



UNODC

United Nations Office on Drugs and Crime

Guidebook on anti-corruption in public procurement
and the management of public finances

Good practices in ensuring
compliance with article 9
of the United Nations
Convention against Corruption

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Executive summary

Implementing an effective public procurement system based on transparency, competition and integrity is not simple. A procurement system that lacks transparency and competition is the ideal breeding ground for corrupt behaviour and thus most important international codes on anti-corruption and public procurement rest heavily upon these fundamental principles, in order to discourage corruption.

The United Nations Convention against Corruption (UNCAC), which provides a framework for shaping national public procurement legislation, is a lead example in this regard. UNCAC calls for the establishment of appropriate systems of public procurement based on the fundamental principles of transparency, competition and objective criteria in decision-making. It has been at the heart of the United Nations Office on Drugs and Crime's (UNODC) continuing efforts to improve procurement systems worldwide. Moreover, most recent reforms in public procurement, around the world, reflect the text and spirit of UNCAC. These reforms are:

- In keeping with the reforms called for by UNCAC, States have codified and published their procurement rules, and have made their procurement processes more predictable and transparent. These reforms have made it easier for those in civil society and vendors to monitor and participate in public procurement. Some States have gone a step further and have used electronic procurement systems quite effectively, both to save money and to enhance transparency.
- Procurements that have been tainted by corruption are now subject to challenge, usually before a court or an independent agency, on the simple premise that once corruption invades a procurement process, the award is no longer based on best value to the community. This tracks UNCAC's explicit call for challenge systems in States parties.
- Also in keeping with UNCAC, States have bolstered their rules regarding ethical behaviour in contracting, for both public officials and contractors.
- True to UNCAC's goals of making procurement systems more accountable, States have sanctioned and debarred corrupt and fraudulent contractors.
- States, with support from a broad array of international institutions, have invested in professionalizing their procurement work forces.

UNCAC, which entered into force in 2005, played a significant role in the further development of the *UNCITRAL Model Law on Public Procurement* (UNCITRAL Model Law). The UNCITRAL Model Law is being used as a template by numerous governments around the world for shaping national public procurement legislation. UNCAC, with its far-reaching approach and the mandatory character of many of its provisions, has already proven to be of major impact in the fight against corruption.

This *Guidebook* serves as a reference material for governments, international organizations, the private sector, academia and civil society, by providing an overview of good practices in ensuring compliance with article 9 of UNCAC, which requires establishing appropriate systems of public procurement, as well as appropriate systems in the management of public finances.

The *Guidebook* starts with an overview of public procurement as a major risk area for corruption; an overview of UNCAC and public procurement; and a review of the most common forms of corruption in public procurement. Chapter I analyses the requirements of article 9 of UNCAC, in terms of the objectives of public procurement. The flow of the entire public procurement cycle (divided into the pre-tender, tender and post-tender stages) is discussed in chapter II, which maps important corruption risks and identifies examples of responses to these risks of corruption. It also covers remedy systems in public procurement, as well as further corruption-prevention strategies, such as electronic procurement. Chapter III analyses the requirements of article 9 of UNCAC,

in terms of the objectives of public finance systems. A series of good practice examples—two of which won the United Nations Public Service Award (UNPSA)—are covered in the final chapter, chapter IV. Annex I briefly introduces other standards and policies in the area of public procurement, which have been sponsored by other international organizations. Annex II includes a checklist for meeting minimum requirements set out by article 9 of UNCAC.

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Abbreviations and acronyms

ADB	Asian Development Bank
ECJ	European Court of Justice
EU	European Union
EU Directives	European Union Public Procurement Directives
GDP	Gross domestic product
IAS	International Auditing Standards
IFRS	International Financial Reporting Standards
IMF	International Monetary Fund
IRMT	International Records Management Trust
ISO	International Organization for Standardization
OECD	Organisation for Economic Co-operation and Development
PEFA	Public Expenditure and Financial Accountability
PFM	Public Finance Management
ROSC	Reports on Observance Standards and Codes
SIGMA	Support for Improvement in Governance and Management: A joint initiative of OECD and the EU, principally financed by the EU
TI	Transparency International
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	The UNCITRAL Model Law on Public Procurement
UNODC	United Nations Office on Drug and Crime
UNPSA	United Nations Public Service Award
WB	World Bank
WTO	World Trade Organization
WTO GPA	World Trade Organization Government Procurement Agreement

Introduction

A. Public procurement as a major risk area for corruption

In order to carry out its functions, a government needs to purchase goods, services and works. This government activity is referred to as public procurement (or as government procurement or government contracts or public contracts). The procurement of copy paper, information technology (IT) equipment or medical devices, the provision of health services or consultancy services, the construction of a road or an airport terminal, are just a few examples of government spending on behalf of a public authority. In this context, it is important to keep in mind that a procuring entity never spends its own money but instead taxpayers' money. This is why governments are under an obligation to purchase goods, services and works only from the firms which offer the best value for money.

It is the sheer volume involved in public procurement that make it so vulnerable to corruption. In fact, public procurement is estimated to account for 15-30 per cent of the gross domestic product (GDP) of many countries. This means that thousands of billions of dollars are spent by governments every year to purchase different kinds of goods, services and works. Although the costs of corruption are difficult to measure, due to its clandestine nature, it is obvious that corruption in public procurement has an enormous negative impact on government spending. These costs arise in particular because corruption in public procurement undermines competition in the market and impedes economic development. This leads to governments paying an artificially high price for goods, services and works because of market distortion. Various studies suggest that an average of 10-25 per cent of a public contract's value may be lost to corruption. Applying this percentage to the total government spending for public contracts, it is clear that hundreds of billions of dollars are lost to corruption in public procurement every year.

The volume and complexity of any particular procurement play an important role when it comes to corruption. Larger procurements are often most vulnerable, as bribes are frequently demanded and paid as a percentage of the public contract's value. Experience also shows that certain sectors are particularly vulnerable to corruption. Many corruption scandals in recent years were in the field of public works contracts, such as infrastructure projects, the defence industry, the oil and gas sector, and in the health-care sector, especially in pharmaceuticals and medical devices.

Despite its enormous negative impact and the various efforts undertaken to curb corruption in the field of government contracts, public contracts have remained highly prone to corruption during the last decade; this is true both of developing and developed countries. Even in an environment where the public and private sectors are aware of the enhanced enforcement of anti-corruption laws, corruption opportunities and challenges continue to arise through private sector contact with government officials.

It is thus vital that anti-corruption initiatives and procurement reform work more closely together. It seems that adopting anti-corruption laws and model procurement codes will only partially solve the problem. More focus should be placed on supporting the rules by norms such as accountability and integrity—in other words, the ideals of anti-corruption must be brought into the fabric of the procurement community.

B. Overview of UNCAC and public procurement

Introduction

Traditionally, procurement reform and anti-corruption initiatives have followed separate tracks, although they share a common purpose: a sound government, supported by a robust and politically legitimate procurement system. The *United Nations Convention against Corruption* (UNCAC),¹ however, seeks to integrate sound procurement practices into a broader anti-corruption initiative.

Policymakers crafting a sound procurement system must balance a number of goals. Of those goals, experience has shown that competition, transparency and integrity are probably the most important. If a government's procurement system reflects all three elements, the system is much more likely to achieve best value in procurement and to maintain political legitimacy. These central goals, moreover, complement one another. A fully transparent procurement system is far less likely to have problems with integrity, as many more stakeholders can exercise oversight in a transparent procurement system. The reverse is also true: a system with weak systems to enforce integrity will probably have shoddy competition, and transparency is likely to erode as corruption drains the procurement system of political legitimacy.

It is apparent that reform initiatives need to integrate these goals. In practice, however, too often competition and transparency have been dealt with as issues of procurement reform, while integrity has been addressed separately, as part of anti-corruption initiatives. The goals are the same—a strong, effective and politically legitimate government—but too often the efforts have been divided. UNCAC offers an opportunity to draw together these parallel tracks, of improving procurement and fighting corruption.

UNCAC is the first truly global agreement against corruption. As of early 2013, 167 countries have agreed to become States parties to the Convention, which obliges them to implement mandatory provisions in UNCAC. UNCAC's procurement provisions complement the efforts of the United Nations Commission on International Trade Law (UNCITRAL),² which in 2011 finalized a substantial revision of the *UNCITRAL Model Law on Public Procurement*.

The Convention spans a number of important topics, many of which reach beyond the topic of public procurement. The Convention addresses: prevention, criminalization, international cooperation and asset recovery:

- **Prevention:** Corruption can be prosecuted after the fact, but first and foremost, it requires prevention. An entire chapter of the Convention is dedicated to prevention, with measures directed at both the public and private sectors. These include model preventive policies, such as the establishment of anti-corruption bodies and enhanced transparency in the financing of election campaigns and political parties. States must endeavour to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once recruited, public servants should be subject to codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures. Transparency and accountability in matters of public finance must also be promoted, and specific requirements are established for the prevention of corruption, in the particularly critical areas of the public sector, and public procurement. Those who use public services must expect a high standard of conduct from their public servants. Due to the importance of preventing and combating corruption through the legal system, judicial and prosecutorial integrity must be ensured. Preventing public corruption also requires an effort from all members of society at large. For these reasons, the Convention calls on countries to promote actively the involvement of non-governmental and community-based organizations, as well as other elements of civil society, and to raise public awareness of corruption and what can be done about it. Article 5 of the Convention enjoins each State party to establish and promote effective practices aimed at the prevention of corruption.

¹*United Nations Convention against Corruption*, UNODC, 2005. <http://www.unodc.org/unodc/en/treaties/CAC/index.html>

²*UNCITRAL Model Law on Public Procurement*, UNCITRAL, 2011. http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html

- *Criminalization and law enforcement:* The Convention requires countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law. In some cases, States are legally obliged to establish offences; in other cases, in order to take into account differences in domestic law, they are required to consider doing so. The Convention goes beyond previous instruments of this kind, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption. Offences committed in support of corruption, including money-laundering and obstructing justice, are also dealt with. Convention offences also deal with the problematic areas of private-sector corruption. The Convention also provides for measures that are needed for national authorities to investigate and prosecute corruption.
- *International cooperation:* States parties agree to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Countries are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court and to extradite offenders. Countries are also required to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.
- *Asset recovery:* The Convention's asset recovery provisions support the efforts of countries to redress the worst effects of corruption while sending at the same time, a message to corrupt officials that there will be no place to hide their illicit assets. The Convention provides for the return of assets to countries of origin as a fundamental principle of this Convention and sets out a framework for asset recovery.

UNCAC and other international texts on public procurement

An appropriate system of public procurement, as required under article 9 (1) of UNCAC, is considered to be a core component of any government programme. In particular, the volume of public funds spent on public procurement and the multiple negative effects of corruption in public procurement are reasons why, besides UNODC, several other international organizations promote the implementation of appropriate systems of public procurement. In this regard, the UNCITRAL Model Law, the World Trade Organization (WTO) Government Procurement Agreement (GPA)³ and the European Union (EU) Public Procurement Directives (EU Directives)⁴ are most important from a legislative perspective, as they are the models most often examined when drafting procurement legislation. A comparison of these international texts shows that while the comprehensiveness of the rules framing an efficient procurement system varies significantly, the same principles underpin the rules set out in all the texts. All the texts are designed to promote procurement systems based on the cornerstone principles of transparency, competition and objectivity, as required under article 9 (1) of UNCAC.

UNCAC had a significant influence in the drafting of the UNCITRAL Model Law. For instance, the Working Group responsible for revising the 1994 UNCITRAL Model Law took specific note of article 9 of UNCAC, which calls for an independent domestic review mechanism and a mechanism for conflicts of interest of public officials responsible for procurement. The Working Group decided to include provisions in the UNCITRAL Model Law to address these two UNCAC requirements. In this way, UNCAC played an important role in the further development of the UNCITRAL Model Law, which is used as a template by numerous governments around the world in shaping national public procurement legislation.

³WTO Agreement on Government Procurement, World Trade Organization, 2012. http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

⁴EU Public Procurement Directives, European Union. http://ec.europa.eu/internal_market/publicprocurement/rules/current/index_en.htm

C. Corruption and public procurement

Examples of corruption in public procurement and public finance

To understand UNCAC and its anti-corruption tools, it is important to understand the forms of corruption that can arise in procurement. Historically, the most easily recognized form of corruption has been bribery—payments by private parties to sway procurement decisions made by public officials. These types of bribes of public officials are banned outright under UNCAC article 15. These bribes may not necessarily involve money, but could involve anything that gives an undue advantage.

There are, however, many related forms of corruption, which are also addressed by UNCAC. For example, if a public official accepts an undue advantage in return for performing or failing to perform an act in violation of laws, that will constitute an abuse of functions in violation of article 19. Similarly, if a public official trades in influence to lend private parties an undue advantage, that may violate the principles of article 18 on trading in influence. Article 17 of UNCAC also addresses embezzlement or misappropriation by a public official. If a payment is made by a private party to a private party, for example a prime contractor in connection with the award of a sub-contract to the paying party, the payment may constitute a bribe under article 21, or a kickback, as it is known in some jurisdictions.

Conflicts of interest pose special problems of corruption, which UNCAC seeks to address. Article 7 (4) requires States parties to promote transparency and prevent conflicts of interest in the public sector. Article 8 calls for codes of conduct and asset declarations for public officials, to bring structure and clarity to officials' obligations as public servants. Article 10 calls for measures to enhance transparency in public administration and article 12 for limits on post-government employment (what in the United States is called the revolving door) for public officials.

As many of the forms of corruption discussed in UNCAC stretch beyond bribery, so too do the protective measures. Article 12, for example, calls for States parties to encourage private firms to establish compliance systems, in order to establish internal codes of conduct as a buffer against corruption. Article 37 calls for these private entities to cooperate with any investigation, which is an integral part of a successful compliance system.

The procurement cycle, procurement methods and associated corruption risks

To understand corruption in public procurement, it is important to understand the procurement process. Public contracting processes broadly follow the same general steps. There are generally three phases of the public procurement process: the pre-tender stage, the tender stage and the post-tender stage. Corruption risks exist throughout the entire procurement cycle:

- **Pre-tender stage:** The pre-tender stage includes the decision on the scope of the governmental need, i.e., deciding which goods, services or works are to be purchased. The procurement officials need to identify the relevant technical requirements to determine what exactly will be sought from the private sector and when. The pre-tender stage also includes the structuring of the contracting process. In this regard, procurement personnel generally follow a pre-existing regulatory structure to determine how the process will work, including the timeframes for bidding, the stages in the process, the number of bidders who are eligible, any applicable restrictions or exceptions from normally applicable processes, and what transparent communications systems and opportunities are available between the procuring entity and the bidders. The pre-tender stage will also involve budgeting.
- **Tender stage:** The tender stage includes the invitation to tender, which is choosing which offeror will become the contract partner by evaluating the actual tender and the tenderer, and the award of a contract based on established terms and conditions for how the goods, services or works are to be provided. It includes any conditions or limitations relating to the award, including agents and subcontractors that may have connections to government officials.

- *Post-tender stage*: The post-tender stage (often referred to as contract administration) refers to the administration of the contract to ensure effective performance. Further interactions of many kinds between the successful bidder and governmental authorities continue during the course of contract performance, e.g., regarding benchmarks, changing orders, payment schedules, licensing and permits.

The choice of the procurement procedure is a crucial factor in the procurement process. In particular, it determines the number of stages intervening between the decision to buy and the actual purchase. It is important to understand how the choice of the procurement method can have an impact on corruption in public procurement.

There are different ways of categorizing procurement procedures, for instance distinguishing between types of procedures with or without a public notice, procedures with one or several stages, or procedures with or without negotiations. The choice of tender method regularly depends on the estimated contract value, the estimated number of bidders and the complexity of the relevant good, service or work (particularly if the procuring entity is able to specify its exact need). Procurement methods under the most important international texts on public procurement, for instance under the UNCITRAL Model Law, the World Trade Organization Government Procurement Agreement (WTO GPA) or the EU Directives, differ from each other; however, a possible general classification of the various procurement types would be the following:

- *Open procedure (sealed bidding)*: Open tendering is a formal single-stage procurement method in which any interested company, without any pre-selection, may submit a bid; bids are usually made against detailed government specifications, and the award is usually made to the bidder offering the lowest price. This method allows maximum transparency and competition, for it generally requires a public notice advertising the contract opportunity, exhaustive technical specifications and contractual terms, a public opening of tenders and the absence of the possibility to negotiate the contract. In general, a procuring entity must use this procurement method unless the use of alternative methods is justified.
- *Restricted procedure*: A restricted procedure is different from an open procedure in the sense that only pre-selected qualified companies are allowed to submit a bid. There are slight variations in restricted procedures under different frameworks. They may involve a restriction of the bidding to those companies which pre-qualified following a public advertisement and on the basis of disclosed minimum and/or selection criteria, as is done under the EU Directives. A restricted procedure may also mean that a public advertisement of a contract opportunity is not required, as interpreted in the UNCITRAL Model Law. This may happen, for instance, if the subject matter of the procurement is available only from a limited number of suppliers.
- *Negotiated procedure*: A negotiated procedure is often used for cases in which it is not feasible (or not possible) to formulate exhaustive technical specifications and contractual terms. It is thus necessary to enter into a dialogue with the offerors to conclude the contract. A negotiated procedure is also often used for cases of failed tendering procedures (e.g., no tenders or only non-responsive tenders were delivered). Another frequent reason for a negotiated procedure is circumstances of urgency or a catastrophic event.
- *Single-source procurement (direct award or limited tendering)*: Single-source procurement often allows the procuring entity to choose the contracting partner without any form of transparency or competition. This type of procurement constitutes a major departure from the fundamental principles outlined above. Grounds for direct contracting may include, for instance, the low estimated value of the contract, the fact that the goods, services at issue are available only from a particular provider, urgent needs, a catastrophic event, the need for additional supplies to be procured from an existing contractor, or special concern regarding national defence or national security.

The type of procurement procedure chosen may have a direct impact on the corruption risk involved in a public procurement. For this reason, the open tendering procedure is often considered the method of first resort (i.e., the default procurement method), and single-source tendering—which poses perhaps the highest risk of corruption and favouritism—is typically allowed only under exceptional circumstances. It has often been the case that direct, single-source

contracting has been abused to facilitate corruption. Those concerned about corruption have stressed that single-source procurement done in the name of extreme urgency should occur only when, for good cause, there is too little time to use the regular procedures and where the urgent event was truly unforeseeable by the procuring entity and not attributable to that entity. A procuring entity must therefore plan ahead and cannot claim that a requirement was unforeseeable simply because the procuring entity failed, for example, to gain the external and internal approvals in due time, or that the minimum deadlines for bid submission cannot be met. In the context of direct contracting, it is therefore essential that procurement legislation specifies in detail the grounds under which single-source procurement may be used. These grounds must then be strictly interpreted, and the reasons for use documented in the procurement file.

Procurement is complex and in the case of infrastructure and other large-scale projects, it often takes years from project kick-off to completion. Because officials exercise discretion at every stage of the process, corrupt government officials have ample opportunities to seek irregular payments from prospective contractors. Officials who receive a bribe or accept an undue advantage may return the corrupt favour by restricting or eliminating competition; they may do so by splitting contracts which should be aggregated, tailoring award criteria to a favoured company, approving anti-competitive consortia which would otherwise violate anti-trust laws, accepting non-responsive bids, hosting flawed bid openings or staging discriminatory contract negotiations. On the private sector side, temptations to shortcut the process, or to tilt it in some illegitimate way, similarly abound. Once a contract is issued, the temptations do not stop, as contract administration similarly involves numerous interactions between the public and private sectors that can lead to corrupt payments. Bribes can be paid to overlook bad performance or non-performance.

It is important to note that the tendering (or bidding) stage in public procurement, in particular, is highly regulated. International texts on procurement, especially the UNCITRAL Model Law, the WTO GPA and the EU Directives, focus on this stage. Practice, however, shows that corruption risks in the procurement cycle can be equally high before the tender process even begins (in the pre-tender or planning stage) or once the contract has been awarded (in the post-tender stage). For instance, it is often the case that, as a result of corruption or political expedience, large-scale infrastructure projects (roads, airports, sport stadiums) are initiated although there is no immediate need for such projects. Also, a large number of scandals have stemmed from contractors' failure to perform according to the contracted terms and conditions. For example, when the contractor meets delivery requirements by using lower-quality materials, or when contractors have falsely overstated the volumes of work done and have colluded public officials to hide this under-performance. With regard to the bidding stage, it is often the case that corruption arises even when policymakers have put in place a sound public procurement regime regulating the tender phase. Unjustified exceptions from competitive procedures on the basis of national security interests or on grounds of urgency, in particular in the defence sector, are common examples.

Main actors

It is rarely the case that a single individual is responsible for corrupt behaviour. Indeed, corruption in the field of public procurement usually involves a series of actors.

The key actors facilitating corruption are the entity paying the bribe and the recipient of the bribe. The briber is usually the legal entity competing for and delivering on contracts (e.g., the bidder, including consortium partners, subcontractors or suppliers). The recipient of the bribe is usually a procurement official with the procuring entity who is responsible for awarding and/or managing the public contract. Frequently, bribes do not flow directly between the bidder and the procuring personnel but instead through an agent, consultant or other intermediary.

Corruption—broadly understood here to mean a breakdown in the best-value procurement process—may take place even when no procurement officer is involved. A good example of this is anti-competitive agreements, such as price fixing between bidders. Similarly, politicians tainted by corruption can attempt to influence a decision to initiate a procurement procedure, or to award a particular contract to a certain company.



CHAPTER I.

Public procurement: requirements of
article 9 (1) UNCAC

A. Introduction

To ensure legitimate procurement procedures and adequate public records, article 9 of UNCAC requires: (a) the establishment of a sound procurement system; (b) transparency in procurement; (c) objective decision-making in procurement; (d) domestic review (or bid challenge) systems; (e) integrity of public officials; and (f) soundness of public records and finance.

The protections of article 9 against corruption should not, however, be seen in isolation. As noted, the UNCITRAL Model Law, and the other provisions of UNCAC itself, frame additional solutions for failing or corrupt procurement systems. Article 9 simply points to many of the most important of such anti-corruption tools.

As the discussion above noted, a sound procurement system must balance a number of goals. Of these goals, experience has shown that competition, transparency and integrity are probably the most important. With the aim of efficiently preventing corruption in the area of government contracts, article 9 (1) of UNCAC—as noted above—requires States parties to base their systems of procurement on these fundamental principles. Specifically, the Convention requires that the appropriate systems of procurement its parties must establish are “based on transparency, competition and objective criteria in decision-making that are effective, inter alia, in preventing corruption”.

This chapter and chapter III below discuss the requirements of article 9 in detail.

B. Fundamental principles

This section addresses what the principles of transparency, competition and the use of objective decision-making criteria actually mean in practice and how the Convention prescribes their implementation.

Importantly, article 9 (1) of UNCAC allows parties to the Convention to “take into account appropriate threshold values in their application”, when applying the fundamental principles of transparency, competition and objective criteria in decision-making.

Chapter II below will discuss in more detail the key elements of the successful procurement planning needed to prevent corruption, as required under article 9 (1) of UNCAC, and based on existing procurement regimes and good practices.

Transparency

Transparency is a key feature of a sound procurement system and generally involves: (a) publicity of procurement opportunities and the disclosure of the rules to be followed; (b) undertaking procurement processes publicly and visibly, according to prescribed rules and procedures that limit the discretion of officials; and (c) the provision of a system for monitoring and enforcing applicable rules. Given that procuring entities frequently have a high degree of discretion in the procurement process, it is also transparency which allows this exercise of discretion to be monitored.

Procurement systems depend on transparency to allow stakeholders (policymakers, officials, competitors and members of the public) to monitor the procurement process. That monitoring is a crucial tool to ensure that the government agents in the procurement process—the procuring officials and the vendors themselves—pursue the government’s ends and not their own. Transparency ensures that the rules are followed, and, conversely, to ensure that non-compliance can be both identified and addressed. It is thus transparency that makes it more difficult to disguise and maintain discriminatory procurement decisions. Importantly, transparency also facilitates the achievement of the other objectives of a procurement system (in particular, non-discrimination), and thus it must be addressed at all stages of the public procurement process.

Competition

Competition in public procurement usually means that two or more bidders act independently and engage in a contest for the opportunity to secure the procuring entity's contract by offering the most favourable terms. Competition is a key factor for governments (and their citizens) to achieve best value-for-money. It leads, in particular, to lower prices and better quality of goods, services and works. Competition furthermore serves as an important driver of innovation. Importantly, real competition only ensues in the absence of collusive tendering, which represents one of the most prominent examples of corruption in public procurement.

Potential suppliers to the government are likely to compete only when they are confident that they have been provided with all necessary information and that their offers will be evaluated on the basis of objective criteria in a non-discriminatory way and that decisions of the procurement entity can be challenged before an independent body.

Objective criteria in decision-making

UNCAC stipulates objectivity in connection with criteria for decision-making as one of its cornerstone principles.

Objectivity in decision-making in the context of public procurement refers to striving (as far as possible) to reduce or eliminate biases, prejudices and subjective evaluations.

The principle of objective decision-making criteria in public procurement is closely linked with the principle of non-discrimination and equal treatment for providers. The latter means that no distinction should be made between providers of goods, services or works except where this is justified based on relevant objective considerations.

The principle of objective decision-making criteria in public procurement is also closely linked with the principle of integrity. Integrity, in particular, requires objectivity at all stages of the procurement process, and ethical conduct by all parties involved, as well as an independent and effective remedy system. Importantly, integrity and objectivity facilitate other objectives, such as avoiding corruption, and objectivity demonstrates how the cornerstone principles of transparency, competition and non-discrimination are applied in practice.

Objectivity can be safeguarded in many ways, for instance, through requirements to disclose all criteria for participation and qualification of suppliers, rules on technical specifications drafted with the express intention of ensuring that procuring entities do not discriminate against and among foreign suppliers, and requirements guiding technical and price evaluations.

C. UNCAC's suggestions on ensuring the principles of transparency, competition and objective criteria in decision-making

Introduction

In addition to setting out three fundamental principles, UNCAC then sets out how these principles may be reflected in the adoption of a procurement system. By way of examples, UNCAC outlines several measures which can be used to promote these objectives in public procurement, including: the public distribution of information relating to procurement procedures and contracts (article 9 (1) (a)), the disclosure of conditions for participation (article 9 (1) (b)), the use of objective and pre-determined criteria for public procurement decisions (article 9 (1) (c)), an effective system of domestic review (article 9 (1) (d)), and measures to regulate matters regarding personnel responsible for procurement (article 9 (1) (e)).

The subsection below will focus on these measures set out in article 9 of UNCAC.

Public distribution of information

Article 9 (1) (a) of UNCAC, calls for the “public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders”. This requirement for publicity is an essential tool to achieve transparency. Transparency in procurement reveals what otherwise might have been concealed, and it is considered to be a prerequisite for ensuring the accountability of government officials.

UNCAC’s requirement on the public distribution of information focuses, in particular, on the publication of contract opportunities. This will usually mean the public advertisement of a prospective procurement, which will make potential contractors aware of a particular contract opportunity and will help to ensure that the contract being publicized is not directly awarded to a favoured company without competition. Public advertisement will thus generally (depending on the choice of the procurement procedure) also maximize competition and value for money. Article 9 (1) (a) also includes the obligation to make procurement legislation publicly available. While it is not specifically addressed, it would be consistent with the requirements of article 9 to require the publishing of judicial decisions and administrative rulings.

Publication of conditions for participation

UNCAC, in article 9 (1) (b), calls for the “establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication”.

This requirement is another essential tool to achieve transparency. Publicity of the procedures and award conditions for each procurement procedure helps to ensure that companies submit bids which best match the procuring entity’s needs. Publicity will also, in light of anti-corruption efforts, allow for verification of whether the procedures and conditions for award are in line with applicable procurement laws, and will allow for timely challenge or enforcement proceedings where those laws have not been followed.

The requirement that the conditions for participation in a particular procurement procedure be disclosed must include the selection and award criteria and tendering rules. Procuring entities thus must lay down, in detail, all requirements as to contractor qualifications such as personnel and financial capabilities and must spell out the criteria on which the winning contractor will be selected and the contract will be awarded (i.e., whether the award will be based on lowest price or on a combination of price and other non-price criteria). Tender rules will include, for instance, the sequence of the procedure, the deadlines for requesting clarification and bid submission, as well as the permissibility of subcontractors or consortia.

Use of objective and predetermined criteria for decision-making

Article 9 (1) (c) of UNCAC calls for the “use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures”.

This requirement goes hand in hand with the requirements for public distribution of information and for publication of conditions for participation (article 9 (1) (a)-(b)) which follow from the principles calling for transparency and the use of objective criteria in decision-making.

Selection criteria are objective when the procuring entity’s discretion is limited and biases, prejudices or subjective evaluations are reduced or eliminated. Criteria for awarding a contract must be exhaustively specified in advance so that bidders can assess their chances of winning a tender; if prospective bidders can make that assessment fairly and accurately, the government will be presented with an optimal group of bidders. The requirement that there be predetermined criteria for public procurement decisions also means that a procuring entity is, in principle, constrained in making any drastic changes to contract requirements once those requirements have been disclosed (i.e., once the tender documents have been published). This avoids any favourable treatment of a particular company in the course of the tender procedure.

The predetermination of criteria for public procurement decisions is necessary so that those exercising oversight (including, potentially, members of civil society) can verify if the rules laid down in the tender documents or in the relevant procurement legislation have been followed. That said, by narrowing procuring officials' discretion, these rules make it more difficult for the procuring agency to adapt to—and capture—rapid advances in the marketplace.

Effective systems of domestic review

Article 9 (1) (d) of UNCAC requires that an appropriate system of procurement include an “effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established” in article 9 (1) of UNCAC are not followed.

Effective enforcement in the area of public procurement is of utmost importance. The existence of mechanisms to monitor compliance with applicable rules and to enforce them when necessary is a key feature of an appropriate system of procurement contemplated by article 9.

UNCAC does not provide any further guidance as to when it considers a domestic remedy system effective. For instance, it does not require particular remedies such as interim measures to maintain the status quo during the challenge procedure, set asides or the annulment of procurement decisions or damages. The Convention is also silent on time limits for launching a challenge procedure, and on the necessary characteristics of the review body.

UNCAC does, however, require that an effective system of domestic review also include an effective system of appeal. This means that the official decision of the review body of first instance must be subject to a formal appeal.

The responsibilities of public officials

Article 9 (1) (e) of UNCAC suggests that implementing States undertake “measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular public procurements, screening procedures and training requirements” in the course of establishing appropriate systems of procurement.

In general, this clause refers to ethics regulations for officers and employees of procuring entities. Such regulations usually require procurement personnel (i.e., public officials) to pursue ethical, fair and impartial procurement procedures in line with applicable legislation and tendering rules for a particular procurement. Public officials should promote and maintain the highest standards of probity and integrity in all their dealings.

In this light, UNCAC suggests instituting screening procedures for public officials. These screening procedures could be used to assess prospective employees during the appointment process. Furthermore, it is suggested that entities address training requirements, and that public officials concerned with procurement should have to declare any interest they might have in a particular procurement (e.g., so that a public official is prohibited from placing a contract with a firm in which the public official holds personal interests, for instance, or with a company which employs a member of a public official's immediate family).

Importantly, article 8 of UNCAC regarding codes of conduct for public officials has direct relevance to public procurement, including procurement personnel. In its paragraph 5, it refers in particular to “measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result”.

In assessing ethics requirement for public officials, including procurement officials, policymakers may wish to consider that ethics rules and screening procedures are almost always part of part of a broader fabric of social norms, laws and mechanisms for ensuring social harmony. In that light, the ethics rules crafted to protect the procurement system should complement the broader

set of norms and rules, and may well draw upon other formal and informal mechanisms for maintaining social order.

D. Assessment of the requirements of article 9 (1) of UNCAC

As noted, UNCAC requires its States parties to establish appropriate systems of procurement based on the fundamental principles of transparency, competition and objective criteria in decision-making.

The rules applicable to establishing an appropriate system of public procurement outlined by article 9 (1) of UNCAC are highly focused. UNCAC is not very prescriptive in describing what rules a procurement system should include in order to curb corruption. There is little, for instance, on estimation of the procurement value, methods of procurement and their conditions for use, public procurement notices, the required content of tender documents, qualification of suppliers, rules concerning the description of the subject matter of the procurement, abnormally low tenders, acceptance of the successful tender, etc. Instead, article 9 relies chiefly on fundamental principles.

In fact, UNCAC allows parties to opt out the fundamental principles set forth in article 9 (1) for smaller procurements which do not exceed a certain threshold. It is for each UNCAC party to decide upon the appropriate value for such thresholds. This exception reflects the transaction costs which accompany anti-corruption measures—for some smaller procurements, those transaction costs could be overwhelming—and perhaps suggests that larger procurements, if tainted by corruption, carry greater risks to the governing state's perceived integrity.

It follows from the above that UNCAC allows a very high degree of flexibility in connection with appropriate systems of procurement as long as there is adherence to the principles of transparency, competition and objective criteria in decision-making. Before implementing the measures prescribed by article 9, States parties will need to analyse their existing public procurement laws and procedures to assess whether they suffice to meet UNCAC's requirements, or whether further reforms are necessary.

Checklist for meeting minimum requirements set out by article 9 (1) of UNCAC

Article 9 (1) of UNCAC sets the general parameters for shaping national legislation on procurement. It outlines selected measures which can be used to comply with the Convention's call for appropriate systems of procurement "based on transparency, competition and objective criteria in decision-making that are effective, inter alia, in preventing corruption".

In order to assess the effectiveness of national public procurement legislation in curbing corruption, annex II provides a set of questions that will assist States parties in determining whether their procurement system is in compliance with article 9 (1) of UNCAC.



CHAPTER II.

High-risk areas and key elements of
successful public procurement

A. Introduction

Article 9 (1) of UNCAC sets the general parameters for shaping national public procurement legislation. It requires establishing appropriate systems of procurement based on the fundamental principles of transparency, competition and objective criteria in decision-making. A good procurement system distinguishes itself, firstly, by incorporating these principles effectively and, secondly, by making sure that these principles are applied throughout the entire procurement process. Experience shows that corruption is likely to creep into the procurement process if these conditions are not met.

This chapter will map important corruption risks that may arise during the tender process, and will highlight the most important features a system of procurement must have to minimize those corruption risks. It will also focus on good practices in this regard. Given that the pre-tender stage, the tender stage and the post-tender stage face specific corruption risks, this chapter will focus on these three stages separately. In addition, it will cover the essential features that a robust procurement system must have throughout the procurement cycle, such as conflicts of interest and an effective remedy system. This chapter also identifies examples of good practices in responding to risks of corruption.

B. Risk mapping and prevention

Pre-tender stage

Needs assessment

Goods, services or works should only be procured by the government if there is an identified need in the foreseeable future. Needs assessment will in particular involve a decision as to whether the envisaged purchase is required at all, and whether the envisaged quantities and technical requirements and the time and location for contract performance, are justified. Corruption risks in this stage of the process are particularly linked to: the approval of unnecessary, under- or overestimated, low-quality or overly luxurious purchases; purchases that are not truly needed in the near future; or goods that would be delivered only once they are no longer required. Needs assessments often require in-depth knowledge of the market. The gathering of information through past experience, market studies, etc. is essential. If procuring entities do not have the necessary personnel and know-how to assess the need, in-house procuring entities may hire external consultants.

Good practices to avoid these risks begin with the requirement that the needs assessment be carried out by more than one member of the procurement team, particularly for high value projects. Diversifying the assessment team—indeed, almost any team called together to assist in the procurement process—reduces the risk of individual corruption and strengthens the team's understanding of the requirement and the market. Furthermore, the entire decision-making process should be documented and transparent, e.g., by organizing consultations with the private sector or by making feasibility studies available. Transparency International (TI) suggests using public hearings or other consultation mechanisms in the needs assessment.

The expert opinions of external consultants performing the procurement feasibility assessment might be biased, for instance due to political pressure. It is, therefore, essential that consultants be independent and free of any conflicts of interest. External consultants need to be contracted in line with public procurement law, which will often require a modified tender procedure for intellectual services. Good practice often involves the evaluation of the qualifications of the applying consultant being carried out by a competent commission. Ethics provisions should be included in consultancy contracts to promote the consultant's integrity. Frequently, external consultants, such as engineers, accountants and lawyers are subject to a professional code of conduct to promote the integrity of the consultant. A consultant who was involved in the preparation of a tender procedure for a particular contract should not be allowed to bid for this contract unless he or she has no competitive advantage. Good practice may also include involving potential bidders to assist in connection with needs assessment, so as not to rely solely on the expertise of an external consultant.

Example: A government official purchases vaccines against a particular virus without any competitive tender procedure (justifying this by the urgency of the matter), though he knows that by the time of delivery the virus will already have mutated and the vaccine will be of no further use and a new type of vaccine will need to be purchased. This government official received a bribe from the vaccine manufacturer, which wants to get rid of an outdated vaccine by selling this product to the government.

Solution: The decision to launch a specific procurement procedure should be taken by more than one official. The reason given for allowing direct award without any competition (in this case urgency) should be documented and pre-approved by another public official or external advisor. The decision should be available for public review and possible challenge, if the decision was not appropriate.

Categories of procurement

Public procurement usually covers contracts concluded by a public procuring entity for pecuniary interests which are goods (e.g., supplies or products), services or construction works contracts, or any combination thereof. The contractual means is usually irrelevant, as a purchase, lease, rental or hire purchase would all be covered by national procurement legislation.

Although this is an emerging issue in procurement doctrine, good practice suggests that concessions (the award of a right to act in the government's behalf, or using a public resource) should also be awarded according to the fundamental principles of transparency, competition and objectivity. A concession is an arrangement very similar to a regular goods, services or works contract except for the fact that the consideration for the goods, services or works to be carried out usually consists in the right to exploit these goods, services or works together with payment.

Example: A municipality, which is operating its own local bus service, intends to outsource these services to a private company. In doing so, the municipality grants a private company the right to exploit these transport services for payment (i.e., passengers must pay the private bus operator for tickets). The private bus operator will assume the economic risk arising from the provision and management of its transportation services, such as the risk that only few people will use the concessionaire's buses. The concession period is 20 years. It is assumed that the annual revenues of the bus operator are around US\$ 10 million.

Solution: The public procurement legislation of the hypothetical country requires that service concessions be granted in accordance with the fundamental principles of public procurement law, in particular with transparency, competition and objectivity in decision-making.

The municipality, aware of its responsibility for its citizens, publishes the contract opportunity, thereby ensuring that the service concession is opened up to competition. It predetermines all criteria for the decision in tender documents and grants the concession contract to the best bidder.

Budgeting

After the needs assessment, comes the estimation of costs for the goods, services or works to be purchased. Costs can be estimated on the basis of past procurements or can be based on sound forecasting methods. Cost estimates must be realistic and should already take into account possible variations of the contract over time. Procuring entities must ensure timely budget approval and verify that funds are available. Complex projects, such as large-scale infrastructure projects or complex information technology projects, are likely to require external specialist advice.

Good practice would suggest conducting in-depth market research to estimate the likely costs of the procurement. Bid prices that are considerably higher than market prices may be an indicator

of collusion between bidders, also known as price fixing. Concluding a contract with a company that offered a considerably higher-than-market price could also indicate collusion between this winning company and the responsible procurement officer.

Electronic procurement has proved to be an effective tool in data collection and data management at the stage of budgeting; for example, an integrated procurement and finance system may yield rich data on past procurements in the same sector

Good practice also recommends careful consideration of how similar procurements may be aggregated over a period of time. If too many requirements are aggregated too aggressively, potential suppliers—especially smaller suppliers—may be forced from the market. At the same time, however, if requirements are split in order to keep procurements under the threshold for regulation, corruption may flourish in this unregulated realm. In the budget planning stage, it is of particular importance that skilled and dedicated project officials be in a position to provide a realistic budget, relying on sound external experience if necessary.

Example: A procuring entity procures an elevator for a public school for persons with mobility disabilities. After contract completion it turns out that this elevator needs special maintenance which can only be provided by the contractor and that the maintenance was not part of the contract. Total costs for the elevator over its life-cycle multiply, because the contractor charges unreasonably high fees for the maintenance services.

Solution: Good practice includes having budgets and costs of procurements realistically estimated applying a holistic approach, taking into account projected lifetime costs of ownership. Maintenance should have been part of the competition and accordingly included in the tendered contract.

Structuring of the bidding process

(a) Tender documents

This stage involves the choice of a procurement method and development of the tender documents or solicitation documents setting out the terms and conditions of a given procurement.

The tender documents are the key component of any tender procedure. The procuring entity shall set out in the tender documents all requirements that submissions must meet in order to be considered responsive and the manner in which those requirements are to be assessed. The tender documents will include, in particular, the timeframes for bidding, the stages in the process, criteria regarding eligibility of companies, technical specifications, selection and award criteria, criteria for the rejection of bids or the disqualification of a bidder, legal terms and conditions, as well as means of communications between the procuring entity and bidders. All these criteria and conditions must be objectively defined, available to all potential suppliers in understandable terms and applied equally.

Procurement laws, in order to ensure that the competitive process is fully fair and transparent, typically specify in detail the minimum content which tenders must include. Good practice suggests not only setting out the minimum content of tender documents, but also any information, useful to those offering tenders, which promotes transparency, competition and integrity.

(b) Procurement procedure

As a general principle, the procurement procedure chosen by the procuring entity should always ensure the maximum practicable competition. For this reason, the open procedure (or sealed bidding), is often the default procedure under procurement legislation.

Other procedures, such as restricted procedures which restrict the competition to a few highly qualified bidders, negotiated procedures or single-source procurement should only be allowed under special circumstances. Grounds for use of these procedures should be defined in the law and restrictively applied by the procuring entities. While negotiations allow the procuring agency to respond more nimbly to innovations in the marketplace, negotiations also significantly increase the risk of corrupt behaviour. To discourage corruption, bidders participating in negotiations must be treated equally and provided with the same information. The conduct and result of negotiations should be documented in the procurement file. The use of non-competitive procedures should be the exception, and any such procedures must be justified and documented.

Example: A procuring entity enters into (non-competitive) direct negotiations with a manufacturer who is already a contractual partner, for the delivery of complex software in the airport sector. The entity argues that there is no other company providing the required product and that a standard procurement procedure would be impractical. A couple of months later, two software producers become aware of the contract award and inform the procuring entity that they are also able to deliver the ordered software and on more favourable terms.

Solution: Good practice suggests that the procuring entity should have conducted an open tender procedure with a prior public invitation to tender. It was likely that the procuring entity was not aware that other suppliers, such as foreign companies, would have participated in the tender procedure, which would have enhanced price and quality competition for the public contract.

(c) Time limits

Procuring entities must give suppliers a sufficient period of time to prepare applications or tenders. The response time period allowed should be taken into account, with consideration given to the nature and complexity of the procurement. Time periods must be extended in case of material changes or clarifications of the tender documents. A reduction of the standard time period can be considered only in exceptional cases, for instance if a notice of a planned procurement was published or if tender documents were circulated electronically. Because rushed procurements may be tainted by corruption or discriminatory favouritism, procurement laws and international trade agreements, often establish certain minimum time periods that the procuring entity must allow for the presentation of applications or tenders.

Example: The solicitation documents in a restricted procedure require that candidates submit various reference letters to prove their experience with similar projects (past performance). One week before the deadline for presenting applications, the procuring entity announces that reference letters must be signed by the respective former clients of the candidate and that originals of each letter must be submitted (i.e., no copies will be accepted). Due to this change, only one bidder was able to provide the requested documents in time. The only company that manages to obtain the signed reference letters was informed of this new requirement at the very beginning of the tender procedure.

Solution: Good practice suggests that tender documents must describe all significant requirements. The requirement that signed reference letters be submitted represents a material change or clarification of the tender documents. The procuring entity should have been required to extend the deadline for submitting applications appropriately.

(d) Contractor qualification

Contractor qualification requirements must be reasonable in order to make competition possible; if they are too restrictive, competition will fail.

At the same time, qualification requirements must prevent fraudulent or incompetent companies from participating. Bidders which, for example, lack adequate financial resources or have been convicted of particular criminal offences, such as corruption or fraud, or which are guilty of grave professional misconduct should be excluded from a tender procedure. Procurement regimes often set out exhaustive lists of criteria that the procuring entity may use in the assessment of the qualification of suppliers, as grounds for mandatory or discretionary exclusion. Good practice includes making debarred companies ineligible to be awarded a government contract for a certain period of time because they have been sanctioned under corruption legislation. Debarred companies are thus automatically disqualified from bidding for a public contract or must (on a case-by-case basis) be excluded from a particular tender procedure.

Good practice includes collecting declarations of integrity from potential bidders regarding their eligibility—declarations which may be personally binding on the company principal(s) who endorse them. A further good practice is the inclusion of an option that allows an economic operator to provide the procuring entity with evidence that measures have been taken that show its reliability despite the existence of a relevant ground for exclusion. These are sometimes referred to as self-cleaning measures. These measures usually involve the proof that this economic operator has taken concrete technical, organizational and personal measures that are appropriate to prevent further criminal offences or misconduct.

(e) Minimum and selection criteria

Criteria for participating must be designed so as to avoid bias, be objective and relate to the capacity to perform. They must be predisclosed, relevant and appropriate with regard to the subject matter of the procurement and are essential to ensure that the bidder has the legal, financial and technical capacity to perform. Criteria for participating may include past performance, which may call for references. Minimum and selection criteria, which apply, for example, in a two-stage procedure in order to pre-qualify candidates, should not lead to an unnecessary reduction of competition. Good practice allows suppliers to freely partner with other companies to submit an application or tender to fulfil minimum or selection criteria (e.g., as a consortium or by using a subcontractor). Procurement legislation and/or tender documents should regulate the requirements as to bidding via consortia and the use of subcontractors. Throughout this process, procuring agencies should recognize that while they may reduce performance risk, or reputational risk, by tightening qualification requirements for bidders, the agencies run a concomitant risk that tighter qualification requirements may, in effect, narrow the field of available competitors and potentially exclude useful solutions.

Example: A procuring entity initiated a tender procedure for the construction of a soccer stadium. The tender documents indicated a maximum budget of US\$10 million and required that bidders have had annual revenues of US\$50 million from the construction of soccer stadiums during the past two years. Only one tenderer, which paid a bribe for this requirement to be included in the tender documents, meets this requirement.

Solution: Minimum requirements optimally should be objective, relate to the capacity to perform and be appropriate with regard to the subject matter of the procurement. A minimum revenue requirement of five times the estimated contract costs does not seem to be appropriate and it restricts competition. It is also questionable whether a requirement according to which revenues must have come only from the construction of soccer stadiums, and not, for instance, from a rugby stadium, is justified. Good practice suggests lowering the revenue requirement to an appropriate volume and taking revenues from the construction of other sports facilities into consideration.

(f) Technical specifications

Technical specifications should be designed so as to avoid bias, especially so as not to favour any particular bidders or particular products or services. They must be predisclosed, relevant and

appropriate with regard to the subject matter of the procurement, objective and be based on the actual needs of the government. Good practice suggests that procuring entities should call for a particular good or service—a brand name—only where no other sufficiently precise description can be used. The call for a particular good can also be followed by the wording “or equivalent” with a description of the key characteristics being sought. Good practice requires, where appropriate, that technical specifications be set out in terms of performance and functional requirements rather than design or descriptive standards. External consultants for drafting technical specifications must be independent.

Example: A procuring entity, in an open tender procedure, puts the delivery of 180 laptops out for tender. According to the technical specifications, the processor must be a “One Intel Celeron 2.4 GHz with 400MHz FSB and 256KB L2 cache”. Only a few companies are able to offer this particular processor although other processors exist which have the same performance and functionality.

Solution: Good practice suggests defining technical specifications in terms of performance and functional requirements or adding the wording “or equivalent” in order to guarantee objectivity and allow maximum competition [e.g., “One Intel Celeron 2.4 GHz with 400MHz FSB and 256KB L2 cache or equivalent”].

(g) Award criteria

To stem corruption and ensure appropriate competition, the award of a public contract should be made only on the basis of predisclosed criteria. This may either be the lowest price or a combination of the price with other criteria, such as the most advantageous or best value tender. Award criteria should be drafted in an objective way to ensure fair, impartial and non-discriminatory application. The weighting between criteria, and the manner of application for the criteria, must be set out in the tender documents, and non-price related criteria, such as time for delivery and extension of the minimum warranty period, should be quantifiable, so that they can be assessed objectively and transparently. Good practice suggests that subjective criteria, such as the viability of a bidder’s proposed staffing schedule, are best evaluated by a panel or commission, to reduce the risk of individual corruption and to gain the benefit of a consensus opinion.

Example: A procuring entity initiates a tender for the delivery of police cars. Tender documents state that besides the price, other criteria relating to environmental friendliness will also be evaluated, but those solicitation materials do not provide any further explanation of such. The environmental friendliness criterion is evaluated so as to favour a particular tenderer.

Solution: Good practice requires that a procuring entity set out all award criteria and their relative weighting in detail in the tender documents. For instance, the procuring entity might state that the lowest price will be evaluated out of a maximum of 80 points and the environmental friendliness out of 20 points. While the use of such fixed points has been criticized by some as overly constrictive, as a practical matter the use of such predetermined points to make the award helps to shelter the process from the corruption that can work its way into a more open-ended, subjective procurement process.

In this hypothetical, the cars’ environmental friendliness could be divided into the subcriteria of fuel use and CO₂ emissions, with the lowest fuel use in litres per 100km being awarded 15 points (the highest fuel use 0 points) and the lowest CO₂ emissions in grams per 100km 5 points (the highest CO₂ emission 0 points). Other scores would be calculated by linear interpolation. The actual fuel use and CO₂ emissions could be assessed by an independent and accredited testing laboratory.

Tender stage

(a) Public notice

For the reasons described above, transparency and competition are of the essence in public procurement. As a general rule, a procuring entity should therefore publish a public notice of its intent to procure goods or services, so that potential bidders can become aware of any contract opportunity with the government. Advertising a notice of intended procurement is one of the cornerstone elements of an appropriate procurement system. A public procurement notice must include certain minimum information so that potential bidders can assess whether a particular procurement is of competitive interest to them. The notice should include, at the least, a short description of the subject matter of the procurement, the deadline for bid submissions, where the tender documents may be obtained, and the contact point for enquires. All prospective bidders must receive the same information to ensure a level competitive field. Good practice includes advertising contract opportunities as broadly as possible—including internationally—so that a broader group of suppliers may compete for the contract. Procurement methods without notice should be the absolute exception.

(b) Requests for clarification

Procurements are inherently complicated, and solicitation documents may be unclear. Potential candidates and bidders should therefore have the right to request clarification of tender documents. The procuring entity should promptly reply to any request for information, and certainly in due time before the deadline for submitting applications or the bids. Clarifications of the solicitation should typically be provided in writing, and should be circulated to each company which was originally provided with the tender documents so as to ensure equal treatment. Good practice suggests extending deadlines in the event that clarifications are material, so that prospective bidders can accommodate the new information.

Example: A procuring entity tenders a framework agreement with the duration of three years for the delivery of knee implants for one of the largest hospitals in the country. The tender documents specify that the maximum quantity of implants that will be competed among the contract holders (the number subject to individual orders or so-called “call-offs”) during the duration of the framework agreement is 3,000 implants, but the tender documents do not specify any minimum purchase volumes or when it is likely that individual orders will take place. A potential bidder requests clarification, indicating that it is not possible to calculate a reliable price given the lack of a volume structure. The procuring entity proffers its clarification only a week before tenders are due.

Solution: Good practice suggests that the procuring entity should specify the likely volume structure (e.g., that it is intended to order 600 knee implants in the first year of the framework agreement, 1,000 knee implants in the second and 1,400 knee implants in the last year of the framework agreement) and that at least 50 per cent of the estimated volume projected for each year will be ordered (competed). Because here the procuring entity has issued this clarification only one week prior to the deadline for submitting a bid, good practice suggests extending this deadline for another seven days to give bidders sufficient time for calculating bids.

(c) Public bid opening

To ensure transparency, bids should be opened immediately after the deadline for submitting bids in a public bid opening session. All tenderers should be permitted to be present at the bid opening session. Absent extraordinary circumstances, bids which were submitted after the deadline normally need not be evaluated. In a traditional open tender, the procuring entity should be required to announce the names of all bidders and the prices offered. Good practice requires that, for open tenders at least, not only the price but all the other elements of a bid which are necessary for applying the award criteria should be announced. To ensure transparency and accountability,

minutes should be drafted and made available to all tenderers and other interested persons not present at the bid opening.

A procuring entity should be allowed to refrain from a public bid opening only under very limited circumstances (for instance, in a negotiated procedure where disclosing the names of the bidders who submitted the first bid could then lead to collusion between bidders before submitting the final offers).

Example: A procuring entity is tendering the supply of office chairs for a district court. The award criteria are the price and the delivery time. The price is weighted as 80 per cent (= 80 points for the lowest price). With respect to the non-price related criteria, a bidder offering a delivery time between 6 and 5 months gets 5 points; between 5 and 4 months 10 points; between 4 and 3 months 15 points, and less than 3 months, 20 points. For a delivery time of more than 6 months, no points are awarded. Two companies submitted bids. In the public bid opening, only the names of bidders and prices are disclosed. The prices were almost the same. One company offered a delivery time of 4.5 months (by ticking the appropriate box in the tender documents) while the second bidder deliberately did not offer any delivery time. No minutes were drawn up.

A corrupt government official, in return for receiving a bribe, ticks the box “less than 3 months” in the second bid after the bid was submitted. This was the decisive factor in winning the tender and for the contract award. In fact, the office chairs were delivered 8 months after contract conclusion.

Solution: Good practice requires that all elements of a bid which are relevant for applying the award criteria and the evaluation of the successful bid be announced in the bid opening session. Minutes must be drawn up containing all relevant details of bids and be handed out to tenderers present at the opening of bids.

(d) Evaluation of tenderers and tenders

Tenders may be evaluated only on the basis of the predisposed requirements and criteria. The evaluation of bids should, as a general rule, be carried out not by a single individual but by a committee with the relevant technical and economic experience. If the evaluation is done by one individual only, the resulting decisions should be reviewed and approved by that individual’s superior.

Non-responsive tenders must be rejected. Procuring entities should have the right to ask bidders for clarification of their tender as long as this was done in a non-discriminatory and transparent fashion. Changes to the bid after the deadline for submitting the bid should, in general, be prohibited. Procurement regimes sometimes provide for the opportunity to correct unintentional errors of form or errors which do not involve any substantial change of the bid. A correction of errors should be allowed only in exceptional cases given that allowing for corrections may risk granting a particular bidder an illegitimate advantage. This could occur, for instance, in the case of a company that submitted a bid which failed to comply with certain mandatory requirements according to the tender documents, and which intends to bribe the responsible public official to remedy this error after the bid was submitted.

In general, it is strictly forbidden to negotiate the contract after bid submission. Exceptions to this rule apply only in those cases where the chosen procurement procedure allows for a dialogue between the procuring entity and the bidder (e.g., a negotiated procedure). All decisions should be documented, including the compilation of an evaluation report containing the result of the evaluation of the tenderer and the tenders.

Example: A procuring entity is planning to award a contract for copy paper on the basis of lowest price. According to the tender documents, the copy paper must be delivered to 20 different locations in total. The tender documents required bidders to offer a price for the

copy paper and a price for the transport of the copy paper to each of the 20 locations (the overall price thus had 21 price components). The submission of an incomplete price offer was specified in the tender documents as a ground for deeming a bid non-responsive. One bidder did not offer a price for the transport of the copy paper. After bid submission, this bidder bribed the responsible procurement officer to allow it to remedy this defect by sending an amendment to the bid offering a price for the transportation of the copy paper. The bidder who submitted the amended price after the deadline for bid submission was awarded the contract because he offered the lowest overall price.

Solution: Good practice requires that non-responsive bids must be rejected. The procurement officer did not have any discretion in this regard, since the submission of an incomplete price offer was expressly defined as being a ground for rejection of a bid. In addition, an incomplete price offer should be considered non-reparable regardless of any provision in the tender documents. A bidder who is granted the opportunity to submit parts of the bid after the respective deadline has an illegitimate advantage over the other bidders and is treated more favourably, as this bidder has more time to prepare the bid. Furthermore, good practice suggests that award decisions should be made by more than one person or at least be reviewed and approved by a superior.

(e) Publication of intended contract award and awarded contract

After bid evaluation and ranking of bids, bidders should be promptly notified about the procuring entity's intention to award the contract to the successful bidder. This award decision should, for reasons of transparency, contain sufficient information, besides the name of the successful tenderer, the contract price and a summary of other characteristics and relative advantages of the successful tenderer, to allow all bidders and stakeholders to assess whether the procuring entity's decision is reasonably based. The award notice should include the standstill period (i.e., the period during which the procuring entity is not allowed to conclude the contract), if such a period is specified in the relevant procurement legislation. Good practice suggests that the opportunity of a debriefing, either in writing or orally, should be offered to suppliers on request. After contract award, the procuring entity should publish an award information notice.

Example: A procuring entity tenders waste disposal services for toxic waste based on the most economically and technically advantageous offer. The two award criteria are the (a) price and (b) technical and safety features of the waste collection vehicles. Both factors are weighted as 50 points and the second criterion is further subdivided into five different subcriteria weighted as 10 points each. The award notice announced bidder C to be the successful bidder and justified this on the basis that he offered the lowest price. In fact, bidder C ought to have been ranked second because he scored only 10 points in connection with the waste collection vehicles offered. Even upon request, the remaining bidders were not provided with any information beyond the name of the winning tenderer and the price offered by this company.

Solution: Good practice requires that an award notice, when awarding a contract on the basis of the most economically and technically advantageous offer, include not only the price but also the relative advantages and the characteristics of the successful bid. Only the disclosure of the relevant characteristics of the waste collection vehicles offered would have allowed others to assess whether the procuring entity's award decision was justified. Good practice requires the procuring entity to re-issue an appropriate award notice.

Post-tender stage

The post-tender stage commences once a contract is awarded. It refers to the implementation and administration of the contract and has the objective of ensuring effective performance according to the agreed contractual obligations. This stage is often also referred to as contract administration. Important international texts on procurement, especially the UNCITRAL Model Law, the WTO GPA and the EU Directives, as well as many national domestic public procurement regimes, offer

little guidance in relation to this stage of the contract since these legal texts are concerned with the prior phase, of contract formation. Similarly, article 9 (1) of UNCAC does not specifically focus on the post-tender stage. Due to its focus on preventing corruption in the area of public procurement, UNCAC seeks to ensure that public contracts are awarded in a transparent and competitive manner by using objective criteria in decision-making and that an effective system of domestic review will guarantee that breaches of these principles can be challenged.

In practice, however, corruption risks in the procurement cycle are particularly high once the contract has been awarded. Contract specifications or the scope of work are often altered after contract conclusion, and contractors all too often do not perform according to their contractual obligations. Due to an understanding between the contractor and a corrupt public official, deviations from what has been agreed to between the parties, such as poor quality or defective performance, may not result in any negative consequences. The same is true for unjustified change orders, that is, orders which increase the scope of goods or services and, at the same time, the costs of the contract, often through highly uncompetitive prices.

Good practice includes the setting-up of an effective monitoring system regarding the verification of compliant contract performance, for both contract terms and specifications. Contract changes should be allowed only if this possibility is provided for in the contract or the law (e.g., by a clear and pre-established monetary cap on the contract's value), or if those changes will not substantially change the essence of the contract.

Example: A procuring entity awards the delivery of ten diesel locomotives in an open tender procedure. After the contract is signed, the contractor and the procuring entity come to the understanding that, five electrical locomotives are also to be paid for and delivered under the contract. The contractor is one of the few companies that can deliver both technologies.

Solution: The additional order for five electrical locomotives under the awarded contract is problematic in various respects. It alters the quantity of goods as well as the contract's value substantially. Because the order comes after the award, and the order is made in the relatively non-transparent context of administration of an existing contract, the order raises concerns about corruption. Also, the order changes the subject matter of the awarded contract partially from diesel locomotives to diesel and electrical locomotives. The supply of electrical locomotives was at no time subject to a competitive tender procedure. According to good practice, the correct course of action would have been to include the delivery of the five electrical locomotives in the original tender or to initiate a separate competitive procurement procedure for the delivery of the five electrical locomotives.

C. Effective remedy systems

An effective remedy system, which is also known as a challenge or bid protest system, in public procurement is a key element of a robust procurement framework. For this reason, article 9 (1) of UNCAC explicitly calls for an effective system of domestic review in public procurement.

An effective review mechanism has several purposes. Most importantly, it is an incentive to respect an established procurement system because non-compliance will be enforced. Bidders have the right to turn to a review body, which will then verify whether a decision by the procuring entity was made in conformity with applicable rules.

An effective remedy system requires that an application for review be heard by an independent body. The notion of independence with respect to the review body usually means independence from the procuring entity rather than independence from the government. For instance, a body that merely has the competence to approve or disapprove of certain actions of the procuring entity probably will not qualify as truly independent. The same will be true if this body advises a procuring entity on public procurement procedures.

It is good practice for a reviewing body to include, or be composed of, outside experts independent from the government, such as experts from statutory professional representations such as a chamber of commerce or a non-governmental organization. It is also good practice to have the manner of the appointment of members of a review body and the duration of their term specified in the law or in other regulations. For instance, personal independence should be guaranteed by the fact that any arbiter is appointed for life, is not subject to transfer, and cannot be relocated involuntarily. Whether the review body is an impartial administrative authority or a judicial authority, and whether it specializes in public procurement law cases, will depend in part on the legal system in the country concerned. The decisive factor is that the independent body be afforded the highest possible degree of autonomy and independence of action from the executive and legislative branches.

Effectiveness in the area of remedies will also require that any supplier which has, or has had, an interest in a particular procurement will be granted sufficient time to prepare and submit a challenge. Procurement legislation usually sets out a minimum period of time to file a complaint, starting from the time when the basis for the challenge becomes known or reasonably should have become known to the supplier. It is good practice to ensure that an aggrieved bidder is able to appeal any important decision or action taken by a procuring entity.

Remedies in an effective enforcement system usually include interim measures and corrective measures, as well as damages. The possibility of suspension of a procurement procedure as an interim measure while the challenge is pending is essential, because this prohibits the procuring entity from entering into the contract before the review body has decided on an application for review. A suspension will allow the reviewing body to verify whether the challenged decision was made in accordance with the rules and the solicitation materials. If it is found that a decision was issued in breach of the applicable rules, the review body may make use of a corrective measure, such as prohibiting the procuring entity from taking a decision, or overturning or revising a decision of the procuring entity. Procurement systems also often provide for the payment of damages for breaches of procurement law by the procuring entity. Damages may comprise compensation for the loss or damage suffered such as the costs of participation in the tender procedure and/or the loss of expected profits.

A weakness in many procurement systems is the lack of effective remedies in situations where the contract has already been concluded. National procurement legislation may, therefore, provide for the possibility of setting aside contracts that have already been concluded, if they were the product of a flawed formation process. If this is not feasible, procuring entities could be obliged to pay penalty payments for having entered into public contracts in breach of public procurement law.

UNCAC sets out various consequences for corruption, which are also relevant in the area of public procurement. These include the annulment of a contract which was entered into as a result of corrupt behaviour, such as a bribe, and compensation for damages.

D. Further corruption prevention strategies in public procurement

Sound legal frameworks for public procurement and anti-corruption are important pillars in the fight to reduce corruption. Both are prerequisites for a transparent, competitive and objective procurement system. Respect for the rule of law is essential. Experience has shown, however, that legislation alone is not sufficient to prevent corruption in public procurement. If that were the case, corruption in public procurement would barely exist in countries with advanced legal regimes based, for example, on the UNCITRAL Model Law or the EU Directives.

It is essential that legal frameworks be supported by other efforts to ensure qualities such as accountability and integrity. Various additional strategies have proven to be particularly useful in fighting corruption in public procurement.

Integrity of public officials and bidder employees

Both the public sector and the private sector must ensure that only professional, honest, reliable and skilled staff who demonstrate integrity are involved in public procurement activities. Staff must be appropriately informed and trained on how to navigate through complex legal frameworks, such as public procurement and anti-corruption laws. A robust compliance programme that includes a code of conduct is considered important, to provide contractors and potentially public agencies a framework for following the law (see annex II below on how to implement robust compliance programmes in the area of public procurement law). Article 8 of UNCAC also calls for the implementation of codes of conduct for public officials.

Procurement personnel, in particular, exercise discretion throughout the entire procurement cycle. Efforts to limit the discretion of procurement officials with specific rules of operation have proven effective in curbing corruption. To this end, important decisions such as the approval of tender documents, the decision to reject a bid or the decision to award a contract to a particular bidder should be made by more than one person, or through a process that includes several informed stakeholders. The same is true for bidders. The decision, for instance, to partner with other companies when participating in a tender procedure or to set a final bid price, should be undertaken, or at least reviewed, by a group of people.

Exclusion, suspension and debarment⁵

As anti-corruption initiatives around the world gain momentum, one device for fighting corruption—debarment, or blacklisting, of corrupt or unqualified contractors and individuals—has emerged as an especially noteworthy tool. Governments and international institutions have developed their own debarment systems, to exclude contractors that have committed certain types of wrongs such as bribery or fraud or, more broadly, to exclude contractors that pose unacceptable performance or reputational risks because of bad acts or broken internal controls. Although UNCAC does not specifically cite debarment as an anti-corruption tool, the *Legislative Guide for the Implementation of the United Nations Convention*,⁶ notes that States parties should implement appropriate measures, such as debarment, to encourage compliance with UNCAC's anti-corruption requirements.

As debarment systems have matured in different countries, two broad models for debarment have emerged. The first is a highly discretionary approach, such as that used by the United States federal procurement system, under which a senior contracting official, acting on behalf of one or more government agencies, may exclude contractors because of almost any serious issue regarding contractor qualification. The alternative model, used by the World Bank (WB) in its sanctions system, is much more focused: under this approach, the reviewing officials act in an adjudicative manner, and a formal determination must be made as to whether the contractor in question has committed acts that qualify as grounds for debarment, under a specific list of prohibited acts. The EU Directives, for example, do not provide for a debarment regime, but for an ad-hoc approach of exclusion in which each procuring entity has to determine, on a case-by-case basis, whether or not a particular company is suitable and reliable or should be excluded from a public tender procedure.

Suspension or debarment from public contracts has proven to be an effective tool in the fight against corruption. Depriving private companies of the opportunity to do business with the government is likely to be one of the strongest deterrents for future wrongdoers, and it ensures that the government does not contract with those contractors that lack effective internal controls.

Collective action

Collective action, which is a collaborative and sustained process of cooperation of like-minded stakeholders, has become a concrete policy issue in the fight against corruption. This is particularly

⁵This discussion is adopted from Cross-Debarment: A Stakeholder Analysis, Christopher R. Yukins, to be published in the *Geo. Wash. U. Int'l L. Rev.*, 2013 (forthcoming).

⁶*Legislative Guide for the Implementation of the United Nations Convention against Corruption*, UNODC, 2006: 338.

true in the area of public procurement, where private companies, governments, international organizations, civil society, academia, etc. join forces to limit the opportunity for corruption in the business environment. The goal of this collective action is to create a level playing field for companies competing for government contracts. Public procurement processes should be transparent and exclusively based on market economic criteria, such as price, quality and innovation, so that the best bidder is awarded the contract and not the bidder who, for instance, paid the highest bribe. Collective action seeks to put this principle into action and to ensure that bidders competing for public contracts are not disadvantaged for acting honestly and ethically.

Despite the protective legal frameworks already in place, corruption in public procurement remains a challenge for governments and companies around the world. It is vital that all actors in society cooperate to counter corruption when taxpayers' money is spent awarding public contracts. All actors involved are required to build an alliance and to act collectively in the fight against corruption.

Governments should, therefore, implement UNCAC so that public procurement processes are conducted in a transparent and competitive manner, based on objective criteria. Companies competing for public contracts should implement effective compliance programmes in order to prevent corruption. Civil society should monitor the efforts governments and companies are making in order to fight corruption in a watchdog role.

There are various methods of collective action, the most important of which are integrity pacts, including anti-corruption declarations, principle-based initiatives and codes of conduct:

- **Integrity pacts:** Integrity pacts usually refer to a particular tender and include a written agreement between the procuring entity and all bidders agreeing to refrain from corrupt practices. A violation of the agreement is sanctioned (for instance, by penalty payments, right of exclusion for future tenders, damages, etc.). Frequently, an independent monitor is appointed to oversee compliance with the integrity pact.
- **Principle-based initiatives:** Public procurement processes are often very complex and this complexity plays an important role when it comes to corruption in the area of public procurement. Principle-based initiatives include the promotion of collective action methods, training and capacity-building programmes, information campaigns and best practice sharing. In particular, training programmes with the contributions of the public sector, the private sector and civil society explaining corruption risks in the procurement cycle and how to tackle these risks are vital so that anti-corruption efforts in public procurement are effective.
- **Compliance systems:** Compliance systems include business principles that reject corruption and put standards and procedures in place to ensure that the entity acts according to the legal requirements. A compliance system in the area of public procurement should not only focus on anti-corruption law but also on public procurement law. The content of the compliance system will be different if it is for the government or a private bidder, depending whether it relates to an entity which may pay a bribe or an entity receiving a bribe.

Civil society procurement monitoring

Civil society plays an essential role in monitoring procurement processes to ensure that public procurement is conducted in a transparent, competitive and objective manner. Civil society—be it a single citizen, media, a company, an NGO, academia, etc.—may identify possible improper public official action which may be the result of collusion between a public official and a bidder. For instance, a journalist may discover that the number of computers contracted and purchased for a public school was not delivered or that a procurement official is providing incomplete information to selected bidders in order to favour a certain company, which repeatedly wins contracts from the same procuring entity.

Civil society, therefore, frequently generates pressure against corruption in public procurement, leading to the penalization of corrupt actors.

In order to allow effective monitoring by civil society, access to government information is needed. Good practice in the area of public procurement suggests that information regarding awarded contracts, including the name of the contractor and the contract price, should be publically available, either through transparency measures or through access to information regimes.

Whistle-blowing

Whistle-blowing, the reporting of information about perceived corruption, has proven to be an important tool in the fight against corruption. In the area of public procurement, whistle-blowing by individuals directly involved in the procurement process is particularly important. Those persons involved in the process may be the only ones who have access to procurement documents, such as the evaluation report on the submitted bids, and therefore the highest potential knowledge of corrupt behaviour. In addition, these individuals usually possess the necessary technical and/or legal knowledge to notice corruption.

Whistle-blowing allows insiders to provide information to other individuals or organizations, such as the compliance officer within the corporate structure of a private company participating in a public tender or a public anti-corruption authority, so they can take the necessary steps.

In order to encourage reporting of corruption, it is absolutely essential to have effective whistle-blower protection systems in place.

E-procurement

E-procurement became a key component in the reform and modernization of public procurement frameworks in many countries worldwide. The use of electronic procurement can be very efficient in increasing competition and transparency, and can therefore greatly help in reducing corruption in public procurement.

E-procurement tools include the electronic publication of contract opportunities, the electronic distribution of tender documents and the electronic submission of bids. Importantly, all the tools of e-procurement (e.g. e-communication, e-submission, e-tendering, etc.) have one essential effect: they eliminate or minimize the direct human interactions between bidders and the procurement personnel, interactions which are one of the main sources of corrupt behaviour in public procurement.

E-procurement in the area of anti-corruption is also important for other reasons. In particular, e-procurement has the advantage of allowing for easy data generation and data management. This could in particular be helpful in the assessment of offered prices, to assess whether bid prices are reasonable and in line with market rates, such as by benchmarking collected data such as prices/price items in an electronic database with offered prices in a particular tender procedure in order to detect overpricing or bid rigging.

Electronic data collection and data management in the area of public procurement could also constitute an important tool in helping to comply with article 9 (3) of UNCAC, which requires its parties to preserve the integrity of its records, including accounting books or other documents related to public expenditure.

For all the reasons mentioned above, States parties to UNCAC adopted resolution 3/2 on preventive measures which invites States parties “to consider the use of computerized systems to govern public procurement”.⁷ The use of e-procurement is well suited to assisting countries to establish systems of public procurement based on the fundamental principles of transparency, competition and objective decision-making as required by article 9 of UNCAC.

⁷Conference of the States Parties to the United Nations Convention against Corruption, Resolution 3/2, para. 13, UNODC, 2009. <http://www.unodc.org/documents/treaties/UNCAC/COSP/session3/V0988538e.pdf>

CHAPTER III.

Public finance and public records:
requirements of articles 9 (2) and (3)
UNCAC

A. Introduction

A weak public finance management system leaves the door open for corruption. Corruption, in turn, can damage public finances, public confidence in the government and delivery of services to the citizens. To address this challenge, article 9 (2) of UNCAC requires each State party to take “appropriate measures to promote transparency and accountability in the management of public finances,” such as: (a) procedures for the adoption of the national budget; (b) timely reporting of expenditures and revenues; (c) a system of accounting and auditing standards and related oversight; (d) effective and efficient systems of risk management and internal control; and, (e) corrective actions to remedy non-compliance of UNCAC requirements where appropriate.

These provisions mark out the general means of preventing, monitoring and remedying corruption. While implementation requires technical measures in diverse subject matters, all of the measures are rooted in the principle of public money for public good.

B. Public finance management

Budget formulation and adoption

Article 9 (2) (a) of UNCAC calls for procedures for the adoption of the national budget. Since corruption diverts public funds to unlawful ends, a healthy public finance management system must begin with identifying the public fiscal’s legitimate aims. This process draws on how the laws and politics allocate fiscal powers and responsibilities among the executive, the legislature, other State entities, subnational governments and central banks. Indeed, with increased transparency in government, even non-governmental stakeholders, such as civil society, the private sector and international organizations, can play a part.

The division of fiscal powers begins with a basic legal framework comprising the constitutional provisions, statutes on public finance management, financial regulations and other frames of reference like accounting standards. Ideally, the country should have a budget law that addresses public finance management from the beginning to the end, including: powers and responsibilities for budget preparation, formulation, adoption, execution, accounting and auditing; key procedures such as budget timetables, reporting deadlines, the format of budget documents; and substantive requirements such as expenditure ceilings, treasury functions and public debt.

The main driver of budget adoption is the executive-legislature relationship. The executive is usually responsible for preparing the initial budget before presenting it to the legislature for adoption. During this process, officials and legislators can be swayed by corruption to earmark projects for their constituencies or to pad fiscal assumptions with room for future corruption. The legislature’s ability to examine, debate and amend the budget can check abuses by the executive agencies; however, there must also be constitutional and legal measures (e.g., balanced budget requirements) that check the legislature’s power against abuse.

Within the public finance management system itself, the budget can deliver at least a reality check: policy actions have a cost; the government has a limited bank account; and even honest spending choices may entail controversial trade-offs. To serve policy, the budget needs to be comprehensive. This requires the inclusion of a national chart of accounts, a budget classification system, macro-economic outlooks, all spending authorizations, extra-budgetary funds and activities, contingencies, and quasi-fiscal operations, just to name a few. Performance-based budgeting and a medium-term budget framework can help to account for long-term consequences. A comprehensive budget planning process helps to draw the line against the illegitimate shadow budgets that understate the government’s liabilities or conceal corrupt operations.

Timely reporting of revenues and expenditure

Article 9 (2) (b) calls for “timely reporting on revenues and expenditures.” Although the UNCAC text is silent on the subject, timely reporting is only meaningful if there is an effective budget and finance process that supplies the necessary information. Revenue administration and budget

execution are high-risk areas for corruption because cash changes hands in these stages. Corruption can erode budget expectations, through the evasion of taxes or tariffs, or because of diversion of funds from their intended expenditures.

In revenue administration, corruption brings in lower revenues. Red flags include high tax burdens, opaque laws and procedures, arbitrary exemptions, and a lack of monitoring and enforcement sanctions in collections and assessments. These suggest a potential for collusion between officials and tax evaders. To enact reform, a State should begin with an efficient and transparent tax system that minimizes intervention by officials. The linchpin of such a system is the self-assessment of liabilities by the taxpayer coupled with targeted and appealable reviews by the government. To that end, governments should ensure transparent tax obligations and liabilities, effective taxpayer registration and tax assessment, and effective collection procedures. Within the tax agencies, corruption needs to be controlled by a network of checks and balances which separate certain key functions (e.g., policy and enforcement), and which make officials monitor one another along the process.

In expenditure management, effective execution requires a series of controls to enforce the adopted budget. As with revenue administration, activities (contracts, debts and asset management) involving frequent transfers of money between the public and private sectors deserve scrutiny. Execution must follow the money along the expenditure cycle: allocation of appropriations, commitment, acquisition/verification for accepted services and goods, and payment. This multi-step system helps to deter corruption by dividing powers of payment among multiple officials. For each stage, depending on the transaction, the government also needs to limit officials' discretion with specific rules of operation and clear standards of review.

Timely reporting of revenues and expenditures tells oversight authorities whether the ministries are carrying out the budget as authorized. Whether ministries can deliver timely, complete, relevant, reliable and compliant financial reports, reflects on the health of the fiscal operations. To overcome the incentive of insiders to withhold information, the best practice is to mandate a schedule of release for fiscal documents, such as annual budget documentation and financial reports, mid-year reports, periodic budget execution reports, external audit reports and special reports such as pre-election reports.

Accounting and auditing

Accounting

Article 9 (2) (c) of UNCAC calls for a “system of accounting and auditing standards and related oversight.” While accounting and auditing offers no profit for corruption per se, poor or collusive accounting and auditing compound the harms of corruption by making it hard to detect. Thus, accurate accounting and independent auditing are essential backstops against corruption.

Timely reporting of revenues and expenditures requires the government to have a system to record and organize its financial information in the regular course of business. As with any other large private entity, a proper government accounting system needs:

- A double-entry ledger; adequate, clear and well-documented procedures for accounting and bookkeeping; a common expenditure classification system
- Consistent recording, reporting and reconciliation of accounts and transactions
- Adequate security and controls
- Disclosure of transactions under suspense accounts and accounting policies.

Unlike the private sector, the government also needs to track the lifecycle of appropriations through budgetary accounting. This differs from commercial accounting in its focus on compliance with the budgetary authorizations and on the underlying budget laws or appropriation acts.

The two current challenges to transparency are cash-based accounting and disparate national standards. A cash-based accounting system recognizes transactions only when the government

pays or receives money associated with the transaction. Cash accounting provides limited and often untimely information about the government's transactions, assets and liabilities. Yet, many countries still follow cash accounting and/or budgeting. As a result of cash accounting and divergent accounting standards, the international community often lacks a comparable basis to evaluate any given country's effectiveness and transparency in public finance management.

Auditing

A rigorous audit system includes a hierarchy of internal audits, external audits and legislative oversight. As a practical matter, it is the independence of the auditors, a mechanism for corrective action, and recourse to political oversight that ensure an effective auditing system.

As the first line of defence, the internal audit evaluates whether the organization is complying with internal standards, so as to assure managers that their objectives are being achieved and the organization's internal control environment is adequate. While the financial management unit for each government agency is typically responsible for the agency's internal audit, as well as the standards of its own agency, the internal auditor should also look to national and international standards. To encourage corrective action, the auditing group should build trust with management through clear and credible findings and cost effective recommendations before undertaking any recourse to external oversight.

Nonetheless, the internal audit is often constrained by its management environment, the evaluation of which is best left to the agency's external auditors, e.g., the supreme audit institution. The supreme audit institution generally centres its work on the regularity audit of the financial accountability of individual agencies and of the government as a whole, systemic public finance management issues, financial systems and transactions, internal controls and audit functions. The institution may also conduct performance audits, compliance audits on the legality of specific transactions, and attestation audits on the integrity of the administration and accuracy of the financial report data. Ultimately, the legislature can exercise oversight during the course of a fiscal year through a general oversight committee, such as a public accounts committee, or even through regular legislature committees that have programmatic or budgetary oversight over specific agencies.

In the end, an audit is meant for assurance, not insurance. Auditors only check the standards, and do not design or implement them. Given the human, financial and political resource constraints on auditors, a government may need to design a system of controls and strategize risk management to set the proper foundation for the auditors' work.

Internal controls and risk management

Article 9 (2) (b) of UNCAC calls for an "effective system of risk management and control," which is essential to detecting and controlling fiscal irregularities. Internal controls can be preventive measures to enforce budget authorizations, policy priorities and other laws and regulations governing public finance management. These include the separation of duties, hierarchies of approvals and reviews, cross-monitoring among independent actors, accounting controls, documentation requirements and personal certification. Controls can also be remedial measures to catch and fix problems during execution, such as financial reporting, performance monitoring, protection of whistle-blowers and internal audits.

Controls of revenue administration should help to prevent the diversion of anticipated revenues caused by collusion between the taxpayer and the tax official. An effective system of taxpayer self-assessment requires not only cross monitoring within the tax agency from assessment to collection, but also empowering the taxpayer through education, transparency of liabilities, limitations on official discretion and appeal rights. In particular, governments may also need to target specific sectors susceptible to collusion, such as customs, defence or natural resources. For example, in cases of a resources curse, where countries suffer poverty despite a wealth of natural resources, revenue accountability requires a targeted fiscal regime that sets out national ownership of the resources, with clear procedures for developing rights, transparency of the payment streams and limits on official discretion and negotiation.

Expenditure management harbours risks such as unauthorized commitments, irregular payments and sham transactions that deviate from the budget's policy objectives. Typical controls that are employed to address this are: budgetary accounting; alignment of commitments with funds availability; controls on the use of appropriations before committing funds (e.g., the amount, the time period of availability, and the purpose of funds); requirements for periodic reconciliation of accounts; and tripwires for fraud and abuse. Additional deterrents are criminal penalties against officials who incur unauthorized commitments and the provision of protection and incentives for whistle-blowing. This kind of regime of fiscal protections slows corruption and eases accountability, but makes it more difficult to use other fiscal strategies, such as extra-budgetary funding, tax expenditures, quasi-fiscal activities and contingent liabilities, even when they may have justifiable bases.

Predictably, though, these protective measures can become merely perfunctory unless governments: (a) pinpoint activities prone to corruption in the country; (b) decode incentives (poor pay, peer pressure, easy access to funds, etc.) for corruption; and (c) based on this information, apply controls to defuse opportunities for collusion. Given the size of most governmental organizations, the central authority cannot watch everyone. For the sake of efficiency, governments must empower line officials to watch one another, and provide incentives for them to report problems rather than collude.

Still, even the most prudent controls do not eliminate risks such as shifts in commodity prices and exchange rates, natural disasters and market failures. In more extreme cases, crisis management will entail overrides of the budget process by emergency solutions, reshuffling of political powers and systemic changes to the public finance management. While these measures do not necessarily lead to corruption, emergency powers, to the extent they dispense with regular discipline, can be abused.

To prevent such abuse requires limiting the recourse to emergency powers and contingency budgets, i.e., by distinguishing true crises from more predictable calamities. For the more foreseeable uncertainties, governments can manage with concrete measures such as standardized disclosures of contingent liabilities, risk sharing with counterparties, financial hedging and the institution of fiscal rules. Even in the case of true crises, the government can still set a basic order of business to absorb the impact on fiscal discipline by: (a) assigning roles and responsibilities within government to manage contingencies; (b) incorporating fiscal risks into budgetary forecasts and internalize the costs of contingent liabilities; and (c) adopting procedures and prescribing conditions for contingency appropriations. This kind of response is not a one-time effort, but part of a proactive adaptation to the economic cycle and a commitment to fiscal sustainability over the long term.

Corrective actions

The final provision on public finance, article 9 (2) (e), mandates corrective action in the case of “failure to comply with the requirements established” in article 9 (2) (a)-(d). As the requirements in these paragraphs concern different stages of public finance management, proper corrective actions require pinpointing the responsible officials and the applicable level of government. Generally, effective corrective action requires both sound recommendations and their enforcement. Most often, literature in this field discusses corrective action as a response to audits where sound recommendations depend on the audit and the auditors; however, without enforcement, the recommendations only make for good advice. Enforcement requires personal deterrence, such as sanctions against the wrongdoers and other responsible officials who fail to take corrective actions and oversight from the legislature, the media and the public. By its power in controlling the spending of government resources, the legislature can hold agencies accountable through investigations, hearings and threats of budget reduction based on audit reports and other outside information.

C. Integrity of records

Article 9 (3) of UNCAC requires each State party to “take such civil and administrative measures as may be necessary [...] to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the

falsification of such documents.” The integrity of records helps to provide accurate information for fiscal forecasting and establishes an audit trail to deter corruption. The International Standard on records management, ISO 15489-1,⁸ as established by the International Organization for Standardization, prescribes authenticity, reliability, integrity and usability as the essential characteristics of a record. With regard to integrity, ISO 15489-1 describes the necessary controls over “access monitoring, user verification, authorized destruction and security” to prevent tampering. For financial records in particular, the International Records Management Trust (IRMT) has developed a reference model and assessment tools based on ISO 15489-1 and other standards for the public sector. They expand the bare requirements of records retention into a system of personnel, controls, contingencies and facilities, and even model legislation.

More recently, electronic technologies have changed the basic model and security requirements of record keeping. Governments may have to choose whether to start afresh with electronic systems now, or to phase in electronic records technology later while keeping the old manual system.

To ensure that any entity spending public funds complies with the same requirements, in the very least governments need to incorporate record-keeping requirements in various agency agreements with such an entity. Ensuring the integrity of records also requires external safeguards. There should be, as many countries have established, specific criminal and civil statutes governing unauthorized destruction or tampering with public records. Litigation procedures can also impose sanctions for destroying, whether inadvertently or intentionally, evidentiary documents required by the court, fact-finders or litigants. The Convention on the Protection of the European Communities’ Financial Interests requires member states to adopt laws criminalizing fraud involving false statements and documents that lead to misappropriation and diminution of budgets and resources of the EU Communities. Finally, some countries have enacted Freedom of Information Acts which allow members of the public to request the disclosure of government information. The best way, and in some cases the cheapest way, to preserve the integrity of records may be to publish them.

D. Compliance and assessments

The requirements under UNCAC are quite general and leave a great deal of flexibility to the State party. A number of other international organizations have developed several comprehensive frameworks to assess national public finance systems over the past two decades based on the same principles of internal discipline and external oversight. For example, the International Monetary Fund (IMF)’s *Code of Good Practices on Fiscal Transparency*⁹ rests upon four core principles: clarity of roles and responsibilities, open budget processes, assurances of integrity and public availability of information. The IMF assesses countries on observance of its Code of Good Practices on Fiscal Transparency through Reports on Observance Standards and Codes (ROSC) based on the four main principles mentioned above. The ROSC also looks at non-budgetary indicators such as current reforms, the legal framework, conduct of officials and fiscal sustainability. In partnership with the IMF, the World Bank has also conducted ROSCs on a country’s general accounting and auditing standards and practices, measured against International Financial Reporting Standards (IFRS) and International Auditing Standards (IAS).

Another set of international standards is the Performance Measurement Framework under the Public Expenditure and Accountability (PEFA) Program (PEFA Framework),¹⁰ developed by OECD, the World Bank and aid organizations from donor countries to evaluate effective budgetary performance. The PEFA Framework aims to provide a baseline for identifying reforms. The Program has six key indicators: credibility of the budget-based actual expenditures and original budget; comprehensiveness and transparency; policy-based budgeting; predictability and control

⁸ISO 15489-1: 2001, Information and Documentation – Records Management, International Organization for Standardization, 2001. www.iso.org

⁹IMF’s *Code of Good Practices on Fiscal Transparency*, International Monetary Fund, 2007. <http://www.imf.org/external/np/pp/2007/eng/051507c.pdf>

¹⁰Performance Measurement Framework, Public Expenditure and Accountability Program, 2011. <http://www.pefa.org/en/content/pefa-framework>

in budget execution; accounting, recording and reporting; and external scrutiny and audit. They help to measure the public finance management's ability to "deliver efficient and effective outcomes" in the six key indicators and addresses fiscal transparency in relation to the overall efficacy of public finance management.

Both of these frameworks provide starting points for implementing the provisions of UNCAC because they give actionable guidance for national governments and have country data on compliance with these frameworks. However, complying with multiple standards can be costly and even complicated for a government. Implementing the Convention may be another opportunity to build on existing initiatives and integrate different best practices.

Checklist for meeting minimum requirements set out by article 9 (2)-(3) of UNCAC

Article 9 (2)-(3) of UNCAC set out the general parameters for shaping national legislation to reflect transparency and accountability in the management of public finances. These provisions of UNCAC focus primarily on identifying a number of measures which can be used to comply with this requirement.

In order to assess the effectiveness of national measures taken to promote transparency and accountability in the management of public finances, annex II provides a set of questions that will assist States parties in determining whether the public finance management system of a party to UNCAC is in compliance with article 9 (2)-(3) of the Convention.



CHAPTER IV.

Case examples

This chapter contains selected case examples, including good practices and lessons learned. These case examples were discussed during the second expert group meeting on transparency, competition and objectivity in public procurement, sponsored by UNODC and held at the International Anti-Corruption Academy from 21 to 22 May 2013 in Laxenburg, Austria.

A. The use of electronic government procurement to fight corruption—a case example from Georgia

The country Georgia is one of the first countries in the world in which paper-based tender procedures in the area of public procurement have been eliminated. Since this reform, all tender procedures have been carried out electronically through the Georgian Electronic Government Procurement system (Ge-GP). The reform making electronic tender procedures the exclusive means aimed to promote:

- *Transparency*: ensure transparency for citizens regarding the expenditure of state resources and make documents relating to tender procedures and contracts awarded easily available to the public.
- *Non-discrimination*: introduce tender procedures in which all interested bidders, including foreign bidders, have equal opportunities.
- *Fair selection*: guarantee fair qualification/disqualification of bidders based on objective criteria according to a transparent evaluation system.
- *Simplified procedures*: simplify tender procedures and remove administrative barriers, as paper-based tenders involved complicated procedures and were deemed to be a waste of both time and material resources, making many companies reluctant to participate in public tenders.
- *Getting rid of paper*: ensure that documents submitted to the procuring entity are a reliable source of information, to be handled efficiently by the procuring entity. It was important to make documents relating to tender procedures easily available to the public.

The main benefits of the Ge-GP are its simplicity and transparency. Registration to participate in the system is very straightforward. Any information related to State procurement is accessible in the Ge-GP system for any interested person. This information includes: annual procurement plans; tender notices; estimated procurement values; tender documentation including amendments and corrections; bids of suppliers, bidding documents and bid prices; minutes of tender commission meetings and correspondence exchanged with the suppliers; contracts awarded; decisions of the tender evaluation commission; information about payments made; and all other relevant correspondence.

According to data provided by the government of Georgia, the number of public tenders in Georgia rose remarkably due to the introduction of the Ge-GP. In addition, overall in 2011, with the introduction of the Ge-GP system, it was possible to save GEL 191,487,127 in the budget. In 2012, GEL 155,610,107 was saved, which amounted to approximately 10 per cent of the estimated net value of public contracts.

Procurement procedures became more transparent due to the Ge-GP, providing equal opportunities for bidders across the country/region. Approximately 200 foreign bidders have been awarded more than 50 contracts.

Any person may file electronic complaints, which are reviewed by the Dispute Resolution Board, which includes members of the Competition and State Procurement Agency and NGO representatives. This procedure greatly simplifies the appeal process, makes dispute resolution more transparent, and increases public engagement in the state procurement processes.

The Ge-GP has resulted in a tremendous increase of transparency of all information to all stakeholders and of competition in public tenders. Although the Ge-GP was introduced only recently, Georgia reports that the level of corruption has already been reduced. In 2012, the United Nations recognized the Ge-GP as one of the best tools in “Preventing and Combating Corruption in Public Service” worldwide.

B. The transparent town of Martin—a case example from Slovakia¹¹

Martin, a district town located in northern Slovakia chose to carry out a pioneer anti-corruption project in 2008. The project, called the “transparent town”, maximizes the level of transparency in municipal administration and minimizes the room for corrupt behaviour at the same time.

Before implementing the project, the town Martin, according to an audit carried out by TI Slovakia, showed unsatisfactory levels of transparency in almost all of its policy areas, including public procurement. The public had had only very limited options to control its elected representatives or town hall employees, particularly in the area of awarding public contracts. Contracts had previously only been awarded to a small group of contractors and were heavily overpriced. Furthermore, the mayor himself had been approached by a number of bidders who tried to pressure and corrupt him in order to win public tenders.

Under the project, the town of Martin voluntarily initiated standards in the area of public procurement, which go far beyond the mandatory legislative framework. One of the key measures was the implementation of an e-procurement platform which provides for the possibility of electronic auctions into the process of procurement. To make procurement fully transparent, all information regarding public tenders is available on the Internet.¹² After the launch of electronic auctions to award public contracts, the prices of the winning bidders have gone down rapidly; with the cost savings amounting to approximately 25 per cent in the first year of operation.

The electronic platform lists public tenders, and also all concluded contracts, including the name of the winning company and the offered price, as well as invoices and amounts paid by the town of Martin.

The electronic platform can be openly accessed and, therefore, provides an efficient tool for the public to monitor the activities of the town of Martin when awarding public contracts.

In 2011, the United Nations recognized the project the “transparent town” as one of the best tools in “preventing and combating corruption in public service” worldwide.

C. An independent monitor as a tool to fight corruption —a case example from Austria

Austria is about to renovate the Austrian Parliament building, a landmark building in Vienna from the 19th century. The estimated costs for this project are EUR 500 million. The project environment is considered to be technically and logistically highly complex. Furthermore, it comes on the heels of very negative experiences due to significant delays and cost-over-runs in connection with recent large-scale building projects in Austria. Over the last couple of years, Austria has also been facing a variety of corruption scandals in the area of public procurement and there are negative perceptions among the public with regard to corruption in Austria.

For all these reasons, the Austrian Parliament decided to conduct this renovation project with the highest degree of transparency possible. To this end, it was decided to make communication and information open during the entire project, including through press releases, information on a website, conferences and one-to-one communication with interested parties.

Of significance, the Austrian Parliament decided to cooperate with the Austrian Chapter of TI to prevent any corruption in the project. It was agreed that an instrument similar to the TI Integrity Pact be adopted and applied. The Integrity Pact is a formal agreement between a government entity and those companies submitting a tender for a specific project who agree to conduct a public tender in accordance with the highest ethical standards possible.

¹¹ The below text is adapted from The United Nations Public Service Award, United Nations Public Service Programme, http://unpan3.un.org/unpsa/Public_NominationProfile.aspx?id=1030

¹² Further information on public tenders in Martin available at www.transparentnemesto.sk

To ensure accountability, TI Austria nominated an external, independent lawyer who is specialized in compliance and anti-corruption and appointed by the Austrian Parliament as an independent monitor to oversee selected tender procedures relating to the renovation project. The independent monitor has extensive powers, including the following:

- Right to review all published and non-published documents in connection with the public tenders;
- Right to participate in all meetings of the various committees in the tender process (e.g., evaluation meetings);
- Right of access to all documentation and electronic data.

The independent monitor reports to the project management and, directly to the President of the Austrian Parliament, if necessary. In case of the breach of a law such as the anti-corruption law, the independent monitor has not only the right, but the obligation to inform the respective Austrian judicial authorities.

While the project is not yet completed, as an intermediate conclusion, the Austrian Parliament considers that the cooperation with the independent monitor has been positive. One of the main benefits has been an institutionalized safeguard against corruption, including an effective means of counteraction in case of any allegations. In this way, the independent monitor also provides safety and security for the project management. While cooperation with the independent monitor naturally involves costs (the direct costs of paying the independent monitor's fees as well as the indirect costs of involving him in the tender process), it is felt that these costs are outweighed by the benefits of having the independent monitor, given the high-profile nature of this project and the potential actual and reputational costs of corruption.

D. Social witnesses in the area of public procurement —a case example from Mexico

Mexico has introduced a social witness programme in the area of public procurement. This programme is a central pillar of the Mexican federal public procurement system and has made a considerable contribution towards transparency and integrity in public procurement processes in Mexico. It was initially a voluntary programme that became legally binding in 2009 under certain conditions (e.g., for public procurements exceeding a certain threshold level or when the impact of a project is stated to be significant).

A social witness is a representative of civil society, such as a trusted individual, organization or company with appropriate experience, knowledge and recognized moral qualities, that participates in selected public procurement processes as an external observer. The criteria for becoming a registered social witness are rigorous and, besides experience and knowledge, potential conflicts of interests and criminal convictions are considered.

The responsibilities of social witnesses can be far-reaching, from review of draft tender documents, to participation in the opening of the bids and evaluation meetings, to on-site visits at the place of performance.

A social witness is allowed to propose any improvements regarding the tender procedure that might foster efficiency, transparency, impartiality and the fight against corruption, such as those concerning minimum selection or award criteria. Social witnesses must issue a publicly available report on the procurement procedure, which contains their assessment as well as recommendations. Social witnesses are required to alert authorities if they detect any irregularities in the procurement process.

The social witness programme is publicly funded; a social witness is paid an hourly fee plus expenses.

Various individuals and organizations have participated in hundreds of public procurements valued at many US\$ billion so far. Experience and research have shown that the social witness programme has a positive impact on transparency, competition and objectivity in public procurement, and is therefore a valuable tool in the fight against corruption.



Annex I.

Other standards and policies available
from other international organizations

A. Introduction

An appropriate system of public procurement, as required under article 9 (1) of UNCAC, is considered to be a core part of any government programme. Due to the volume of public funds spent on public procurement and the multiple negative effects of corruption in public procurement, several international organizations, in addition to UNODC, promote the implementation of appropriate systems of public procurement.

In this regard, the UNCITRAL Model Law, the WTO GPA and the EU Directives play the most important role from a legislative perspective. While the comprehensiveness of the rules framing an efficient procurement system varies significantly in these instruments, the same principles underpin all of the rules set out. All the texts are designed to promote procurement systems based on the cornerstone principles of transparency, competition and objectivity in decision-making, as required under article 9 (1) of UNCAC.

Besides these international texts on public procurement, the World Bank and other international financial institutions have developed guidelines on public procurement. Other organizations, such as the Organisation for Economic Co-operation and Development (OECD) and Transparency International (TI), have developed important tools for fighting corruption in public procurement.

This chapter will briefly discuss these international texts and publications.

B. UNCITRAL Model Law on Public Procurement

The UNCITRAL Model Law is, internationally speaking, one of the most commonly recognized public procurement codes. One of the main purposes of the UNCITRAL Model Law is to serve as a template available to national governments seeking to introduce or reform national public procurement legislation.

The UNCITRAL Model Law is available online.¹³ It reflects best practice in the area of public procurement from around the world and allows governments to adapt it to local circumstances. For these reasons, many countries have based their public procurement legislation on the UNCITRAL Model Law.

The UNCITRAL Model Law is supplemented by a comprehensive tool—the Guide to Enactment.¹⁴ The purpose of this Guide is to provide background and explanatory information on policies in the UNCITRAL Model Law, to discuss objectives and to advise on options in the UNCITRAL Model Law. The Model Law, and its accompanying Guide to Enactment, have been used extensively as a benchmark for assessing procurement laws around the world. The Model Law was revised in 2011 and is intended to conform to the requirements of UNCAC.

The UNCITRAL Model Law is predicated on the familiar principles of: (a) achieving economy and efficiency; (b) widespread participation by suppliers and contractors, with procurement open to international participation as a general rule; (c) maximizing competition; (d) ensuring fair, equal and equitable treatment; (e) assuring integrity, fairness and public confidence in the procurement process; and (f) promoting transparency. It regulates, in detail, the elements provided for in article 9 (1) (a)-(d) of UNCAC to establish the required appropriate systems of procurement.

These basic principles in the UNCITRAL Model Law are also reflected in article 9 (1) of UNCAC. Given that the UNCITRAL Model Law thus implements the requirements set forth in article 9 (1) of UNCAC, it can be considered that, in principle, a country basing its national public procurement legislation on the UNCITRAL Model Law will, at the same time, comply with the requirement that it establish the legislative framework for an appropriate system of procurement as set forth in article 9 (1) of UNCAC.

¹³UNCITRAL Model Law on Public Procurement, UNCITRAL, 2011. http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html

¹⁴Guide to Enactment of the Model Law on Public Procurement, UNCITRAL, 2012. http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html

C. WTO Government Procurement Agreement

The WTO GPA is a multilateral agreement within the WTO system which provides a framework for the conduct of international trade with governments. Current WTO GPA parties are: Armenia, Canada, the European Union (including its 28 Member States), Hong Kong SAR of China, Iceland, Israel, Japan, Liechtenstein, the Netherlands with respect to Aruba, Norway, Republic of Korea, Singapore, Switzerland, Chinese Taipei and the United States.

Its principal objective is, through non-discrimination obligations, to open up procurement to international competition and, in this context, it requires its parties to ensure the conformity of their laws and regulations with the WTO GPA obligations. It also promotes good governance and the achievement of value for money in national procurement systems. The WTO GPA regulates, in detail, the measures set out in article 9 (1) (a)-(d) to establish the required appropriate systems of procurement.

The WTO GPA, based on its principal purpose of opening-up national public procurement markets, promotes transparency and competition in several ways. Since there is an obligation to provide for a framework that ensures non-discriminatory competition between suppliers, WTO GPA parties are therefore required to use objective criteria in decision-making.

D. EU Public Procurement Directives

The EU Directives are intended to be implemented by the 28 EU Member States (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom) as part of progressive EU legal harmonization. The Directives cover the fundamental principles of procurement processes and transparency and countries are required to apply these fundamental principles when awarding public contracts, particularly concerning non-discrimination, equal treatment, competition and transparency.

It may be argued that the EU Directives establish the most developed public procurement system encompassing different countries worldwide. Their main purpose is to remove barriers to trade which, in the context of public procurement, requires the elimination of any restrictive access to public contracts within the EU.

The legal regime, as established by the EU Directives, is built upon various fundamental principles, which have been developed by the Court of Justice of the European Union (EJC) over the years. The principles of transparency and fair competition, as well as non-discrimination and equal treatment are among the most important principles. The EU Directives regulate, in detail, the measures contemplated by article 9 (1) (a)-(d) of UNCAC to establish the required appropriate systems of procurement.

E. World Bank/International Financial Institution Guidelines

Another source of guidance for anti-corruption efforts in public procurement is provided by the guidelines from the World Bank and other international financial institutions. Borrower nations must generally conform with these guidelines in order to qualify for financing. These institutions routinely impose minimum procurement rules to ensure transparency, competition and integrity in the projects they fund, in order to ensure that the Banks' money is well spent.

A procuring entity which complies with the requirements set out in these guidelines will, therefore, generally comply with the requirements which are necessary in order to establish an appropriate system of procurement as set forth in article 9 (1) of UNCAC.

F. OECD Procurement Assessment Tools and Principles for Enhancing Integrity in Public Procurement

OECD encourages sound governance and, in this regard, it encourages governments to reform their public procurement systems to enhance integrity in public procurement.

In doing so, OECD has developed a number of important recommendations and publications which map corruption risks throughout the entire procurement cycle. These documents serve as an important tool to foster better practice in public procurement. The most important OECD publications in this regard are: *OECD Principles for Integrity in Public Procurement*, *Policy Brief – Keeping Government Contracts Clean*, *Guidelines for Fighting Bid Rigging*, *Integrity in Public Procurement: Good Practice from A to Z*, *Bribery in Public Procurement: Methods, Actors and Counter-measures and Fighting Corruption and Promoting Integrity in Public Procurement*.¹⁵ In cooperation with the European Union, the OECD sponsors the work of Support for Improvement in Governance and Management (SIGMA), which is a research organization that has developed a number of briefs and guidelines on the interpretation of the complex EU public procurement regime.¹⁶

G. Transparency International

TI, a leading non-governmental organization in battling corruption, is also very active in the field of public procurement. It has developed a number of important tools to assist in reducing corruption in government contracts.

TI's integrity pacts, referred to above, are agreements entered into between the governmental procuring entity and all bidders in which all of the parties pledge not to engage in bribery or collude with competitors during the formation or administration of a contract. These pacts also require that a monitoring system is put in place to ensure compliance. TI has also produced various publications dealing with the challenge of overcoming corruption in the field of public procurement. The most comprehensive in this regard is the *Handbook for Curbing Corruption in Public Procurement*.¹⁷

¹⁵Relevant OECD materials available at <http://www.oecd.org/gov/ethics/integrityinpublicprocurement.htm>

¹⁶SIGMA research reports are available at <http://www.oecd.org/site/sigma/publicationsdocuments/publicprocurementpublications.htm>

¹⁷*Handbook for Curbing Corruption in Public Procurement*, Transparency International, 2006. http://www.transparency.org/whatwedo/pub/handbook_for_curbing_corruption_in_public_procurement



Annex II.

Checklist for meeting minimum requirements set out by article 9 of UNCAC

A. Introduction

Article 9 (1) of UNCAC sets the general parameters for shaping national legislation on procurement. It outlines selected measures which can be used to comply with the Convention's call for appropriate systems of procurement "based on transparency, competition and objective criteria in decision-making that are effective, inter alia, in preventing corruption".

Article 9 (2)-(3) of UNCAC set out the general parameters for shaping national legislation to reflect transparency and accountability in the management of public finances. These provisions of UNCAC focus primarily on identifying a number of measures which can be used to comply with this requirement.

In order to assess the effectiveness of national public procurement legislation in curbing corruption, this appendix provides a set of questions that will assist States parties in determining whether their procurement system is in compliance with article 9 (1) of UNCAC.

In order to assess the effectiveness of national measures taken to promote transparency and accountability in the management of public finances, this annex also provides a set of questions that will assist States parties in determining whether the public finance management system of a party to UNCAC is in compliance with article 9 (2)-(3) of the Convention.

B. Checklist for meeting minimum requirements set out by article 9 (1) of UNCAC

General

- (1) Is the State's national public procurement legislation based on other international texts in the area of public procurement (e.g., the UNCITRAL Model Law)?
- (2) Is the State a party to an international text on public procurement (in particular the WTO GPA or the EU Directives)? Is it in conformance?
- (3) Is the State's procurement system in conformance with procurement guidelines drafted to combat corruption, such as those published by the Organisation for Economic Co-operation and Development (OECD)?

Public distribution of information and publication of conditions for participation [article 9 (1) (a)-(b)]

- (4) Are the existing laws, regulations and policy guidelines on public procurement publicly available?
- (5) Do contract opportunities have to be publicly published? If so, are there any restrictions for low-value procurement?
- (6) What is the minimum content of an invitation to tender?
- (7) What is the minimum content of tender documents?
- (8) Is a procuring entity only allowed to enter into a contract on the basis of pre-disclosed criteria?
- (9) Is there any obligation to set out the manner of application for the selection and award criteria in the invitation to tender or the tender documents?
- (10) Is there any obligation that minimum, selection and award criteria must be relevant and appropriate in the light of the subject matter of the procurement?

- (11) Does your country's procurement law address the consequences for when a bidder is insolvent, bankrupt or in the process of being wound up or has not fulfilled its obligation to pay taxes or social security contributions?
- (12) Does your country's procurement law address the consequences for when a bidder submits information that is false, inaccurate or incomplete?
- (13) Are the minimum requirements and the terms and conditions of the procurement required to be disclosed in advance?
- (14) Is it permissible to use for the description of a particular procurement a trademark or trade name, patent, design or type?
- (15) How is the involvement of a bidder in the preparatory stage of a public contract dealt with?
- (16) What is the minimum deadline for the submission of requests for proposals (in a two-stage tender procedure) and submission of bids?
- (17) Are there reasons specified as to why (minimum) timelines may be shortened?
- (18) Do bidders have the right to request clarification of tender documents?
- (19) Do bidders have the right to attend bid opening sessions?
- (20) Are procuring entities permitted to make use of electronic communications?
- (21) Do bidders have the right to correct an error regarding a submitted bid?
- (22) Are there any rules on non-responsive tenders?
- (23) Does your country's procurement legislation list grounds for the rejection of tenders (e.g. the bidder is not qualified)?
- (24) Is the procuring entity allowed to cancel a procurement procedure? If so, does the procurement legislation list possible grounds for such a cancellation?

Use of objective and predetermined criteria for decision-making (article 9 (1) (c))

- (25) Is there a default method of procurement?
- (26) Is there any obligation to justify reasons for using procurement methods other than open tender procedures?
- (27) Is it permissible to enter into a contract without any prior call for competition? If so, under what circumstances?
- (28) What is the procedure in the event that no responsive bids were submitted?
- (29) Is it permissible to negotiate the contract in the course of the tender procedure? What are the prerequisites for such negotiations?
- (30) Does your public procurement legislation set out selection criteria and award criteria or any weighting a particular criterion must have (for instance, the price)?
- (31) Are there any rules regarding technical specifications?
- (32) Does your country's public procurement regime allow for price preferences and domestic-only procurement?

- (33) Is it permissible to change the tendering rules or the selection/award criteria during the procuring procedure? If so, are there any limits to such changes?
- (34) Is it possible to reject abnormally low tenders due to the risk of non- or substandard performance?
- (35) Is a procuring entity required to disqualify a tender if the bidder offers to bribe or bribes any public official of the procuring entity?
- (36) Is the procuring entity required to disqualify a tender if the bidder is convicted by final judgment of corruption or fraud?
- (37) Can a contract be renegotiated after the contract award? If so, are there any limits as to what extent a contract may be subsequently changed?
- (38) Are procuring entities required to keep a record of each procurement? If so, what is the minimum content of such procurement record? How long must procurement records be preserved and who has the right of access to these records?
- (39) Is there any obligation to provide reasons for the rejection of a tender?
- (40) To whom are the decisions of a procuring entity to be disclosed (for instance, a decision to reject a bidder or the award decision)? Is there any minimum content of such decisions (for instance, the price or the relative advantages of the bid of the winning bidder)?

Effective systems of domestic review (article 9 (1) (d))

- (41) Does your country's procurement system establish or designate at least one administrative or judicial authority responsible for review in public procurement?
- (42) Does your country's system of review in public procurement include a system of appeal of the official decisions of the review body of first instance?
- (43) Is an application for review of a public procurement decision heard by a body which is independent of the procuring entity?
- (44) Which decisions of a procuring entity are subject to review?
- (45) Who has the power to file an application for review? Does it include any supplier who has, or has had, an interest in a particular contract?
- (46) Does your country's system of review in public procurement set out any deadlines within which a supplier must prepare and submit a challenge?
- (47) Does your country's system of review in public procurement require a supplier to pay any fees to file a complaint and to have a review body decide? If so, what is the amount of such fee?
- (48) Which remedies are provided for in your country's system of review in public procurement (interim measures, corrective measures, damages)?
 - a. If both corrective measures (e.g., setting aside or annulling a procurement decision) and damages are provided for, is it possible for both types of remedies to be awarded?
 - b. May compensation be limited (e.g., either to the cost of the preparation of the tender or the cost relating to the challenge or both)?

The responsibilities of procurement personnel (article 9 (1) (e))

- (49) Does your country's system of public procurement lay down any measures regulating matters regarding procurement personnel?
- Are there any screening procedures regarding procurement personnel? If so, do such screening procedures apply during the selection of the personnel and/or throughout their employment?
 - Are there any requirements as to the training of procurement personnel? Does this training cover how to award contracts in line with the relevant public procurement legislation or how to award a contract in line with the relevant anti-corruption laws?
 - Are procurement personnel required to declare any interests in a particular public procurement (e.g., due to a possible conflict of interest)?
- (50) Are codes or standards of conduct for correct, honourable and proper performance by procurement personnel required by law?

C. Checklist for meeting minimum requirements set out by article 9 (2)-(3) of UNCAC

Adoption of the budget (article 9 (2) (a))

- What is the timetable for preparing and presenting the budget to the legislature? Does the legislature have a legal deadline in which to pass the budget?
- What are the voting procedures (e.g., aggregate ceilings voted on before individual appropriations)? To what extent, if at all, and when can the legislature amend the budget?
- What laws and procedures specify the format of the budget or the type of information required as part of the submission to the legislature? Does the legislature have budget analysis staff?
- Which government operations are not funded through appropriations?
- What is the accounting treatment of quasi-activities such as government participation in private enterprises, guarantees of third-party obligations and securities holdings?
- Is there a requirement for the disclosure of personal financial interests, recusal from budgetary proceedings, and divestiture of conflicted interests of officials?

Timely reporting of revenues and expenditures (article 9 (2) (c))

- Which budgetary and financial documents must the executive release to the legislature and/or the public? Is there a mandatory schedule for publication and sanctions for failing to meet the deadlines?
- What are the sources of revenues for the government? How are they assessed and collected?
- Are the laws and regulations on taxation, custom duties and other assessments available to the public? How do the laws define tax evasion? What are the penalties for committing or aiding and abetting tax evasion?
- How are tax agents and collectors paid, evaluated and trained?

- (11) What are the requirements for committing and releasing funds? Are payments made out of central treasury account(s) or directly through individual agency accounts? Which institution serves as the central government's fiscal agent?
- (12) What are the limits on transfers across appropriations, allotments or other expenditure accounts?
- (13) Do top and mid-level officials have special borrowing or contracting powers apart from appropriations and procurement regulations? What are the limits on spending and time limits on the agency's emergency expenditures and credit cards?

Accounting and auditing (article 9 (2) (c))

- (14) Does your country have proprietary and budgetary accounting systems? Are these systems cash or accrual based?
- (15) How are accountants and auditors accredited and trained?
- (16) How are compensation, training and operations of internal and external auditors funded? Who supervises and evaluates the performance of the auditors? What are the hiring and firing procedures for auditors?
- (17) What procedures and laws govern communications between: (a) the internal auditors and the external auditors; (b) the auditors (internal or external) and the legislature?
- (18) What are the security protocols for accessing financial information systems? What are means of certifications (stamps, signatures, etc.) and who maintains them? How are documents authenticated?
- (19) Is there civil and/or criminal liability for false statements to the auditors and/or legislature during audits, investigations and hearings?

Internal controls and risk management (article 9 (2) (d))

- (20) Who designs, implements and reviews the agency's internal controls? How often and by what means do agencies update the controls and provide trainings?
- (21) Do managers have to personally certify payment orders, financial reports, etc.? What is the extent of their liability for financial wrongdoing by subordinates, and vice versa?
- (22) Are the internal auditor's office, systems and files segregated from the rest of the agency? Do they share common services?
- (23) Are there anonymous channels, whether inside or outside the agency, to report suspected wrongdoing? Who processes the reports that are received? How is it decided which reports will trigger internal investigations? What are the protections, incentives and immunities for whistle-blowers or cooperating witnesses?
- (24) What are the legal bases and procedures for enacting supplemental budgets and other emergency appropriations? How are responsibilities and powers allocated between the executive and the legislature in this regard?
- (25) How does the government classify risks? Which contingent liabilities, if any, does the government's financial report disclose? How much of the annual budget does the government set aside for contingencies?
- (26) Does the budget have any built-in fiscal rules (e.g., balanced budget) mandated by law?

Corrective action (article 9 (2) (e))

- (27) Are there legal deadlines for corrective action? What is the actual time lag between the issuance of auditors' reports and the initiation of corrective action by the agencies?
- (28) Does the central government keep track of the number of instances in which the particular agency follows or does not follow the auditors' recommendations?
- (29) Do laws or regulations provide for sanctions against individuals and agencies that refuse to adopt corrective action?
- (30) Which laws, if any, provide for investigation of executive agencies by the legislature and its committees? What powers (subpoena, hearing, production of documents, etc.) are available to the legislature in these investigations?

Integrity of public records (article 9 (3))

- (31) Is there a national archiving institution that oversees record keeping?
- (32) Does the government have a general schedule of records retention and disposition? What are the controls and security standards for government records?
- (33) What are the government's policies on electronic records, cyber-security and new technologies?
- (34) What are the rights and remedies available to the public to access information from the government? Is there a dedicated staff and budget for processing public requests for information?
- (35) Is there civil and/or criminal liability for tampering with documents, falsifying documents or intentionally destroying bookkeeping documents? What are the penalties for the violation of any of the related criminal offences?

International codes/references

A. Important international codes on public procurement

- *EU Public Procurement Directives*, European Union. http://ec.europa.eu/internal_market/publicprocurement/rules/current/index_en.htm
- *Guide to Enactment of the Model Law on Public Procurement*, UNCITRAL, 2012. http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html
- *UNCITRAL Model Law on Public Procurement*, UNCITRAL, 2011. http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html
- *United Nations Convention against Corruption*, UNODC, 2004. <http://www.unodc.org/unodc/en/treaties/CAC/index.html>
- *WTO Agreement on Government Procurement*, World Trade Organization, 2012. http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

B. References

- *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, OECD, 2007. <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention>
- *Conference of the States Parties to the United Nations Convention against Corruption*, Resolution 3/2, para. 13, UNODC, 2009. <http://www.unodc.org/documents/treaties/UNCAC/COSP/session3/V0988538e.pdf>
- *Convention on the Protection of the European Communities' Financial Interests*, European Union, 1995. http://europa.eu/legislation_summaries/fight_against_fraud/protecting_european_communitys_financial_interests/l33019_en.htm
- *Cross-Debarment: A Stakeholder Analysis*, Christopher R. Yukins, to be published in the *George Washington University International Review*, 2013 (forthcoming).
- *Curbing Corruption in Public Procurement in Asia and the Pacific: Progress and Challenges in 25 Countries*, ADB/OECD, 2006. <http://www.oecd.org/site/adboecdanti-corruptioninitiative/37575976.pdf>
- *Enhancing Integrity in Public Procurement: A Checklist*, OECD, 2008. <http://www.oecd.org/gov/ethics/enhancingintegrityinpublicprocurementchecklist.htm>
- *Handbook for Curbing Corruption in Public Procurement*, Transparency International, 2006. http://www.transparency.org/whatwedo/pub/handbook_for_curbing_corruption_in_public_procurement
- *Code of Good Practices on Fiscal Transparency*, International Monetary Fund, 2007. <http://www.imf.org/external/np/pp/2007/eng/051507c.pdf>
- *ISO 15489-1: 2001, Information and Documentation – Records Management*, International Organization for Standardization, 2001. www.iso.org
- *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, UNODC, 2006. http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf
- *Performance Measurement Framework*, Public Expenditure and Accountability Program, 2011. <http://www.pefa.org/en/content/pefa-framework>
- *Principles for Integrity in Public Procurement*, OECD, 2009. <http://www.oecd.org/gov/ethics/oecdprinciplesforintegrityinpublicprocurement.htm>
- *Technical Guide to the United Nations Convention Against Corruption*, UNODC, 2009. <http://www.unodc.org/unodc/en/treaties/CAC/technical-guide.html>



UNODC

United Nations Office on Drugs and Crime

Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria
Tel.: (+43-1) 26060-0, Fax: (+43-1) 26060-5866, www.unodc.org

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