in Bhutan. The main focus for analysis is placed on legal interpretation of the national procurement rules and laws that directly govern public procurement in Bhutan.

SECTION 3: OVERVIEW OF MULTINATIONAL AND BILATERAL TRADE AGREEMENTS AND COOPERATION

With the aim of understanding cross-border procurement of goods, works and services, it is necessary to consider the broad framework of trade and commerce within which Bhutan's economic activity takes place. Especially considering that Bhutan is a net importing country, examination of international agreements will allow for an understanding of the access of public procurement authorities to sustainable goods, services and works from outside Bhutan and the extent to which the broad framework of trade and commerce can hinder or favour sustainable procurement.

Bhutan currently holds an observer status in the World Trade Organization (WTO) and thus is not subject to the WTO rules and regulations, nor does it reap the trade facilitating benefits of being a member of WTO. Bhutan has, however, signed regional trade agreements aimed at promoting free trade and commerce. These include the agreement on SAARC Preferential Trading Arrangement (SAPTA) in 1993, which was superseded by the Agreement on South Asian Free Trade Area (SAFTA) in 2004. It is also a member of Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC). In addition, Bhutan is signatory to bilateral trade agreements with three regional neighbours – India, Bangladesh and Thailand.

Sustainability concerns are not explicitly mentioned in any of these agreements. The general objective in these agreements is promoting free trade and commerce, which may have implications in the type and extent to which preferential programmes can be deployed to encourage GPP. For example, Article II of the Agreement on Trade, Commerce and Transit between India and Bhutan states that: "[...] the Royal Government of Bhutan may, henceforth, impose such non-tariff restrictions on the entry into Bhutan of certain goods of Indian origin as may be necessary for the protection of industries in Bhutan [...]." Along the same lines, Article III allows both countries to impose "non-tariff restrictions on entry into their respective territories of goods of third country origin as may be necessary." Similar provisions can be found in the other agreements for all international agreements to which Bhutan is a party.

The space in the regional and bilateral agreements to promote Bhutanese industries could allow for preferential programmes for goods and services of local origin which arguably could also be more sustainable due to shorter transportation distance (thus lowering carbon emissions as well as transportation costs) and more transparency and control as products can be more easily vetted and monitored against green/sustainable standards. Another benefit of establishing preferential programme for goods and services of local origin would be strengthening of the local economy.

Beyond preferential programmes, which may be seen as being restrictive of liberalization trends, another area worth exploring in the realm of international trade and commerce agreements is the space it provides for favourable treatment of green goods and services and encouragement of Small and Medium-sized Enterprises (SMEs). For example, Article VII of the Trade and Economic Cooperation Agreement between Thailand and Bhutan states "The Parties, on the basis of mutual benefits, shall explore and where applicable undertake cooperation projects, including but not limited to the areas of tourism, construction, small and medium enterprises, health and medical care, education, energy and logistic services." Thus, mutually-beneficial projects to promote green products and services and SME growth could be a potential area to explore between the two countries.

In summary, the cross-border trade and commerce agreements do not expressly promote for green procurement. However, the possibility of introducing preferential programmes to promote Bhutanese industry is encouraging for pursuing GPP. Finally, another potential avenue to pursue GPP could be through favouring and promoting green goods and services in cross-border trade (through reduced tariff or even joint investment in green industries) although this option is beyond the scope of this paper and GPP Bhutan.

SECTION 4: REVIEW OF NATIONAL POLICIES, LAWS AND REGULATIONS

Beyond the international framework, it is important to interpret the national policy, legal and regulatory frameworks in order to identify the extent to which GPP can be practised within the existing environment. This section will present an overview of the procurement framework in Bhutan at a national level, with an aim to understand the overall laws and regulations that govern and/or impact public procurement.

4.1 National Policy, Strategy and Development Frameworks

Guided by Bhutan's development philosophy of Gross National Happiness (GNH), most policies and strategies in the country are broadly very favourable towards GPP as they generally take into account environmental protection and social responsibility considerations. In the policy framework, some specific examples illustrate this space for GPP from various angles:

- National Environment Commission's guiding national strategy published in 1998, *The Middle Path*⁴, solicits a balanced approach to development.
- Bhutan's 11th Five Year Plan (2008-2013) has the specific objective of "self-reliance and inclusive green socio-economic development."
- The Framework to Mainstream Gender, Environment, Climate Change, Disaster Risk Reduction and Poverty (GECDP) (2013) states that the mainstreaming approach changes the "development versus environment" debate to one of "development that utilizes resources sustainably", placing particular emphasis on the opportunities the environment provides for development that is sustainable and inclusive (pro-poor).
- The Economic Development Policy (EDP) 2010 of Bhutan envisions "a green and self-reliant economy sustained by an IT-enabled knowledge society guided by the philosophy of GNH."
- The Cottage, Small and Medium Industry (CSMI) Policy 2012 has the vision "to develop a dynamic, competitive and innovative CSMI sector in harmony with the GNH philosophy, thus promoting employment, poverty reduction and balanced regional development."
- The National Strategy and Action Plan for Low Carbon Development recommends immediate and mid-term action plans including licensing of energy intensive industries with carbon emission limit obligations in order to achieve carbon reduction and sound foundation for informed decision making and policy design, and possibility for branding of sectors as green.

Furthermore, recommendations in the Bhutan Human Development Report 2011, "Sustaining Progress: Rising to the Climate Challenge" include "investment in sustainable energy services and systems" and "[promotion of] green industry."⁵

Therefore, it can be concluded that at the national level, Bhutan's development vision and strategies are favourable for sustainable procurement and green growth, even though there is no explicit policy instrument to either reinforce SCP habits or mandate green public procurement.

4 *The Middle Path* identifies 1) production of hydro power, 2) self-sufficiency in food production and 3) industrial development developed as three areas for achieving sustainable development and calls for a balanced approach in development with consideration for tradition and nature while developing economically and adopting technical and social changes.

5 Bhutan's Human Development Report 2011, *Sustaining Progress: Rising to the Climate Challenge* explores the linkages between climate change and human development in Bhutan. The report was prepared by Gross National Happiness Commission with guidance from National Technical Committee and assistance from UNDP.

4.2 Public Procurement Laws and Regulations

4.2.1 Public Finance Act

The Public Finance Act (PFA), passed in 2007, is the legal basis for the RGOB's procurement rules and regulations. Chapter VI of this Act ("Financial Management Requirement") empowers the Ministry of Finance (MOF) to institute norms on public procurement: "issue rules, manuals, directives, instructions or notification on the specific matters as follows: (...) procurement."

Section 104 of the PFA establishes the MOF as the authority to frame the rules and regulations for procurement to be implemented by government agencies. The Act accords the authority to the MOF to issue rules, manuals, directives, instructions or notifications on specific matters such as procurement.

In January 2012, an amendment of the Act was passed in the Parliament and called "Public Finance (Amendment) Act of Bhutan 2012." Several amendments were endorsed particularly on the budget appropriation bill, money bill and consolidated fund.

The PFA provides space for GPP practices in public sector corporations. It entrusts the RGOB to establish state enterprises to carry out significant commercial activities; and according to Article 81, the state enterprises in addition to its objectives of operating as a "successful business", may also strive for social mandates that produce or deliver goods and services regardless of their profitability.

4.2.2 Procurement Rules and Regulations

The Procurement Rules and Regulations (PRR) published in 2009 by MOF is the main document that guides all public procurement processes in Bhutan. Its objective is to ensure transparency, achieve uniformity in procedure, improve efficiency and ensure fairness in procurement.

It contains all rules and regulations pertaining to procurement such as: registration and qualification of bidders; organisation of procurement; procurement thresholds, methods and processes; bidding processes and documents; award of contract and elements of contract; procurement of consultants' services; and finally institutional arrangements that manage procurement matters in Bhutan.

Several amendments have been made to the PRR 2009 and a revised version was launched in June 2014. However, the document is still referred to as PRR 2009⁶. Prior to the PRR 2009, public procurement was guided by the Procurement Manual - Rules and Procedures (2007). The RGOB received assistance from the Asian Development Bank (ADB) in the mid-1990s to create the procurement rules and regulations, which was incorporated in the Financial Management Manual at the time. In 2005, the RGOB received further assistance from the World Bank (WB) to reform the procurement system. Some of the results of the reform process were the establishment of the Public Procurement Policy Division (PPPD) in 2008 under MOF, the current custodian of PRR.

Article 1.1.2.2 of the PRR is of particular interest for GPP as it allows for preferential treatment to goods and works of Bhutanese origin over goods and works from abroad provided that the price difference does not exceed five per cent. A detailed interpretation of the PRR clauses that contain potential space to incorporate GPP is discussed in Section 5.

⁶ This report will refer to the PRR document as PRR 2009 as it is commonly known, although certain amendments were made in 2014.

4.2.3 Standard Bidding Documents

The Standard Bidding Documents (SBDs) (2011) were prepared by the PPPD and are required to be used by the PRR 2009 for the procurement of goods and works in the National Bidding processes that are financed in whole or in part by the RGOB. There are 4 different SBDs, depending on the nature (goods or works) and value of procurement. In addition, Standard Request for Proposal (SRFP) is used for procurement of consulting services.

The SBDs provide all of the information that a bidder will require in order to submit a bid. It includes the following documents: Invitation for Quotation, Schedule of Items and Priced Quotation (bid form), Technical Specification of the Goods required, Purchase Order for the Supply of Goods, Contract Agreement, Performance Security and Bank Guarantee for Advance Payment. The SBDs also include instructions for the bidders on the bidding process. It lists the eligibility criteria for bidders and describes the process for preparing the bids, which extends to the language of the bid, price variation, currencies of bid, price schedules and so on. The submission of bids is also described with respect to specifications of the format and process of submissions, deadlines and bid openings. In addition to the bid price, the SBDs stress on the quality assurance of the goods, services and works supplied.

The SBDs were made available since 2009 together with the PRR, but most of them have undergone revisions in 2011, 2013 and 2014.

There are a number of clauses in the SBDs that are of interest to GPP. For instance:

- The SBD for Goods, Section 1, Clause 26 relating to the evaluation and post qualification of bids, states the evaluation of a bid will take into consideration other factors besides the bid price such as the characteristics, performance and terms and conditions of purchase of the goods and services. The SBDs state that the price of the bid should take into account the cost of the materials, transportation, labour, taxes, levies, overheads and “any other costs.”
- Similarly, in the SBDs for Works in Section V, Clause 10.2 (“General Conditions of Contract”) there is mention of welfare of labour and child labour, requiring proper accommodation and minimum age and for environmental protection.
- In the SBDs for Works in Section V, Clause 10.2 states that contractors “shall comply with all relevant labour laws applicable to the Contractor’s personnel, including their employment, health, safety, welfare, immigration and emigration, and shall allow them all their legal rights”.
- Clause 30 of Section 1 states preference for domestic bidders where they are entitled to benefit from a margin of preference. The margin of preference also applies to Joint Ventures, Consortia and Associations of domestic firms with some conditions attached as outlined in Clause 30.3. A more detailed interpretation of SBD clauses that allow for integration GPP principles is discussed in Section 4.

REVIEW OF PROCUREMENT RULES IN BHUTAN TELECOM AND DRUK GREEN POWER CORPORATION

Most State-Owned Enterprises (SOEs) in Bhutan follow their own procurement rules and regulations. In the PRR, Article 1.1.2.4 states that “Corporations (except municipal corporations) and Financial Institutions fully or partly owned by the Royal Government, Trust Funds, and Welfare Funds may adopt separate rules and regulations for the management of their procurements, provided such rules are within the broad principles of these rules and are approved by their respective Boards of Directors/ Trustees.” In the absence of separate rules and regulations, procurements conducted by these bodies shall be governed by the same PRR.

For the purpose of this research, procurement rules and regulations of two SOEs were reviewed: Bhutan Telecom (BT) and Druk Green Power Corporation (DGPC). Both corporations have adopted their procurement rules and regulations from the government PRR.

The BT procurement manual does not include any provision for preferential treatments or advantages for local producers or contractors. In addition, the manual does not include any clause that states a preference for green products. However, green/sustainable criteria can be included on approval by the competent authority in the bidding document.

The DGPC procurement rules and regulations are similar to the government PRR with a few modified procedures and methods that are calibrated according to its organizational needs. Like BT, DGPC does not have provisions with preferential treatment for goods or works of Bhutanese origin. The DGPC procurement process also includes more procurement methods. The ‘Delegation of Power’ determines levels of tender committees, authorizes responsibilities and also determines the procurement method for a particular procurement.

Box 1 Procurement in State-Owned Enterprises

4.3 Related Laws and Regulations

Beyond procurement-specific laws and regulations, other laws and regulations in the country can have implication on public procurement. The following laws and regulations were reviewed in this research in an effort to understand the overall legal scenario in Bhutan and to assess the extent of legitimacy and reward (or repercussions) for procuring green.

4.3.1 The Constitution of Bhutan

The Constitution of Bhutan was adopted on 18th July 2008.

The Constitution mandates a minimum of sixty percent of the country's land be under forest cover for all times. Furthermore, it confers on the state the authority to facilitate and strengthen institutions that are conducive to a progressive, sustainable and just society. Article 5 of the Constitution bestows responsibility to individual citizens and government to conserve environment through environmentally friendly and sustainable practices and policies and legislations. Section 2 b) and c) under the same article are again very specific in stating that the Royal Government shall “prevent pollution and ecological degradation” and “secure ecologically balanced sustainable development while promoting justifiable economic and social development.” Section 5 of Article 14 (“Finance, Trade and Commerce”) also mandates the Government to exercise proper management of the monetary system and public finance to prevent undue public debt on future generations. Therefore, GPP can be a tool for governments to pursue sustainable development, which is an important responsibility bestowed upon by the Constitution to the government and people of Bhutan.

4.3.2 Environmental Laws and Regulations

Environmental laws and regulations in Bhutan stem from the deep-rooted tradition of respect for the nature in Bhutanese culture. Environmental conservation is one of the pillars of GNH. In order to ensure that Bhutan follows a sustainable development path and that all projects (public or private) take into consideration environmental aspects, a separate high-level autonomous agency, the National Environment Commission (NEC) was established in 1992. The 2007 National Environment Protection Act of Bhutan mandates that NEC be chaired by the Prime Minister or Minister of a relevant Ministry nominated by the Prime Minister. Commission members include four to five members of the highest ranking officers representing relevant ministries nominated by the Chairperson, three representatives from civil society, and the head of the NEC Secretariat as the Member Secretary. A NEC Secretariat with over 50 staff plus 20 District Environment Officers and few in the Environment Units of the Ministries perform various functions such as policy and planning, research, monitoring, setting standards, compliance and advocacy.

Among environment-related laws and regulations, this research analysed the National Environment Protection Act (NEPA), the Environmental Assessment (EA) Act, Waste Prevention and Management Act, Water Act, Regulation for the Environment Clearance of Projects, and Waste Prevention and Management Regulation as they may have direct or indirect implications in the procurement processes. The following subsections offer a general description of the regulations and their relevance to procurement in Bhutan.

4.3.2.1 National Environment Protection Act

The NEPA was enacted in 2007. It was passed in order to provide for the establishment of “an effective system to conserve and protect environment” and to “independently regulate and promote sustainable development in an equitable manner” through the NEC and other sectoral agencies.

The Act lists fundamental environmental principles such as the fundamental right and duty to a healthy environment, intergenerational equity, precautionary principles and so on. In order to ensure the environmental quality, the Act specifies some precautionary measures such as:

- *Laying down standards and procedures for labelling and best environmental practices with regard to any industries, operations or processes or class of industries, operations or processes.*
- *Laying down procedures and safeguards for the handling of hazardous substances.*
- *Inspection of any premises, plant, equipment, machines, manufacturing or other processes, materials or substances.*

Environmental standards are also laid out in the Act, which regulate products and processes that potentially have adverse environmental impacts. The Act allows for voluntary eco-labelling or eco-auditing schemes and regulations for best environmental practices, standards for environmental auditing and labelling.

NEPA includes a section on Financial Incentives and Charges for Environmental compliance in the Act. The Act allows the government to establish financial incentives and charges such as reductions in customs duties for environmentally friendly products and levying taxes for environmentally unfriendly products. Complementing well to this provision, the fiscal incentives programme for various economic activities and sectors, including incentives for certain types of greener industries, were initiated in 2010 by the Department of Revenue and Customs, Ministry of Finance. Section 3.3.3.2 on Fiscal Incentives will cover the scope of this programme in greater detail.

Overall, the NEPA is very favourable to GPP and provides many mutually beneficial opportunities to either mitigate environmental impact or, better yet, promote sustainable consumption and production.

4.3.2.2 Environmental Assessment Act

The Environmental Assessment (EA) Act was enacted in 2000 in order to establish “a system to assess the potential effects of policies, programs and projects on the environment”.

The Act stipulates the issuance of an environmental clearance as a prerequisite of any development activity. The Act details the steps for approval of the development activity. Within this section, the Act gives permission to the competent authority to attach “environmental terms to the development consent which can contain applicable codes of best practices.” The Act empowers the NEC Secretariat to enter a project site without prior permission for inspection. Penalties are listed out in the event of offenses under the EA Act.

The EA Act is relevant to GPP as it has the potential to assess the extent to which a project or an organisation is green or sustainable. The information would be valuable in identifying individual businesses, industries and industry sectors that can either be supported and promoted because they are environmentally friendlier or be avoided and penalised if they do not pass the assessments.

4.3.2.3 Environmental Clearance Regulation

In accordance with the EA Act, the NEC adopted the Environmental Clearance of Projects and Regulation on Strategic Environmental Assessment in 2002. The Regulation is meant to be a guiding document for project proponents in adhering to the EA Act. Therefore, Environmental Clearance (EC) Regulation essentially defines the responsibilities and procedures for the implementation of the EA Act.

The EC Regulation explicitly states that consent for development activities will be given only with the issuance of an environmental clearance from the competent authority or the NEC Secretariat. It further delineates “special areas” which require clearance from concerned agencies such as protected areas, public parks, sacred landscapes and so on. Environmental clearances are issued for no longer than 5 years after which projects are reassessed.

The regulations mandate all agencies to establish an Environmental Unit, which will be responsible for the implementation of the EA Act. The Regulation specifically states that all environmental clearances must incorporate terms and conditions to sufficiently protect the environment and make a basis for the environmental inspectors during monitoring visits to the project sites. The environment clearance is issued following an Environment Impact Assessment (EIA). The conventional EIA includes economic and social impact assessment. Therefore, similar to the EA Act, the EC Regulation is pertinent to procurement since it acts as a safeguard for GPP.

4.3.2.4 Waste Prevention and Management Act

The Waste Prevention and Management Act was adopted in 2009.

It has numerous provisions which directly and indirectly affect GPP through concepts such as intergenerational equity, middle path strategy, precautionary principle, principle of 3Rs, polluter pays principle and so on. For example, Section 7 of the Act states, in pursuit of sustainable economic development, natural resources shall not be degraded and, in line with Middle Path strategy, economic development and environment conservation shall receive equal priority.

Specifically, Section 11 of the Act on principle of 3Rs and waste minimization hierarchy mandates all persons to: a) avoid, eliminate, or substitute the use of products or unnecessary packaging that generates wastes, b) reduce the generation of waste from the manufacture and use of products, and c) reuse products and packaging materials. Similarly, Chapter III of the Act on management requirements for different categories

of wastes mandates implementing agencies to prevent procuring of goods that will turn into hazardous wastes category when obsolete, with specific mention of prohibiting import of hazardous wastes in section 13 b), and ensuring minimization, storage and disposal of medical and e-wastes in sections 14 and 15 respectively. Thus, the Act strongly supports green and sustainable habits in procurement and consumption of goods by public entities and individual citizens.

4.3.3 Fiscal Laws and Regulations

While tax laws do not directly affect the public procurement process, they are worth considering since they affect the price of commodities. Due to low economies of scale in Bhutan, imports are generally cheaper at the point of purchase and thus more competitive than local products. In view of this situation, the use of fiscal tools by the government has an impact on the availability of locally manufactured goods and services as well as the availability of sustainable or green products in the Bhutanese market.

The use of fiscal instruments to promote SCP has an impact on the public procurement process as the supply of goods and services available in the market is highly influenced by the type of fiscal measures that have been deployed in the market. Bhutan's introduction of the green tax in the Sales Tax, Customs and Excise Act through the 2012 amendment presents an opportunity to use indirect taxes to make sustainable and green products more competitive and attractive to consumers. At the same time, offering fiscal incentives to sustainable domestic production of goods and services also provides a framework for the growth of clean industries and social protection through value creation in the form of jobs and resilience of the economy. These are discussed in more detail below.

4.3.3.1 Sales Tax, Customs and Excise Act

The Sales Tax, Customs and Excise Act of 2000 was passed with the objective of ensuring “economic progress, promote social justice, general welfare, fairness in the levy and collection of taxes and duties and to secure financial sustainability, growth and prosperity.”

The Act was amended in 2012 and called Sales Tax, Customs and Excise (Amendment) Act 2012. Another minor amendment was made in 2014.

The 2012 Act introduced new tax head called the “Green Tax” in addition to Sales Tax, Customs Duty and Excise Duty. Clause 7 of the Act establishes the authority of the Parliament to fix the rates of Green Taxes applicable to goods and services of activities. However, the Act remains silent on the powers of identifying these goods or services and in a note states that the Bhutan Trade Classification 2012 shall be used for the purpose of levying Green Tax.

The 2014 amendment was passed with the objective “to give effect to the fiscal measure to provide for alteration, imposition, repeal, remission and regulation on Sales Tax, Customs Duty and Green Tax.” The 2014 amendment mainly differs from the 2012 Act with regard to the Green Tax rates.

The initial Act of 2000 and the subsequent amendments clearly establish the powers of the Government over the imposition of indirect taxes on goods and services and, at the same time, the lack of power to impose direct taxes on goods of Indian origin being imported into the country. This may be an important aspect to consider when implementing GPP as it would have implications on the nature and scope of using tax incentives as well as imposition of taxes to industries.

4.3.3.2 Rules and Regulations on Fiscal Incentives

In 2010, the Ministry of Finance issued the Rules and Regulations on Fiscal Incentives drawn from the Economic Development Policy for a more self-reliant Bhutan.

These incentives are being offered in three categories namely i) General Incentives – applicable to all sectors of the economy, ii) Specific Incentives – pertaining to cross sector incentives such as for Cottage and Small Industries, and Waste Management & Recycling iii) Sector Specific Incentives – covering incentives specific to sectors such as Agriculture, ICT, Tourism, Film, Construction, Transport and so on.

The Fiscal Incentives programme and GPP can be especially complementary for economic development in Bhutan. For instance, the incentives promote green initiatives such as waste management and recycling as well as social initiatives such as cottage and small industries and cooperatives. Incentives include tax holidays, import exemptions, sales tax exemptions, reinvestments, provision for R&D expenses to be tax deductible and rebates for environmentally friendly technological up-gradation. The programme also clearly promotes GPP practices through the exemption of customs duty and sales tax on green building materials under clause 3.5.2 and tax holiday for car/taxi hiring services. Most incentives have a validity of five to ten years, counting from the base year of 2010.

4.3.4 Standardisation Laws and Regulations

4.3.4.1 Bhutan Standards Act

Bhutan Standards Act (2010) aims to “foster and promote standards and standardization activities as a means of advancing the national economy, benefiting the health, safety and welfare of the public, assisting and protecting consumers, protecting our natural environment, promoting industrial efficiency and development, facilitating domestic and international trade.”

Clause 11 (i) in Chapter III states that one of the functions of the Board on the Bhutan Standards Bureau (BSB) is establishing a standard mark, the “Bhutan Standards Certification Mark” to oversee the functioning and authorize inspection of all goods and services. An additional function of the Board is to “represent Bhutan in International and Regional Standardization and Accreditation Bodies such as ISO, IEC, SARSO and APLAC to formulate national view on issues affecting national interest” (Chapter III, Clause 11 (a)).

During GPP implementation, BSB Board members can be potential collaborators and provide linkage to ISO and other international certification, which may be necessary in establishing green standards for Bhutan. The Bhutan Standards Act can also serve as a generic legal baseline for all suppliers to adhere to, informing them of requirements for the goods and services and, most importantly, ensuring their quality.

4.3.4.2 Food Act of Bhutan

The Food Act of Bhutan (2005) was enacted to protect human health and to regulate and facilitate the import, export and trade of food in the Kingdom of Bhutan.

The Act states that the National Food Quality and Safety commission, headed by the Minister responsible for agriculture, is responsible for formulating policy to maximize industry development, protect consumers, foster trade and improve food control in the Kingdom. The Commission is also mandated to review and approve the work of the National Codex Committee regarding the development and acceptance of national standards regarding international and regional food standards, collect and analyse data for elaborating national food standards and establish standards for food of all types in the Kingdom, ensuring that such standards are practicable in the local environment.

While the Food Act may not have direct implication and relevance for GPP, since Bhutan imports large quantities of food, especially from its neighbour India, food standards and labels related to organic food and environmentally sustainable methods of production could promote GPP. Currently, the Act does not mention any consideration for sustainable consumption or production but it does give the Commission the authority to review the local food standards requirement and make amendments to the Act.

4.3.5 Consumer Protection Law

Consumer Protection Act (2012) was enacted by the Parliament to provide for the protection of economic interest and safety of consumers, to ensure better consumer products and services, to facilitate quicker redressal mechanisms and to avoid economic harm and adverse consequences in the course of acquiring and using goods and services made available in the market.

Under the Act, consumers have the right to a physical environment that will “enhance the quality of life for present and future generations and basic goods and services which guarantee dignified living”. Also, the consumer has the responsibility to consider the impact of consumption patterns on the environment to maintain the ecological balance, safe environment for consumption of goods and services by providing information on the supply of goods and services, which are harmful and not safe for consumption.

In order to address the consumption pattern, the Office of Consumer Protection promotes the development of a policy on sustainable consumption of goods and services as well as encouraging sustainable consumption by disseminating information on environmental impacts of consumer choices and impact of products on the environment.

This Act endorses the importance of sustainable consumption by taking into consideration the present and future needs of the society. The definition of “consumer” in the Act does not include public organisations as consumers. However, procurement is an important tool to promote sustainable consumption and production patterns and government is arguably the largest consumer of a variety of goods and services in Bhutan. Therefore, in a move towards GPP, the rights and responsibilities of consumers as stated in the Act could be made applicable to public organisations.

4.3.6 Other Laws

4.3.6.1 Audit Act of Bhutan

The Audit Act of Bhutan (AAB) was passed in 2006 with the aim to “enhance accountability and proper utilization of public resources through effective auditing and reporting without fear, favour or prejudice, and to promote good governance.”

AAB is an important legislation for procurers and procuring agencies as it has implications on procurement and directly allows GPP. In general, procurers are careful about conducting their duties in accordance with the standards and requirements set by auditors. Introducing environmental and social criteria in the procurement process may become a cause of concern for auditors as there is no existing auditing mechanism to check for standards and compliance.

A potential challenge for GPP in the AAB would be the facts that since audits are conducted against established norms that may not have GPP criteria, introducing new methods of tendering and evaluation may contravene the commonly-practised auditing methods. For instance, Article 41(c) of AAB notes that the auditors would ascertain whether “accounts have been maintained in the prescribed forms and such accounts fairly represent the position of the transactions.” Similarly, Article 58 states that “An auditee

shall submit annual financial statements for their operations for audit in accordance with standards and requirements established by laws." The question to bear in mind is whether the environmental and social criteria can be recorded in "prescribed forms" for auditing and whether public procurement done in a new manner can be "in accordance with standards and requirements" that currently exist.

On the other hand, Article 38 (b) is more promising for GPP. It states that one of the functions of the RAA is to "conduct performance audit to ascertain and report on the economy, efficiency and effectiveness of the operations of agencies audited." "Performance Audit", according to the definition provided within the Act, means auditing "the aspects of value-for-money (VFM), operational and management audits including an audit of the economy, efficiency and effectiveness with which the audited entity uses its resources in carrying out its responsibilities [...]." This article not just allows for GPP, but empowers and reinforces the basic principles of green procurement since governments that adopt GPP seek value for money across the asset life cycle rather than simply at the point of purchase.

4.3.6.2 Anti-Corruption Act

The Anti-Corruption Act of Bhutan (ACA) came into force in July 2011, superseding the ACA of 2006. ACA was enacted to tackle corruption and enhance transparency and accountability in governance.

Similar to the ramifications to civil servants for violating laws and regulations under the AAB, the ACA has potential implications on procurement.

Clauses 48 and 49, which relate to active or passive bribery in relation to bids, state that a person who gives or accepts advantage as an inducement to or reward for "submitting a tender, proposal, quotation or bid with a specified price or with any specified inclusions or exclusions, shall be guilty of an offence." Environmental and social specifications enlisted by a procurer may be classified as "specified inclusions or exclusions" under the ACA. Similarly, clauses 50 and 51 state that active and passive involvement in providing or obtaining an advantage on a contract for work or procurement shall be guilty of an offence.

Hence, it would be important for procurers and procuring agencies to: 1) be cautious in how they incorporate GPP specifications within the standard bidding documents, 2) be diligent in evaluating the bids strictly as per the GPP specifications and guidelines, and 3) communicate clearly, and possibly collaborate, with the RAA and Anti-Corruption Commission before adopting GPP criteria in their standard procurement procedure.

4.3.6.3 Local Government Act

The Local Government Act (LGA) was enacted 2009. It establishes the premise for various types of structures of local governments; and covers all matters relating to the establishment, election, functioning, transparency and accountability of these structures.

Upon its enactment, the Local Government Act, 2007, the *Thromde Act, 2007*; *Dzongkhag Yargay Tshogdu Chathrim, 2002*; *Gewog Yargay Tshogchung Chathrim, 2002* and the provisions of any law, bye-law, regulations, circular and order that were inconsistent with LGA 2009 were repealed.

The LGA is reviewed in this research because local governments operate and manage their funds independently; therefore understanding the structure and mechanism of local government would elucidate the legal procurement scenario at the district level.

The clauses in the LGA which pertain to procurement mostly entrust the local governments with the responsibility to procure in accordance with the provision of the PFA and PRR. Clauses 55(b), 221, 222, 223

and 224 all make reference to the national laws, rules and regulations governing procurement and call for prudent management of funds according to those laws, rules and regulations.

Therefore, one can conclude that the opportunity for GPP at the district level would be the same as what space is identified in the PFA, PRR and other laws affecting procurement.

Summing up Bhutan's national policies, laws and regulations relevant to procurement, the policies are exceedingly favourable towards implementing GPP. Other pertinent laws and regulations to procurement, especially in the areas of environment, finance/economy, and audit indicate complimentary legislative framework for pursuing GPP. In the absence of specific legislation or policy to pursue green and sustainable procurement, the largest potential for implementing GPP can be found in the interpretation of PRR 2009 which is illustrated in the following section.

SECTION 5: INTERPRETING LEGISLATION, POLICY AND REGULATIONS FOR ENVIRONMENTALLY FRIENDLY AND SOCIALLY RESPONSIBLE PROCUREMENT

Although there is no specific mention of the words “green” or “sustainable” in the legislation governing public procurement in Bhutan, an integral legal interpretation of the procurement legal framework provides a strong basis for procurers to integrate GPP in public procurement. Indeed procurement laws are about setting sound principles for buying, and transparency, fair competition and accountability should remain their focus. Following from our research, it is apparent that the PRR 2009, together with the Constitution of the Kingdom of Bhutan, the environmental laws and regulations, and the Public Finance Act, among others, allows procurers to implement GPP practices in their procurement processes within the existing regulatory framework.

Current legislation and regulations on public procurement in Bhutan *provide enough space for incorporating environmental and social considerations into the procurement process*. The following section offers an analysis of the legal provisions permitting the implementation of GPP in the Bhutanese procurement process. GPP implementation includes environmental criteria or requirements, social considerations and preference to local content or small businesses’ goods and services.

5.1 Incorporating Environmental and Social Considerations in the Procurement Cycle

There are four distinct stages in the procurement cycle that provides the opportunity to practise GPP within the existing laws and regulations governing public procurement as discussed below.

5.1.1 Pre-qualification and Qualification Criteria for Bidders

The pre-qualification of bidders provides an opportunity to pre-select suppliers that take environmental and social concerns into consideration in their operations. In both the regulation of pre-qualification and qualification, *PRR 2009 allows agencies to set specific criteria that could potentially include environmental or social criteria*. There is a particular provision in the PRR 2009 (Article 2.1.3.4.) that enables procurers to assess the technical facilities and capabilities of the supplier, which can include using energy and resource-efficient equipment and environmentally-friendly alternatives:

2.1.3.4 Evidence of the party's technical ability may be furnished by any of the following means: [...] d. A description of the party's technical facilities, including reference to the tool, plant and technical equipment available.

In the absence of other specific provisions on pre-qualification in the PRR 2009, it is clear that procuring agencies are not prevented from asking pre-qualified suppliers to meet a predetermined level of environmental and social performance as prequalification condition moving forward. In the case of pre-qualification, there is also *broad power of the procuring agency to include environmental and social criteria in the pre-qualification documents terms and conditions that would govern the procurement contract*.

5.1.2 Technical Specifications/Scope of Work

The PRR 2009 makes only passing reference to technical specifications, in effect allowing procurers great liberty in preparing the specifications for their bids. The main reference to specifications can be found in Chapter V on the Bidding Process and Documents, Article 5.2.2.11:

The technical description of the goods, services or works under the bid shall be provided in the bid documents. The specifications or scope of works shall include all essential features or components desired [...] or as specified by the Procuring Agency. [...]

This provision is wide enough for procurers to prescribe “green” specifications for goods/services/works, such as the use of recycled content in production, or ensuring toxin-free products or requiring energy and/or water efficient services.

Procurers are not prevented either from using functional specifications or performance-based specifications for the good/service/works they require, which is widely considered to be best practice for implementing green public procurement. When procurers write specifications based on functions, or performance, they are able to specify their needs based on outputs or outcomes (e.g. enhanced mobility options for 50 public officials around Thimphu) instead of detailed inputs (e.g. a fleet of 50 diesel cars). The former allows the private sector to innovate and come up with efficient solutions.

Under the existing regulations, therefore, procurers could, for example, simply *outline their functional need/requirement for a good with improved resource efficiency, and leave it up to the private sector (suppliers) to respond to that tender with innovative solutions* that address the functional needs rather than simply the technical requirements.

Furthermore, the PRR 2009 provides for a “two-stage process” whereby when a procurer/procuring agency is unable to set precise specifications, they can obtain input from bidders (stage 1) in order to finalize the scope of work and set the specifications in a manner that guarantees the best and most appropriate outcome (stage two). This means that procurers can re-evaluate their tenders based on what the market first responds.

This “two-stage process” presents another opportunity to implement GPP in Bhutan:

- i. Procurers can use the first stage to get input from experienced bidders on possible specifications for ‘green goods and services’ and then set the specifications as per their needs for environmental and social considerations for the second stage.
- ii. Procurers can use the first stage to understand whether or not the market will be able to deliver a certain level of performance for goods, services and works, and then formulate an outcome-based or performance based specification in the second stage to encourage the uptake and commercialization of eco-innovative solutions.

INVOLVING LOCAL COMMUNITIES IN SMALL INFRASTRUCTURE DEVELOPMENT

Community Contracting Protocol (CCP) is a policy intervention introduced by the Ministry of Home and Cultural Affairs (MOHCA) that is aimed at increasing the availability of local builders and improving skills of local communities in small infrastructure development. It is permitted under LGA 2009 and its supporting regulations.

The policy was introduced mainly because most of the established and professional builders work on larger national infrastructure projects, resulting in shortage of building contractors for small works in local communities. CCP allows for “community contractors” to participate in contract works in the community worth not exceeding a value of Nu. 1.5 million at the gewog (sub-district) level. A community contractor is an association of local residents that represent the local community and undertake building contracts in their community.

CCP has been developed and implemented on the legal basis provided by the PRR. CCP is advantageous as considerable amount of spending remains in the local community - as wages paid to local labour and as cost for local materials - resulting in additional income for the community members. This is ensured through a requirement in the protocol that community contracts should not require the local community to obtain equipment or materials that are not available in the gewog (sub-district) or dzongkhag (district). In cases where such a project requires equipment, materials or skills not available in the community, the Gewog Tshogde (sub-district council) may consider procuring the unavailable skill, material or equipment in line with the PFA and PRR, and assign only the appropriate parts of the project to a Community Contractor.

CCP is a relevant example of, and opportunity for, practising GPP by using local materials and supporting local economy.

Box 2 Community Contracting Protocol

5.1.3 Evaluation of Bids

In the procurement cycle, the regulation of the evaluation of bids may be the best opportunity to implement GPP. Article 5.4.3 clearly mentions that “*the price offered by a bidder shall be only one of the criteria for evaluation of bids*”, meaning that the price is not the exclusive criteria of evaluation therefore allowing authorities to consider as many other (justifiable) criteria as necessary. There is a non-exclusive list of evaluation criteria that includes, among others, criteria in line with GPP such as: preferential treatment of local goods, running costs and cost effectiveness, after-sales service and technical assistance (life-cycle assessment) and quality and technical merit (innovation).

By evaluating goods and services using criteria such as running costs, cost effectiveness, after-sales services and technical assistance, procurers can move away from purchasing products based on the lowest cost at time of purchase into long-term, integrated strategic purchasing focused on value for money across the life-cycle (IISD, 2014). This means that the consideration of quality and technical merit allows for evaluation that favours the most innovative product in terms of being environmentally and socially friendly offer.

Given that the list, as stated above, is non-exclusive, the procurer can include as many criteria as deemed

preferable, with the only condition that it is objective and non-discriminatory. Consequently, procurers can begin to include environmental and social evaluation criteria with no restraints by the Bhutanese law. However, a challenge that remains for GPP is the development of robust evaluation matrix and technique for evaluating environmental and social criteria.

PRR 2009 is reinforced by the SBDs. The SBD on Goods, *Section 1, Clause 39.5* states that the evaluation of a bid may consider other factors besides the bid price such as the characteristics, performance and terms and conditions of purchase of goods and services.

The SBDs state that the price of the bid should take into account the cost of the materials, transportation, labour, taxes, levies, overheads and “any other costs.” Section III.2 allows the purchaser to consider costs of major replacement components, mandatory spare parts and service as well as operating and maintenance costs, performance and productivity of the equipment. This consideration allows procurers to make better life cycle analysis of the products.

The SBDs for Works in Section V, Clause 10.2 (“General Conditions of Contract”), mention social and environmental requirements, considering, among other things, compliance with labour laws, respecting health standards and environmental protection arising as a consequence of the contractors’ methods of operation.

The SBD for Works in Section V, Clause 19.2 states that “[The contractor] shall take steps to protect the environment and to minimize noise, pollution or other undesirable effects resulting from his method of operation”.

5.1.4 Contract Conditions

The contract is the legal document between the procurer and the supplier once the contract is awarded. Contract conditions are therefore very important for GPP as the *introduction of conditions to the contracts to comply with environmental or social criteria will compel the supplier to perform according to the set obligations or standards*. Article 5.2.2.10 iv. of PRR 2009 establishes that “(...) there can be a number of special or particular conditions that may be peculiar to the particular contract.” In this way, each agency can introduce environmental or social performance obligations for the supplier to comply with during the time frame of the contract.

The contract conditions may also include standards to which goods, equipment or material shall comply (Article 6.3.4.1.c). These must be internationally or nationally accepted standards. By acting under this article, the procurer could introduce environmental and social standards to which the contractor must abide.

5.2 Incorporating Environmental Considerations in Procurement in conjunction with Environmental Laws and Regulations

5.2.1 Protecting the Environment through Procurement

One way of incorporating environmental considerations in public procurement is through environmental assessments and regulations. In Bhutan, all developmental activities and projects other than those listed in the Annexure 2 of the EC Regulation for not requiring environment clearance are required to fulfil an environmental assessment and obtain an environmental clearance. The first step in the environmental assessment process is to conduct a site survey, followed preparation of pre-feasibility, engineering, environmental and social investigations, including an EIA study as outlined in the statutes.

Clearances are regulated and mandated under the Environmental Assessment Act 2000 and the Regulation for the Environmental Clearance of Projects with the purpose, among others, to ensure that all projects are implemented in line with the Environment Management Plan developed for sustainable development.

The PRR 2009 integrates this directive when regulating the evaluation of bids by requiring licences or clearances in the bidding documents. Thus, synergy between Bhutan's existing environmental laws and regulations and existing procurement laws and regulations could provide great opportunities for procuring in an environmentally friendly manner.

5.3 Incorporating Social Considerations in Procurement in conjunction with other Legislation and Policy

Similar to establishing synergy between environmental and procurement laws and regulations, a synergy between procurement laws and regulations with the constitution, as well as laws and regulations aimed at inclusive growth, provides a great opportunity for procuring in a socially responsible manner.

5.3.1 Supporting Small Businesses through Procurement

The Constitution in Article 9 promotes the private sector development and equity on the basis of different needs – so that allocation of national resources results in a comparable socio-economic development. In 2012, cottage, small and medium industry (CSMI), constituted an overwhelming majority of the industries in the country (approximately 98%). Given the large percentage of CSMLs in Bhutan, the government is focusing on boosting these businesses. The 2012 CSMI policy proposed to strengthen the legislative framework and enterprise environment with a sustainable development perspective of growth for the CSMLs by delegating the RGOB to “increase CSMLs access to public procurement opportunities by ensuring that public procurement favours products and services locally produced or provided and that has low ecological footprints.”

Although there is no differential treatment for CSMLs in Bhutan's public legislation through special processes or percentages of procurement destined to these, the PRR Article 4.1.1.7 benefits CSMLs participation by allowing the division of procurement contracts. It establishes that “a procurement agency may break up a work, supply or service assignment into separate lots or components for awarding to different contractors, suppliers or service providers”. The division of works, supplies or service contracts into separate lots allows more participation of CSMLs in government procurement not only in small contracts but also in large ones. This is reinforced by the SBDs (Section 1, Clause 39.6 of the SBD on Goods).

5.3.2 Promoting Domestic Goods and Services through Procurement

An example of the social function of public procurement in Bhutan is the preference established for supply of domestic goods and works. The Constitution mandates in Article 9.9 that the State shall endeavour to achieve economic self-reliance and promote an open and progressive economy. Similarly, various government policies and programs allude to social responsibility and inclusive growth. In light of that, procurement can be a tool to achieve such development objectives, particularly through promoting local products and services.

Although the PRR Article 1.1.1.1 states that the procurement process must guarantee equal access to all suppliers, Article 1.1.2.2.a. gives a preferential treatment to goods of Bhutanese origin or works from Bhutanese bidders in the tenders by setting a margin of preference as a tiebreaker in an equivalent evaluation of foreign and domestic goods/works:

“In case of any Procurement, goods of Bhutanese origin may be given preferential treatment. Where two or more tenders are equivalent in the light of evaluation methods and factors set out in 5.4, preference shall be given to the bid offering goods of Bhutanese origin provided that the price difference does not exceed five percent (5%). Use of preferences shall be indicated in the bidding documents. Similarly, a five percent (5%) margin of preference may be given to the National bidders in case of works.”

The preferential treatment is also specified in PRR 2009 when regulating the evaluation criteria: “In addition to the price, the evaluation criteria shall include criteria from the following non-exclusive list (...): a. Preferential treatment for goods of Bhutanese origin.” The SBDs includes particular clauses on preference for domestic bidders and the requirements to meet the criteria to be eligible for the margin of preference (SBD on Works, Section 1, Clause 30, SBD on Goods, Section 1, Clause 38).

Procurers could include requirements relating to the use of local labour and materials in the conditions of the contract as allowed by Article 5.2.2.10 iv. of PRR 2009 which establishes that “(...) there can be a number of special or particular conditions that may be peculiar to the particular contract.” However, it should be noted that preferential treatment of domestic goods has raised disputes under the WTO norms in the recent past. Although Bhutan has observer status in the WTO, its potential engagement with this organization will mean a review of these provisions in its domestic law.

In summary, a careful review and interpretation of Bhutan's legislations, regulations and policies reveals that they are, in fact, supportive of incorporating environmental and social considerations. In other words, GPP is viable under the existing legislative and policy framework of the nation. *The main leverage points for practicing GPP lie in four stages of the procurement cycle: 1) pre-qualification and qualification criteria for bidders, 2) technical specifications /scope of work, 3) evaluation of bids and 4) establishment of contract conditions.* The PRR 2009 provides enough room for procurers to include social and environmental criteria in those four stages. In addition, the Constitution and various development policies provide great leverage and justification for incorporating green procurement practices in the procurement cycle. The key factor to move towards more sustainable procurement would be for Bhutanese public authorities and procurers to interpret the current legislation and policy in favour of the inclusion of sustainability considerations in the procurement process. *In addition, it would also be necessary to establish uniformity and transparency in the understanding of environmental and social considerations in the procurement process.*

SECTION 6: CONCLUSIONS

While it may not be possible to change the public procurement process overnight, a gradual shift in approach and mindset could catalyse a move towards green public procurement. Small and incremental changes within the government in how and what it buys could result in making significant positive impacts in the country. The government plays two significant roles in public procurement: 1) as the largest consumer/ buyer of goods and services, it can influence the market for green goods and services; and 2) as the authority that establishes rules and regulations for procurement, it can embed environmental and social criteria in procurement processes.

The analysis of existing legal, policy and regulatory documents in Bhutan pertinent to public procurement indicates that GPP criteria can be included within the current frameworks. There are opportunities for introducing green procurement into the procurement cycle stipulated in the PRR 2009, namely 1) pre-qualification and qualification criteria for bidders, 2) technical specifications /scope of work, 3) evaluation of bids and 4) establishment of contract conditions, as suggested in Section 4. Further elaboration of how GPP criteria can be introduced in these stages shall be explored in future research reports of the GPP in Bhutan Project.

Furthermore, a review of relevant laws, policies and regulations reveals no significant conflict for pursuing GPP, and in fact shows strong harmony concerning aims and objectives. Indeed, practising GPP can be an effective tool for implementing existing policies and goals aiming at achieving an equitable and sustainable economic development. A recommendation on the way forward within the current framework is to support the introduction of green procurement guidelines and guidance materials that could steer the standard procurement process towards the inclusion of environmentally-preferable and socially-beneficial criteria. Mainstreaming GPP criteria into the current procurement process would be subject to RGOB's commitment to the cause and its willingness to align related rules and procedures such as the auditing procedure to allow for green procurement.

Ultimately, the move towards green procurement will not be possible without a fundamental change in mindsets and behaviour of public servants. Especially in public sector, individual civil servants tend to simply follow orders and detach themselves from decisions and actions in their workplace. The Civil Service Act of Bhutan (2010) states that among other things, the act is in place to "ensure that civil servants render professional service guided by the highest standards of ethics and integrity to promote good governance and social justice in implementing the policies and programmes of the Government." All civil servants are mandated to "take decisions solely in terms of the public interest" and are supposed to be efficient, transparent and accountable in public duty. If individual heads of ministries and departments, managers and procurers recognize the benefits of green procurement and make a conscious and concerted effort to buy greener products and services, they would be doing great service to the nation and to the sustainable development agenda. Given the constitutional provisions regarding sustainability and development, the integration and uptake of GPP ought to be a public responsibility, not a voluntary decision.

DEFINITIONS

Bidding documents: the set of documents sold or issued by the intending employer/purchaser/procuring agency to potential bidders in which the specifications, terms and conditions of the proposed procurement are prescribed. The terms “bidding documents”, “tender documents” and “bid documents” are synonymous.

Employer: the Government agency, which enters into a contract with a supplier, service provider or contractor for procurement of goods, services or execution of works for the Government. The terms “procuring agency” “procuring entity”, “client”, “ purchaser” and “employer” are synonymous.

Environment: “means the physical factors of the surroundings of human beings including the earth, soil, water, atmosphere, climate, sound, odors, tastes, and the biological factors of animals and plants of every description including the complex web of interrelationships between the abiotic and biotic components which sustain life on earth”.

Fiscal incentives: policy measures implemented by the Government such as: tax holidays; import exemptions; sales tax exemptions; reinvestments; provision for R&D expenses to be tax deductible; and rebates for environmentally friendly technological up-gradation, to promote sustainable domestic production of goods and services also provide a framework for the growth of clean industries and social protection through value creation in the form of jobs and resilience of the economy.

Five Year Plan: is a developmental plan timeframe followed for a five years period. Bhutan embarked a five year developmental plan beginning July 1961 and the present plan period is eleventh in series (July 2013 – June 2018) known as the 11th Five Year Plan (FYP).

Goods: any object in solid, liquid or gaseous form that has an economic utility or value, which can be exchanged or traded.

Government agency: an entity of the Government whose source of funding is the Government.

Green growth: growth that emphasizes sustainable use of “natural capital,” along with managing environmental risks cost-effectively and in an institutionally sound manner to limit risks to human health and of irreversible degradation of the natural environment.

Green Public Procurement (GPP): a process whereby public authorities seek to procure goods, services and works with reduced environmental impact through their life cycle when compared to goods, services and works with same primary function that would otherwise be produced.

Gross National Happiness (GNH): The developmental philosophy of Bhutan.

Intergenerational equity: is a concept that says that humans ‘hold the natural and cultural environment of the Earth in common both with other members of the present generation and with other generations, past and future’.

Lowest evaluated bid: the bid which offers the best value for money, evaluated on the basis of various objective criteria set out in the bidding document. It does not necessarily mean the “lowest quoted price”.

Performance audit: means the aspects of value-for money (VFM), operational and management audits including an audit of the economy, efficiency and effectiveness with which the audited entity uses its resources in carrying out its responsibilities and any other review or examination of any aspect of the operations of an entity including audit of any performance report prepared by the management.

Procurement cycle: cyclical process of key steps when procuring goods or services, from identification of a need and conducting market analysis through to the process of selecting the supplier, managing their performance and reviewing lessons learnt.

Procurement: the purchase of goods, services or the engagement of contractors for execution of works by procuring agencies.

Procurer/Procuring agency/Procuring entity/Purchaser: see Employer.

Services: consulting and other services.

State Owned Enterprise (SOE): any enterprise with state ownership, a distinct legal form (separate from the public administration) and having commercial sales and revenues.

Supplier: an individual or a legal entity entering into a contract for the supply of goods or services.

Sustainable Consumption and Production (SCP): the use of services and products which respond to basic needs and bring a better quality of life while minimizing the use of natural resources and toxic materials as well as the emissions of waste and pollutants over the life cycle of the service or product so as not jeopardize the needs of future generations.

Sustainable Development: development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs.

Sustainable products: are those products providing environmental, social and economic benefits while protecting public health, welfare, and environment over their full commercial cycle, from the extraction of raw materials to final disposition.

Value for Money: is a term used to assess whether or not an organisation has obtained the maximum benefit from the goods and services it both acquires and provides, within the resources available to it.

Work/Works: any activity involving construction, fabrication, repair, overhaul, renovation, decoration, traditional Bhutanese painting, installation, erection, excavation, dredging which make use of a combination of labour, machinery, equipment, material and technology.

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