



Policy Note



December 2012

Improving Transparency in Public Procurement in Bangladesh: Interplay between PPA and RTI Act

The Context

Public procurement is a public policy tool, translating development finance into particular economic and social outcomes (Ellmers 2011). However, it has also been globally identified as the fountain-head of corruption in the public sector. Globally, at least US\$ 400 billion a year is lost to bribery and corruption in public procurement (Transparency International 2006). In Bangladesh public procurement consumes about 70 per cent of annual development finance and the total amount of which accounts for around Tk. 287 billion in fiscal year 2011-12 (The Daily Star 2010a, Ellmers 2011). This large volume of procurement related transactions provide a fertile ground for corruption in public sector. Transparency International Bangladesh in fact finds that mismanagement of development projects is one of the major reasons behind Bangladesh's position in corruption perception index (as the most corrupt country from 2001 to 2005).

The social and economic costs of corruption in public procurement are very high in developing countries (Schapper et al. 2006). The corrupt procurement environment brings about distorted delivery of public services such as poor quality of health care and education especially for the poor and the marginalised people; thus impairing the efforts of poverty reduction. Though reliable estimates are not available in the case of Bangladesh, it can safely be surmised that the costs of bad governance in the procurement activities in Bangladesh could be significantly high, with debilitating impacts on the poor and the vulnerable.

In such a context, a transparent system of procurement may ensure value-for-money outcomes (Jones 2007) as it may raise high level of public confidence regarding fair dealing in relation to procurement processes and practices. Wittig (2005, p. 113) termed transparency in the

context of public procurement as "the ability of all interested participants to know and understand the actual means and processes by which contracts are awarded and managed. This requires the release, at a minimum, of information sufficient to allow the average participant to know how the system is intended to work, as well as how it is actually functioning".

This advisory note, while accepting the existing limitations of the transparency regime in public procurement process of the country, argues that the Right to Information (RTI) Act has the potential to perform as powerful 'proxy' to catalyse and bring about greater transparency in the procurement process.

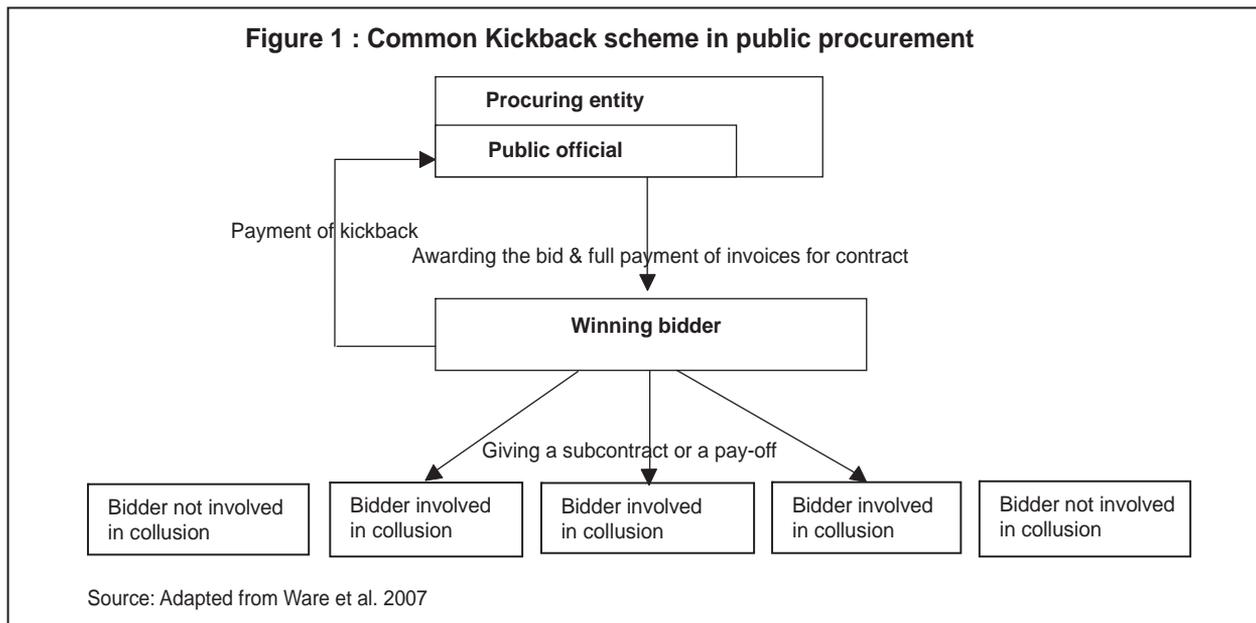
Legal and regulatory framework of public procurement and scope of its manipulation

A potent tool in the fight against corruption in public procurement is procurement reforms, aimed to streamline and regulate the process of procurement (Lennerfors 2007). Until 2003, a Compilation of General Financial Rules (CGFR) had regulated public procurement procedures and practices in Bangladesh. These rules were originally issued during British period and then slightly revised in 1951 under the Pakistani regime. After Bangladesh's independence in 1971, few changes were made to these rules in 1994 and 1999 respectively (Mahmood 2010). In an attempt to establish good governance in the public procurement system the Government promulgated new public procurement regulations in October 2003. There had been two noticeable limitations in the new regulations, i.e. exemptions were permitted on matters of state security, including military purchase and a wide range of discretion was allowed for its implementation. These limitations led to the enactment of the full-fledged public procurement law (Public Procurement Act -

PPA) in 2006 followed by issuance of the Public Procurement Rules (PPR) in 2008. The promulgation of the Act and Rules have given rise to a legal and administrative framework which creates a uniform procurement system within the public sector, clearly defines the processes and criteria, and specifies roles and responsibilities of procurement officials and entities. More specifically, this legal framework stipulates some provisions aimed to promote transparency in public procurement process.

Despite having a good law, public procurement process is still subject to certain vulnerabilities especially the acts of violence, sometimes under political patronisation in the forms of obstruction to submitting tender documents and snatching of tender boxes. Although, media very often report poor compliance with procurement Act and Rules and mismanagement at the sub-national levels, bid rigging by the bid participants is reported to be the most common corrupt procurement scheme in the

sub-national levels. It is the manipulation of a competitive public tender in favour of a pre-selected bidder with or without the participation of the public officials. It has been gathered from a series of workshops arranged by the Institute of Governance Studies (IGS), BRAC University recently at district level across the country under the auspices of Second Public Procurement Reform Project (PPRP II) that some public officials get engaged in this sort of manipulation by determining the technical specifications or the qualification requirements in such a way so that only the preselected bidder meets all the requirements or by giving inside information to the favoured bidder to enable him/her to enter as the lowest-priced bidder. On the other hand, bidders participate in the bid rigging scheme through informal negotiations (locally called niko¹) among themselves in order to reach an agreement in favour of a particular bidder. Then the winning bidder gives a subcontract or a payoff to the other bidders (see Figure 1 below).



Furthermore, the amendments to the Public Procurement Act, 2006 including introduction of lottery and relaxation of experience for contracts involving up to Tk. 20 million may provide space for manipulation in the procurement process and thus rendering the system more vulnerable to corruption. These amendments were promulgated by the government in November 2009 and July 2010. The civil society members and the development partners have expressed their deep concerns about these amendments (The Daily Star 2009). The participants in the workshops of the

IGS, BRAC University held at district level across the country have categorically stated that quality of procurement has been significantly compromised because of these amendments.

It can be argued that scope for such manipulations will reduce significantly if the procurement process can be made transparent. This view has been supported, in an interview with the author, by an Executive Engineer of Local Government Engineering Department (LGED), who is usually involved in different stages of public procurement.

¹: A contractor of Madaripur District under Dhaka Division told the author in an interview that most of the bids were divided among the contractors through negotiation with/or without involvement of procuring officials.

Transparency provisions in Public Procurement Act

Public procurement entails a sequence of procedural steps that offers opportunities for ensuring transparency. These procedural steps include disclosure in relation to submissions, disclosure in relation to tender processing and its outcome, and right to appeal against a decision. The PPA, 2006 delineates provisions for transparency in different stages of the procurement chain, an overview of which is given below:

a. Disclosure in relation to submissions

The transparency provisions delineated in the Public Procurement Act, 2006 that promote disclosure of information relating to submissions are:

- Open competitive bidding as the preferred method of procurement [Section 31]
- Issuance of tender documents to interested bidders [Section 5]
- Public accessibility of procurement-related documents [Section 9]
- Preparation of an annual procurement plan by each procuring entity and its publication for the information of all concerned [Section 11]
- Providing all necessary information to all prospective bidders and giving at least the minimum time to respond properly; thereby enhancing competition in procurement [Section 13]
- Publication of tender advertisements [Section 40]
 - ✓ directly in at least one in Bangla and one in English daily newspapers of wide circulation in the country in their every edition
 - ✓ in addition, on the website of the procuring entity and advertisement for procurement above prescribed price limit on the Central Procurement Technical Unit (CPTU)²'s website
 - ✓ for international bidders, in an English newspaper or publication of wide international circulation, or in a United Nations (UN) publication, or in foreign trade missions of Bangladesh at home or abroad, whichever are deemed appropriate
- Arrangements for submission of tenders at more than one location [Section 46(5)]

b. Disclosure in relation to tender processing and its outcome

Tender submission is followed by the holding of a tender opening meeting. In this stage, the names of bidders and the prices offered by them should be made public. An evaluation committee then evaluates the tenders submitted and selects the lowest bidder for the contract. The PPA, 2006 stipulates the following provisions to improve transparency in tender processing and its outcome.

- Holding of a pre-tender meeting and allowing the tenderers who have purchased or who intend to purchase the tender document to attend this meeting [Section 44(5)]
- Opening of tenders in the presence of bidders or their authorised representatives [Section 47]
- Notification of award of contract to the successful bidder [Section 20]
- Notification in writing to all the other unsuccessful bidders [Section 53]
- Publication of award notification on notice board and website [Section 21 (1)]

c. Right to appeal

It means to grant the unsuccessful bidders the chance to make a plea for fair treatment and against arbitrary discretionary power of the public officials of procurement. The PPA, 2006 allows any losing bidder to know the grounds for non-acceptance of his/her tender from the procuring entity following the signing of a contract with the successful bidder [Section 21 (2)]. Furthermore, any aggrieved person deserves the right to complain against the procuring entity to the administrative authority of the relevant procuring entity and the review panel constituted by the Government [Section 29 & 30]. The review mechanism in fact increases the transparency of the procurement process.

In addition, the PPA, 2006 has provided opportunities of processing of public tenders through e-procurement (namely, e-GP). In order to operationalise this provision, the Government has included a component in the Second Public Procurement Reforms Project (PPRP-II) to introduce e-GP. The CPTU signed a contract on e-Government Procurement (e-GP) System development and implementation with GSS America Infotech Ltd, India in April 2010 (The Daily Star 2010b). e-GP has been developed and

². The CPTU, headed by a Director-General, was established in April 2002 as a unit within the Implementation Monitoring and Evaluation Division of the Ministry of Planning. As per Public Procurement Act and Rules, it is responsible for monitoring compliance with and implementation of the Act; proposing any amendment to the Act, Rules or other documents which appears necessary; issuing guidance and instructions regarding the interpretation and implementation of procurement Rules and other documents issued by it and give, upon request from the concerned procuring entity or tenderer, advice and assistance to procuring entities; and preparing and distributing standard documents to be used in connection with public procurement.

installed in the CPTU and the four target agencies of PPRP-II at their headquarters level (Islam 2012). The four agencies are Roads & Highways Department, Bangladesh Water Development Board, Local Government Engineering Department, and Rural Electrification Board. Now, e-GP is set to be rolled out at a much wider scale in these agencies (The Daily Star 2012).

Limitations of PPA in improving transparency and filling the gap through RTI Act

Although PPA delineates provisions for transparency in different stages of the procurement chain, in reality transparency may not always be established in public procurement system. Since the procurement legal and regulatory regime allows only the bidders and public officials in processing procurement it is very likely that an unholy nexus will be forged between them based on personal gains and relationships, resulting in by-passing of transparency provisions. As there is no institutional space for citizens other than bidders and public officials to get involved in the procurement process, the likelihood of such nexus is quite strong.

In this context, citizens can play a vital role to improve transparency in public procurement by participating in the procurement process, for example by oversight of the bidding process. Based on the findings of such oversight activities, they can raise their voice and demand good governance from the public authorities. In fact, an enabling legal framework for facilitating citizens' engagement in overseeing the public procurement system is the right of access to information.

Right to Information Act, 2009

In March 2009 the Jatiya Sangshad (national parliament) in Bangladesh ratified the Right to Information Ordinance which was promulgated in October 2008 during the Caretaker Government regime. Thereafter the Act came into full effect on 1st July 2009. This Act lays down a procedural right to information in which public authorities are obliged to provide information held by them or under their control upon citizens' requests and to proactively disclose certain key information, even in the absence of a request. However, the RTI Act has given a long list of exemptions from providing information, including any such information pertaining to a purchase process before it is complete or a decision has been taken about it [Section 7(p) of RTI Act]. Nevertheless, the exemption of the RTI Act does not limit the

spontaneous proactive disclosure of information in relation to submissions and processing of tenders as stipulated in the procurement Act. Furthermore, once the procurement process is complete or a decision has been taken about it, all information pertaining to procurement decision taken, proceeding or activity executed or proposed decisions is mandatory to be published and publicised by indexing them in such a manner as may easily be accessible to the citizens [Section 6 (1)].

In addition to the proactive disclosure, the RTI Act allows a person to apply to the designated officer requesting for information and makes it mandatory for the officer to provide the information within the specified time limits [Section 8 & 9]. Section 10 of the Act has stipulated appointing a designated officer for each of the units of all authorities for providing information. When any provision of the PPA in relation to promoting transparency in tender submission, processing and outcome as discussed in the foregoing section, is not adhered to by any procuring entity, any bidder or citizen can take recourse to the RTI Act's provisions of request for information and the concerned procuring entity is then bound to provide information on request. Thus, the compliance of PPA provisions is reinforced.

However, public institutions in developing countries like Bangladesh, may not serve citizens' requests for information due to their ingrained 'culture of secrecy'. In such a context, an external body is necessary to ensure compliance with the RTI Act. Hence, the Act provides for an Information Commission³ which has the power to call for disclosure of information. However, the success of an external body depends on the active cooperation of public agencies. If the agencies deliberately restrict access rights, the Commission will be flooded with appeals that will slow down the Commission's ability to promptly resolve appeals. In order to promote compliance culture the Commission could receive statistical reports from public agencies at intervals that will allow the Commission to monitor institutional compliance.

In reality, the potential of improving transparency through the use of the RTI Act in context of Bangladesh is much greater than that of procurement Act. Where the PPA stipulates making available information/documents pertaining to tender submission, processing and outcome; and is aimed for only the interested bidders the RTI Act allows access of all citizens including the bidders to the procurement information. By using the RTI Act any citizen can avail of information relating to procurement processing or procurement decisions by requesting the information officer of the concerned procuring entity which is restricted only for the concerned bidders in the PPA.

³. As per Section 12 (1) of the RTI Act, the Information Commission consists of the Chief Information Commissioner and 2(two) other Commissioners, at least 1 (one) of whom is a woman.

Strategising interplay between public procurement and RTI Acts

It needs to be noted that transparency will not be improved through isolated implementation of Public Procurement Act or RTI Act, however well-drafted and well meaning they are. These legal instruments should be implemented in a coordinated manner. The PPA and RTI Act can open up legal spaces to improve proactive and demand driven disclosures (See Table 1 below) which can reinforce each other.

Table 1:
Interplay between PPA and RTI Act to improve transparency in public procurement

Areas for improving transparency	PPA 2006	RTI Act 2009
<i>Proactive disclosure</i>		
Procurement plan	<ul style="list-style-type: none"> Annual procurement plan 	<ul style="list-style-type: none"> Catalogue and index of all information [Section 5 (1) (2)]
Tender submission	<ul style="list-style-type: none"> Public accessibility of tender documents 	<ul style="list-style-type: none"> Annual report containing all laws, notifications, directives, manuals, etc [Section 6 (3)]
Tender outcome	<ul style="list-style-type: none"> Notification of award of contract Publication of award notification 	<ul style="list-style-type: none"> Publication and publicity of all information pertaining to any decision taken, proceeding or activity executed or proposed and any important decisions taken with explanation of reasons [Section 6 (1)(2) (4)]
<i>Disclosure on demand</i>		
Right to appeal	<ul style="list-style-type: none"> Right of any losing bidder to know the grounds for non-acceptance of its tender Right to complain against the procuring entity 	<ul style="list-style-type: none"> Right to request for information to designated officer [Section 8] Right to appeal to the appellate authority [Section 24] Right to lodge a complaint to the Information Commission [Section 25]
<i>Monitoring compliance and prospective users of the Acts</i>		
External body	<ul style="list-style-type: none"> Central Procurement Technical Unit (CPTU) 	<ul style="list-style-type: none"> Information Commission [Section 11 & 13]
Users	<ul style="list-style-type: none"> Public officials & bidders 	<ul style="list-style-type: none"> Any citizen including public officials and bidders

Way Forward

Though the RTI Act is quite recent, its outcomes are far from encouraging. Awareness of the RTI Act is quite low and utilisation even worse in most public entities. This is mostly due to the limited capacities within both citizen groups and government, and more specifically, due to weak efforts by civil society organisations, including the media to utilise the space and point of entry provided by this Act. Therefore, citizens and civil society must monitor government's efforts to disclose information proactively. At the same time demand-side must be developed adequately so as to fill in the gaps of supply-side.

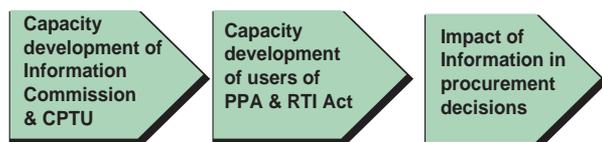
The following recommendations are thus put

forward to promote the implementation of RTI Act and PPA in interlinked manner.

a. Need for a strong enforcement mechanism to be set in place

Promulgating laws is only the first step in establishing a transparency regime. A strong enforcement mechanism needs to be set in place which generally goes through three time-bound phases. The primary phase is to enhance the organisational and human capacity of the CPTU and the Information Commission to deal with the immediate challenges. The medium-term phase entails capacity development of both supply and

demand side stakeholders. The long-term phase should emphasise on ensuring the importance of information in making effective procurement decisions through consultation and debates by the government and other stakeholders (See also Ahmad 2010).



Capacity of Information Commission and CPTU can be enhanced through imparting formal training to the officials and making required logistics and policy support available, which will enable them to adequately exercise their authority. In addition, the officials can learn about mechanisms of improving transparency in public procurement from seminars and workshops in which they share case specific experiences and suggest ways to solve implementation problems.

The capacity development of the citizens, the public officials of the procuring entities and the bidder community may include preparation and dissemination of 'user manuals' of both PPA and RTI Act, translation of all bidding documents into Bengali and making them easily available to everyone in printed as well as electronic version.

In order to assess the impact of information in procurement decisions the CPTU and the Information Commission can jointly and regularly monitor the implementation of procurement and RTI Acts and put the findings on their respective websites. In addition, other non-executive actors such as, the parliament, the media, and the civil society can conduct citizen feedback surveys, social audits, media investigations, and parliamentary hearings on the impact of information in public procurement.

b. Emphasis on proactive disclosure

The best implementation models entail disclosure of as much information as possible; more importantly at the point where records are created. Proactive disclosure makes the Act easier and cheaper to manage. Information and communication technologies (ICTs) can make the disclosure easier and cheaper. However, web-based approaches to transparency should not be

seen as a universal remedy in a country like Bangladesh where internet penetration is extremely low with just 3.7 users per 100 individuals (The World Bank and the International Telecommunication Union 2012). So, web-based disclosure should be a complement to hard copies and traditional publications rather than as a substitute. In addition, the Information Commission can document best practices and lessons learned and widely disseminate the same to stimulate replications and adaptations. Sharing best practices across sectors will also help avoid delays and inconsistencies and result in better and efficient utilisation of resources. The media can also play a proactive role in this regard.

c. Piloting application of RTI Act

The Information Commission in association with CPTU and civil society organisations can pilot the application of RTI Act in selected procuring agencies. The PPRP-II has targeted four agencies for reforms, i.e. Roads & Highways Department, Bangladesh Water Development Board, Local Government Engineering Department, and Rural Electrification Board (for details visit www.cptu.gov.bd). These agencies will provide all information in relation to procurement decisions and processing to citizens. These pilot agencies will develop best practices and become examples for other agencies across the government. A manual and implementation plan for the four target agencies can be prepared for application of RTI Act. The manual should cover records management, assessment of requests for information, provision of documents, and interpretation of the Act.

Finally, transparency should not be seen as an end, rather it is process that builds integrity in procurement system. The mere emphasis on integrity may slow down the procurement process affecting competitiveness in public procurement. Thus, a balance has to be made between integrity in procurement system and its competitiveness.

Notes:

For the Public Procurement Act, 2006 and its subsequent amendments visit: www.cptu.gov.bd

For the Right to Information Act, 2009 visit: http://www.infocom.gov.bd/ic/forms/rti_english.pdf

DISCLAIMER

The views expressed in this publication are those of the author and do not necessarily reflect the views of the Government of Bangladesh or the Institute of Governance Studies (IGS), BRAC University.

References:

- Ahmad, F. 2010. Implementing the Right to Information (RTI) Act 2009 [online]. Law & Our Rights, *The Daily Star*, Issue no. 180, July 31.
- Available from:
<http://www.thedailystar.net/law/2010/07/05/campaign.htm> [Accessed 12 April 2011].
- Ellmers, B., 2011. *Helping or hindering? Procurement, tied aid and the use of country systems in Bangladesh* [online]. Brussels: European Network on debt & development (eurodad).
- Available from:
http://eurodad.org/uploadedfiles/whats_new/reports/bangladesh%20final%20version.pdf
[Accessed 27 March 2011].
- Islam, Z., 2012. *Bangladesh - Public Procurement Reform Project II: P098146 - Implementation Status Results Report: Sequence 10* [online]. Washington, DC: World Bank.
- Available from:
<http://documents.worldbank.org/curated/en/2012/07/16477295/bangladesh-public-procurement-reform-project-ii-p098146-implementation-status-results-report-sequence-10>
[Accessed 11 July 2012].
- Jones, D. S., 2007. Public Procurement in Southeast Asia: Challenge and Reform. *Journal of Public Procurement*, 7(1), 3-33.
- Lennerfors, T. T., 2007. The Transformation of Transparency - On the Act on Public Procurement and the Right to Appeal in the Context of the War on Corruption. *Journal of Business Ethics*, 73, 381 - 390.
- Mahmood, S. A. I., 2010. Public procurement and corruption in Bangladesh: confronting the challenges and opportunities. *Journal of public administration and policy research*, 2(6), 103 - 111.
- Schapper, P. R., Malta, J. N. V., and Gilbert, D. L., 2006. An Analytical Framework for the Management and Reform of Public Procurement. *Journal of Public Procurement*, 6 (1 & 3), 1-26.
- The Daily Star, 2009. WB's \$1.5b stuck in procurement row [online]. *The Daily Star*, 10 December.
- Available from:
<http://www.thedailystar.net/newDesign/news-details.php?nid=117100>
[Accessed 10 April 2011].
- The Daily Star 2010a. Editorial: Citizens' monitoring of public procurement: The watchdog body needs to be failsafe to deliver [online]. *The Daily Star*, 5 February.
- Available from:
<http://www.thedailystar.net/newDesign/news-details.php?nid=124880>
[Accessed 10 April 2011].
- The Daily Star 2010b. Govt signs deal on e-procurement [online]. *The Daily Star*, 13 April.
- Available from:
<http://www.thedailystar.net/newDesign/news-details.php?nid=134181>
[Accessed 10 April 2011].

The Daily Star 2012. 4 govt. agencies succeed in e-procurement. *The Daily Star*, 11 July. P. 2.

Transparency International, 2006. *Handbook: Curbing corruption in Public Procurement*. Berlin: Transparency International.

Ware, G. T., Moss, S., Campos, J. E., and Noone, G. P., 2007. Corruption in Public Procurement: A Perennial Challenge. In: J. Edgardo Campos and Sanjay Pradhan, eds. *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level*. Washington: The World Bank, 295 - 334.

Wittig, W. A., 2005. Linking Islands of Integrity to Promote Good Governance in Public Procurement: Issues for Consideration. In: *Fighting Corruption and Promoting Integrity in Public Procurement*. Paris. OECD, 109 - 14.

The World Bank and the International Telecommunication Union, 2012. *The Little Data Book on Information and Communication Technology 2012* [online]. Washington: The World Bank.

Available from:

http://www.itu.int/ITU-D/ict/publications/material/LDB_ICT_2012.pdf
[Accessed 12 September 2012].

Mohammad Sirajul Islam, Research Associate, Institute of Governance Studies,
BRAC University, Dhaka. Email: i.sirajul1982@gmail.com



Public Private Stakeholders Committee

Public Procurement Reform Project-2
Central Procurement Technical Unit
IMED, Ministry of Planning
Sher-e-Bangla Nagar, Dhaka-1207

Phone: +88-02-914 4252-3
Fax: +88-02-914 4250
Email: info@cptu.gov.bd
www.cptu.gov.bd

Institute of Governance Studies

BRAC University
SK CENTER (5th - 7th Floor), GP, Ja- 4,
TB Gate, Mohakhali, Dhaka 1212

Tel: +88-02-881 0306, 881 0320,
881 0326, 883 5303
Fax: +88 02 883 2542
Email: igs-info@bracu.ac.bd
www.igs-bracu.ac.bd