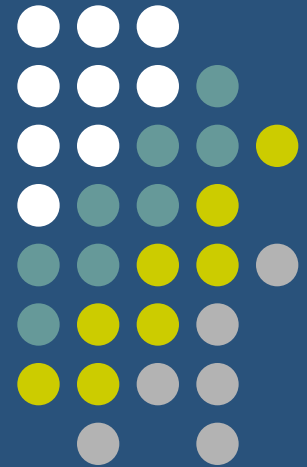


The Law and Business Skills: Essential Tools to Reduce Roadblocks in Bank-Financed Procurement of Medical Products

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Agenda

- Why this study? Approach
- Framework for the study
- Problems as described by participants
- Top Problems
- Solutions
 - Focus
 - Business Skills – Remedies for Breach and CIP
 - The Law – Procurement Law or guidelines insufficient



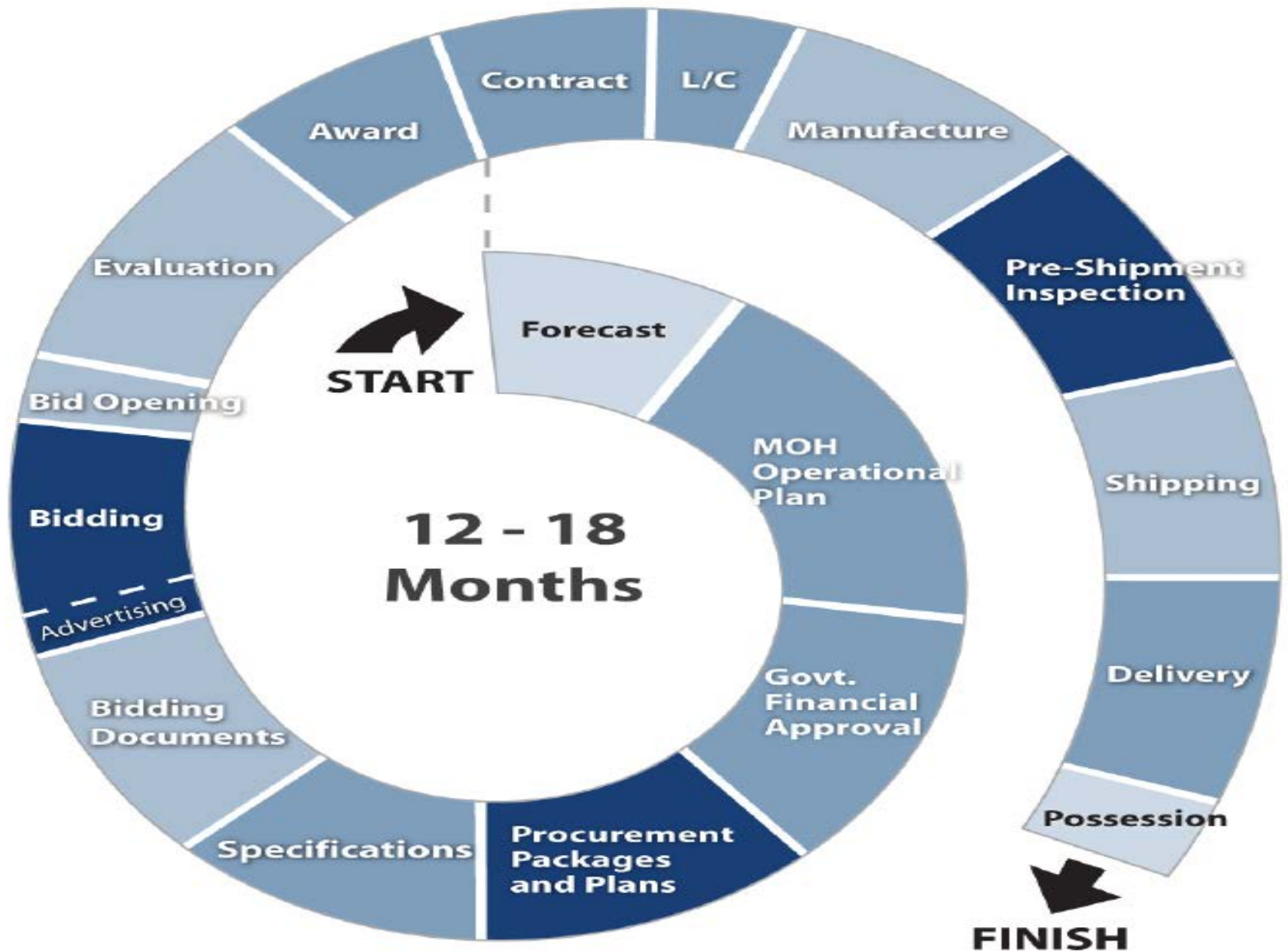
Why the study? Approach

- 1999-2001 365 PMP contracts US\$365 mil.
- Expectation: medicines and supplies when and where needed, right quantities, doses and formulations.
- There are problems. Goal to find solutions to reduce problems.
- Approach:
 - Categorize problems.
 - In what procurement step do the risks or problems arise?
 - How do problems affect procurements?
- Method -Interviews and literature review

The Framework for Discussion with Informants, Results & Solutions



- Pre-procurement
 - World Bank - Project Start
 - Capacity Assessment and Action Plan
 - Ministry of Health/Procurement Entity
 - Quantification, qualification, forecast
 - Budget process
- The Procurement
 - Procurement Entity
 - Initiation and planning
 - Bid management
 - Contract implementation and management



Problems as described by formal complaints and informants



- Common formal complaints
 - Allegations of fraud and corruption
 - Application of evaluation criteria
 - Qualification/disqualification issues
 - ***Technical evaluations and specifications***
- Informants described problems:
 - How to balance price and quality
 - Bidding process
 - Document preparation
 - Technical specifications for health products

Problems as described by informants and reports



- No handling and shipping instructions
- Inadequate inspection; pre, during, post manufacture
- Poor maintenance of conditions during shipment
- No performance pre-qualification system, GMP not verified
- Legal Delivery - what and when is legal delivery?
- Clearing customs at port of arrival - Tariffs
- What to do if a breach of contract. Remedies?

Problems as described by informants and reports



- The law and guidance
 - No or inadequate procurement law
 - How to assess – elements
 - What about other laws? Are there violations?
 - How to manage national law and WB procedures
 - Guidelines and SBDs “complex, confusing”

What are the top problems?



- 1st Capacity – “*old news*”
 - “of course”, “obvious”, “absolutely terrible”
 - HQ Bank staff, local Bank staff and client staff
 - Spans the entire process.
- *What is different in this report?*
 - Defines types of capacity that are lacking.
 - General procurement
 - Procurement of health commodities
 - General business skills

Top Problems - *Continued*



- **2nd** Information
 - Little, poor or no information
 - Quantification, qualification, forecasts
 - Lack of “M” in MIS – inadequate management
 - No standardization or collection across ALL players
- **3rd** Governance
 - No, old or inadequate procurement laws
 - Lack of *other* laws or their potential violation
 - Internal governance processes
 - Corruption and counterfeiting



Solutions to Top Problems

- The Law and Business Skills: Essential Tools for Improvement of Procurement
 - Business Skills
 - The Law, Legal Infrastructure and Use of Lawyers



Business Skills

- Procurement
 - A basic business transaction
 - A contract for the Purchase/Sale of Goods.
- *Basic four* in a contract for purchase/sale of goods.
 - Price
 - Quantity
 - Description – what are you buying?
 - Specifications/quality – the details
- All else is optional! = Special conditions in SBDs

Business Skills



- Most PMP = international business transaction.
- Of total WBPMP value 46% ICB, 40% DIR
 - DIR - unknown % international v domestic
- Long standing business customs or practices and laws.
- Extensive uniformity and harmony in the rules.
 - Convention on International Sale of Goods
 - Incoterms 2000 – Int’l Chamber of Commerce

UNCITRAL: International Standards



- **UNCITRAL Model Law on Procurement of Goods, Construction and Services 1994**
- **Convention on the Int'l Sale of Goods – 71 members 1980**
- **Agency in the Int'l Sale of Goods**
- **Products Liability**
- **Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance**
- **Credits, Guarantees, Bills of Exchange, Notes**
- **Carriage of Goods by Sea – Hamburg Rules**
- **E-Commerce, electronic signatures**

What to do if there is a breach by Seller.



1. Deliver on time
2. Failure to deliver on time
3. Deliver by new date
4. Failure to deliver by new date
5. Deliver non-conforming goods
6. Cure AND compensation for any damages
7. No cure
8. Fundamental breach

SELLER

1. Accept and pay
2. Notice of extension of time to new date
3. Accept and pay
4. Avoid contract – no pay
5. Non-fundamental breach – notice of non conformity
6. Pay
7. No pay
8. Notice of avoidance and no pay

BUYER

What to do if there is a breach by Buyer.



1. Deliver as required
2. Non-fundamental breach – Notice of suspension
3. Deliver
4. Fundamental breach- declare contract avoided – no delivery

SELLER

1. Failure to perform an obligation OTHER than payment
2. Perform
3. Pay
4. No pay and compensate for damages

BUYER

CIP – Carriage and Insurance Paid To named place of destination.



Seller's Obligations

- Provide conforming goods
- Checking operations for quality, count, to prove goods are conforming.
- Export approvals
- Contract insurance and carriage
- Deliver to named place of destination
- Bear all risks to destination
- Notice and Proof of delivery, other required notices

Buyer's Obligations

- Pay the price
- Pay for pre-shipment inspection except when mandated by govt. of importer
- Import approvals or other official authorization for import – clear customs
- Take delivery at the named place
- Bear all risks and costs after delivery



Governance

- Governance problems span the steps.
- Governance should be a constant theme of all solutions.
- What is governance?
 - Government effectiveness
 - Accountability
 - Regulatory quality
 - Rule of law

The Law is Fundamental



- National laws
 - Procurement law – *insufficient by itself!*
 - Aligned with other laws such as DRA
 - Coordination across ministries
 - Other laws – contracts for sale of goods, DRA
- Corruption
 - UN Convention against Corruption
 - OECD Convention Against Bribery
- Counterfeits
 - WHO IMPACT
 - TRIPS, law enforcement and the judiciary

Objectives of procurement law



- Maximizing economy and efficiency in procurement
- Fostering participation by suppliers and contractors thereby promoting international trade
- Promoting competition
- Providing for the fair and equitable treatment of all suppliers
- Promoting the integrity of, and fairness and public confidence in, the procurement process
- Achieving transparency in procedures
- DOES NOT GOVERN BUYERS AND SELLERS

Essential minimum features to achieve the objectives



- PREAMBLE
- GENERAL PROVISIONS
- METHODS OF PROCUREMENT AND CONDITIONS (ICB, NCB, LIB, ISH,DIR)
- TENDERING PROCEEDINGS
 - SOLICITATION OF TENDERS, APPS TO PREQUALIFY
 - SUBMISSION OF TENDERS
 - EVALUATION AND COMPARISON OF TENDERS
- PRINCIPAL METHODS FOR SERVICES
- PROCEDURES FOR ALTERNATIVE METHODS OF PROCUREMENT
- REVIEW



Use Lawyers and Law Tools

- Terms of Reference – Rule of Law
 - Local capacity building – local lawyers
 - Document drafting and review
 - National law revision, legislative drafting and alignment with international standards
 - Operational level general legal advice
 - Problem solving and management of breaches
- Law Tools
 - On-line tool kit – Model International Legal Agreement Series (MILAS)
 - Country status reports - assess legal infrastructure and capacity



Conclusions

- PMP is a basic business transaction.
 - Apply basic business practices and rely on well known rules.
- Rule of law and regulatory infrastructure are essential to solving problems of procurement.
 - Procurement law and WB Guidelines are not enough.
 - Enhance the rule of law.
 - Build legal capacity - use lawyers and law tools.

Thank You. Questions? Comments?



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