MODULE

F

PUBLIC PROCUREMENT TRAINING FOR IPA BENEFICIARIES

Review and remedies; Combating corruption

Review and remedies; Combating corruption

Remedies

MODULE F

PART 1

SECTION 1
INTRODUCTION

Localisation: The structure and much of the commentary is generic and there will need to be adaptations for local use. The notes in green highlight areas where particular attention will need to be paid to local requirements. The notes in green are intended only as an aid to localisation and are not intended to be an exhaustive list of procedures to be followed and issues to be provided for.

1.1 OBJECTIVES

The objectives of this chapter are to explore, explain and understand:

1. The remedies available under EU law
2. Methods and principles of dealing with pre-trial complaints and legal action by economic operators at contracting authority level
3. Legal principles and obligations
4. Progress of award procedures during pre-trial complaints as well as during litigation
5. How economic operators view remedies
6. How problems can be avoided

1.2 IMPORTANT ISSUES

The most important issues in this chapter are concerned with the need to ensure that:

- Pre-trial complaints as well as legal action-related requests are dealt with efficiently and quickly by the contracting authorities
- Sufficient time is allowed for remedies-related delays when planning the procurement process
- The existence, conditions and deadlines of pre-trial complaint procedures as well as of legal actions are fully disclosed to economic operators, so that they know their rights in advance and may make use of them at the appropriate times, within the deadlines and before the designated review bodies

This means that it is critical to understand fully:

- What remedies are available to economic operators
- The implications of remedies sought in the course of an award procedure, including delays and interference with contracting decisions
- The approach of economic operators to remedies

If the above are not properly understood, the procurement process may be unduly delayed or even cancelled.

1.3 LINKS

There is a particularly strong link between this section and the following modules or sections

- Module B on organisation at the level of contracting authorities
- Module E2 on advertisement of contract notices
- Module E3 on selection (qualification) of economic operators
- Module E5 on contract evaluation and contract award
- Module E6 on transparency, reporting, informing tenderers, communication with participants of the procedure.

1.4 RELEVANCE

This information will be of particular relevance to those procurement professionals involved in the procurement planning, as they need to calculate delays related to remedies in their expected date of completion of the award procedure. It will also be of particular relevance to procurement officers who are responsible for receiving and deciding on complaints at any point during the award procedure, as well as officers with the power to make procurement decisions and sign contracts.

1.5 LEGAL INFORMATION HELPFUL TO HAVE TO HAND

Adapt for local use using the format below, including listing the relevant national legislation and the key elements of that legislation. This section may need expanding to reflect particular local requirements relating to setting award criteria. That may include adding information relating to sub-threshold and/or low-value contracts.

Rules on remedies available to economic operators in the course of public sector contract award procedures are found in **Directive 89/665/EEC** as amended by **Directive 2007/66/EC**.

Utilities

Rules on remedies available to economic operators in the course of utilities contract award procedures are found in **Directive 92/13/EEC** as amended by **Directive 2007/66/EC**.

SECTION 2
NARRATIVE

Adapt all of this section using relevant local legislation, processes and terminology.

2.1 INTRODUCTION

Remedies are legal actions available to economic operators participating in contract award procedures, which allow them to request the enforcement of public procurement regulations and their rights under those regulations in cases where contracting authorities, either intentionally or unintentionally, fail to comply with the legal framework for public procurement.

The legal framework on remedies is found in the following directives:

Directive 89/665/EEC regulates remedies available to economic operators during public sector contract award procedures.

Directive 92/13/EEC regulates remedies available to economic operators during utilities contract award procedures.

Both directives were amended by Directive 2007/66/EC. Thus, any reference in this module to Directive 89/665/EEC (or to Directive 92/13/EEC concerning utilities) means as amended by Directive 2007/66/EC.

All directives must be implemented in national law, which provides for the specific procedural rules applying to remedies. Certain procedural rules are provided by the directives themselves, and these rules will be referred to in relevant sections of this module F1.

The aim of the directives on remedies is to allow irregularities occurring in contract award procedures to be challenged and corrected as soon as they occur, and to thereby increase the lawfulness and transparency of such procedures, build confidence among businesses, and facilitate the opening of local public contract markets to foreign competition. The achievement of these objectives is sought by involving economic operators, as prime beneficiaries, in the enforcement of procurement rules and enabling them to demand the observance of their rights to lawful participation in award procedures.

It is important for economic operators to have mechanisms available to them to enforce procurement rules. These mechanisms encourage them to monitor contract award procedures and, eventually, to require that procurement rules be followed so that their chances of being awarded a contract are not unlawfully diminished. Thus these mechanisms both enhance the lawfulness of procedures and encourage competition.

It follows that all national remedies, so as to ensure the enforcement of procurement rules, must be:

- clear and straightforward, *i.e.* understandable and easy to use by economic operators;
- available to all economic operators wishing to participate in a specific contract award procedure without discrimination, in particular on the grounds of nationality;
- effective in preventing or correcting instances of unlawfulness on the part of economic operators and/or contracting authorities.

It also follows, and is of particular relevance for procurement officers, that contracting authorities should not only allow some time, when planning their procurement procedures, for delays and disruptions resulting from remedies filed by economic operators, but should also assist in the rapid and effective resolution of all possible disputes, both:

- before these disputes reach local review bodies (for example, by correcting the irregularity themselves); and
- during litigation (for example, by providing all requested documents and information in good time, to ensure the effectiveness of the review process).

This section will examine the remedies available, who may use them, what are the types of review bodies before which remedies are sought and, most importantly, what is required of contracting authorities and their procurement officers with regard to remedies. As this issue largely concerns local laws, the focus will be on good practice requirements as well as on interaction between contracting authorities and economic operators.

Sub-threshold / excluded contracts

Adapt all of this section for local use – using relevant local legislation, processes and terminology. Briefly set out the requirements of the local legislation for sub-threshold contracts.

Directive 89/665/EEC does not apply to public procurement procedures relating to contracts that are below certain set financial thresholds ('sub-threshold contracts').

Generally speaking, with regard to all contracts that fall outside Directive 2004/18/EC (the Public Sector Directive), including but not limited to sub-threshold contracts, EU Member States are free to introduce their own rules, and thus, if they wish, to make the remedies provided in Directive 89/665/EEC available for all public procurement awards.

In any event, cross-border contracts falling outside the Directive 2004/18/EC are covered by general EU law, such as the EC Treaty rules and principles. Therefore, for all legal action in relation to procurement procedures for such contracts, the basic principles of all remedies to enforce EU rules, *i.e.* the principles of equal treatment, non-discrimination, and effective legal protection of all economic operators, must be respected in all cross-border contracts.

See also module D4 on excluded contracts and module D5 on applicable financial thresholds.

2.2 RIGHT TO USE THE REMEDIES

Adapt this section for local use – using relevant local legislation, case law and terminology.

The remedies are available to any economic operator that has or has had an interest in obtaining a particular contract and that risks or has risked being harmed by an alleged violation of the applicable procurement rules.

This means that all economic operators that have expressed an interest in participating in a contract award procedure – or might have done so if the contract had been advertised – have the right to benefit from the available remedies.

Only an interest in obtaining a particular contract is required of the economic operator (and not a possibility, probability or likelihood of winning the contract) in order to have the right to use the remedies.

Who may be denied the standing to file for remedies (as applicable under local law)?

The standing required to file for remedies may be denied to any economic operator that cannot establish harm as a result of the breach, *i.e.*:

(a) Economic operators that could not possibly have been awarded the contract, for example because they lack the critical technical qualifications, may be denied the right to challenge the contract award.

(b) Economic operators that have not participated in the contract award procedure may not be allowed to challenge contract award decisions. Such decisions cannot possibly affect outsiders to the contract award procedure.

(c) Economic operators that have been excluded at earlier stages of the award procedure (for example at the selection stage) may not have the standing required to challenge decisions taken at later stages of the procedure (for example, the award decision). In particular with regard to the right to challenge the contract award decision, according to article 2a(2) of Directive 89/665/EEC the right to remedies may be denied to those tenderers that have been informed by the contracting authority of the (prior) decision concerning their exclusion and that decision has either been challenged and found lawful or the time limit for challenging the decision has passed. The right to challenge the award decision may also be denied to those candidates that were informed by the contracting authority of the rejection of their applications prior to the notification of the contract award decision. The contract award decision cannot affect economic operators that have been previously and definitively excluded from the procurement process.

(d) Economic operators that remain in the award procedure may not be allowed to challenge at later stages of the procedure any defective decisions that may have been taken at earlier stages of the procedure (for example, at the selection stage), for example by alleging that defects in selection tainted the award decision since the winning tenderer did not actually meet the selection criteria.

(e) Community groups, contractors' trade associations, subcontractors, environmental associations or other interested bodies may not have access to public procurement remedies.

(f) Members of consortia may not be allowed to act individually, *i.e.* local law may provide that only all of the members of a tendering consortium acting together may bring an action and not each member acting on its own. The action can also be dismissed if all members of a tendering consortium act together but the application of one of them is held to be inadmissible. This provision was accepted by the European Court of Justice (ECJ) in case C-129/04 [*Espace Trianon SA and Société wallone de location - financement SA (Sofibail) vs Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM)*, available at http://eur-lex.europa.eu.int/].

Generally, local laws on standing and on representation in legal proceedings are applicable to the extent that they do not interfere with the rule that all economic operators with an interest in obtaining a particular contract and that risk being harmed as a result of a breach of the rules must have access to effective legal remedies.

2.3 TYPES OF REVIEW BODIES

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

Procurement cases are brought before a body that may be either a specialised procurement tribunal or a regular court. EU Member States are free to choose between the two. Such a choice is important, since the speed, cost, outcome and frequency of the use of remedies will depend on it. Briefly, the pros and cons of choosing either (a) the courts or (b) a specialised procurement tribunal are as follows:

(a) Courts

Pros: Courts may have a better knowledge of general law. Also, they are usually better acquainted with methods of interpretation and legal principles and are better able to employ them.

Cons: The procedure before the courts tends to take longer, as they also hear other cases and may lack specialized public procurement knowledge. For this reason, they may possibly be more expensive than specialised tribunals.

(b) Specialised procurement tribunals

Pros: The procedure in specialised procurement tribunals is usually simpler as well as quicker, since they have to deal exclusively with procurement cases. They tend to be more aware of the realities of procurement and more familiar with contract award procedures and related issues.

Cons: The specialised tribunals may not be very familiar with general law or legal principles.

If a specialised procurement review body is chosen, then there should be a right to appeal its decisions to a different independent body, with properly qualified members and at least some procedural rules. Article 2(9) of Directive 89/665/EEC sets out the requirements that such an independent body must meet (refer to 'The Law' section).

Article 2(2) of Directive 89/665/EEC allows for different review bodies to be responsible for different aspects of review. If this is indeed the local choice, usually it is the case that a specialised procurement tribunal hears applications for interim relief and set-asides, and the regular courts hear actions on damages.

2.4 TYPES OF REMEDIES

Adapt this section for local use – using relevant local legislation, remedies and terminology.

In this section we will look at the available remedies. What contracting authorities (and their procurement officers) should do with regard to remedies is dealt with separately in section 2.6 below. In all of the sub-sections to this section, we will examine each type of remedy, addressing the following points:

(a) What does the remedy consist of?;

(b) Where is the remedy brought?;

(c) Procedure;

(d) Measures that can be ordered;

(e) Aim;

(f) Use (from the point of view of the contracting authority and of the procurement procedure).

2.4.1 Complaints before the contracting authority or an authority supervising the contracting authority

To encourage the settlement of disputes without recourse to legal action, local law may require or allow the economic operator concerned, before filing a legal action with the competent review body, to first seek review by lodging an 'application for review' (*i.e.* complaint) with the contracting authority against an alleged infringement in a contract award procedure. Complaints are not legal courses of action as such, as they are submitted prior to the proceedings before review bodies. Depending on the specific facts and circumstances, complaints can lead to enforcement of the law and to quick and early resolution of disputes.

(a) What does the complaint consist of?

A complaint is an application addressed to the contracting authority, containing the economic operator's allegation of an infringement occurring in the course of the contract award procedure and a request for the situation to be reviewed and corrected. Complaints are lodged prior to legal proceedings before local review bodies. The complaint may also refer to the economic operator's right or intention to seek review before the competent review bodies.

Depending on local legislation, complaints may be:

- **optional**, *i.e.* the economic operator may file a complaint, if it wishes, but no consequences are attached to not filing; or
- **compulsory,** *i.e.* the economic operator must file a complaint if it wishes to then proceed with legal action before local review bodies. In such cases, legal action will be dismissed if a complaint has not been filed first, and the procedure and deadlines for such filing are provided for in local law.

According to article 1(5) of Directive 89/665/EEC, if the complaint is compulsory, then its submission results in immediate suspension of the possibility to conclude the contract. Local law may provide that this suspensive effect also applies to optional complaints. The suspension allows the award procedure to go ahead, although the contract cannot be concluded. It is up to the contracting authority to assess whether it is safe to go ahead with the procedure pending review of a complaint or, inversely, whether this may cause future actions or decisions of the contracting authority to be tainted by the unlawfulness of the challenged contracting decision, if it is found to be unlawful. This would also be a matter of local law. It is suggested that it is best, if possible, to wait – see also section 2.6.7 below.

The suspension of the procedure cannot end until 10 calendar days have passed from the day following the date of the contracting authority's reply concerning the complaint, if fax or e-mail was used for this purpose by the contracting authority. If other means of communication were used, the suspension cannot end until 15 calendar days have passed from the day following the date of the contracting authority's reply concerning the complaint or at least 10 calendar days from the day following the date of receipt by the complainant of the contracting authority's reply with regard to the complaint. The same deadlines apply if the contracting authority did not reply to the complaint, and the period of suspension begins on the day following the deadline date by which the contracting authority should have replied but did not.

(b) Where is the complaint brought?

This depends on local legislation. Complaints are generally submitted to the contracting authority, and possibly to a special review panel within the contracting authority that has been designated for this purpose.

(c) Procedure

The complaints procedure depends on local legislation. It can have an informal or formal character (with specific rules applying). If the complaint is a compulsory prerequisite for legal action, then local law will provide for at least some filing requirements and deadlines.

(d) Measures that can be ordered

If the complaint is accepted, the contracting authority will try to correct the breach by undertaking all due actions, for example by allowing an economic operator that fulfils the set selection criteria to remain in the procedure (and thereby correcting an unlawful exclusion decision).

(e) Aim

The aim of pre-trial complaints is to give the economic operator the opportunity to explain its case and to allow the contracting authority the possibility – if it has accepted the complaint – of either convincing the economic operator that no breach has occurred or, alternatively, correcting the breach before the matter reaches the courts.

(f) Use

Complaints can prove to be very useful because they can lead to quick and inexpensive resolution of disputes. In particular where breaches are caused by negligence, the contracting authority usually tries to correct the breach, and thus disputes are resolved quickly and inexpensively for both sides. Alternatively, if no breach has occurred, the contracting authority is given the opportunity to explain this situation to the affected economic operator, presenting the arguments for its position. An adequate explanation may convince the economic operator and prevent further legal action.

There may also be drawbacks to the availability of complaint procedures which in some member states can be time-consuming and not very effective.

2.4.2 Interim measures

(a) What do the interim measures consist of?

Interim measures are provisional measures taken against the contract notice and any contracting decision, including the contract award decision.

Article 2(3) of Directive 89/665/EEC provides that while an application for interim measures is pending against the contract award decision, the contract cannot be concluded until the review body has decided either to authorise or not the application of interim measures (including the further suspension of the conclusion of the contract) or to judge the merits of the case (*i.e.* whether or not to set aside the contract award decision). The suspension is to last at least until the expiry of the standstill period applicable to contract award decisions, examined below under 2.4.4. Applications for interim measures against other contracting decisions do not necessarily, in themselves, have an automatic suspensive effect.

(b) Where are the interim measures brought?

An application for interim measures is brought before the competent local court or procurement tribunal.

(c) Procedure

The procedure for interim measures depends on local legislation, which sets out the filing rules, deadlines, and notifications to other candidates or tenderers. Since the aim of interim measures is to provide a quick provisional resolution to a dispute, the time limits are usually tight. For the same reason, procedural rules (for example, concerning evidence) should be light. Local law must allow for the application for interim relief to be made without requiring a prior application to set aside the contracting decision (C-236/95 *Commission v Greece* available at http://eur-lex.europa.eu.int).

According to article 2c of Directive 89/665/EEC, the deadline for submitting an application for review (therefore also for interim measures) must be at least 10 days from the day following the date on which the contracting authority sent the contracting decision to tenderers or candidates, if fax or e-mail was used. If the contracting authority used other means of communication (such as post) to transmit the contracting decision, the deadline date must be at least 15 days from the day following the date of dispatch of this decision or at least 10 days from the day following the date of receipt of this decision by the tenderers or candidates. If no notification is required (for example, if the dispute concerned specifications set in the contract notice), then the deadline is at least 10 days from the date of publication of the contract notice.

Days are calendar days, not working (business) days. Local law may allow for longer deadline periods.

(d) Measures that can be ordered

The following interim measures can be ordered:

- Suspension of the implementation of any decision taken by the ontracting authority
- Suspension of the whole contract award procedure
- Provisional correction of the breach (this depends on local law and is rather unusual)

(e) Aim

Interim measures aim to prevent the creation of unalterable situations and, before a final decision is reached on whether a contracting decision is unlawful and must be set aside, to avoid the continuation of the contract award procedure without an economic operator that would otherwise have been able to participate and possibly be awarded the contract. (The amending Directive 2007/66/EC provides for automatic suspension of the contract award where legal proceedings are brought.) These aims may only be achieved if the local legal system provides an effective possibility of obtaining interim relief (therefore relevant procedures are neither too complex nor too slow) and if the competent review body is not reluctant to grant interim relief as a matter of principle.

(f) Use

The fact that legal action has been instituted means that the matter is out of the hands of the contracting authority, which can only try to argue its case. It is therefore best that matters are resolved, to the extent that they can be, during pre-trial complaints brought by economic operators. However, applications for interim measures are by far the most useful legal remedy because decisions on such measures are taken rapidly, and therefore economic operators as well as procurement officers may continue relatively quickly with the award procedure.

2.4.3 Setting aside of contracting decisions

(a) What does the set-aside remedy consist of?

The application for the set-aside remedy cancels or renders ineffective a contracting decision taken unlawfully or otherwise corrects an unlawful situation. In particular with regard to the award decision, see below section 2.4.4.

Article 2(3) of Directive 89/665/EEC provides that, while the application for a set-aside remedy is pending against the *contract award decision,* the contract cannot be concluded until either the review body has taken a decision on interim measures or on the merits of the case (*i.e.* on whether or not to set aside the contract award decision). The suspension is to last at least until the expiry of the standstill period applicable to award decisions, examined under 2.4.4 below. Applications for the setting aside of other contracting decisions may not necessarily, in themselves, have an automatic suspensive effect (although interim measures may of course always be applied for and granted).

(b) Where is the application for a set-aside remedy brought?

An application for a set-aside remedy is brought before the competent local court or procurement tribunal.

(c) Procedure

The procedure for a set-aside remedy depends on local legislation, which sets the filing rules, deadlines, and notifications to other candidates or tenderers.

According to article 2c of Directive 89/665/EEC, deadlines to apply for a set-aside must be at least 10 days from the day following the date on which the contracting authority sent the contracting decision to tenderers or candidates, if fax or electronic means was used. If the contracting authority used other means of communication (such as post) to transmit the contracting decision, the deadline date must be at least 15 days from the day following the date of dispatch of this decision, or at least 10 days from the day following the date of receipt of this decision by the tenderers or candidates. If no notification is required (for example, if the dispute concerns specifications set in the contract notice), then the deadline date must be at least 10 days from the date of publication of the contract notice.

Days are calendar, not working (business), days. Local law may allow for longer deadline periods.

(d) Measures that can be ordered

For a set-aside remedy, the following measures can be ordered:

- Removal of discriminatory technical, economic or financial specifications in the contract notice, tender documents or any other document relating to the contract award procedure;
- Annulment of an unlawful contracting decision
- Positive correction of any unlawful document or contracting decision, for example an order of the contracting authority to amend or delete an unlawful clause in the tender documents or to reinstate an economic operator that had been unlawfully excluded.

Local review bodies usually do not review the soundness of the contracting authority's decisions or the way in which the contracting authority reached such decisions. They only examine whether the contracting decision was reasonable or whether the contracting authority committed a serious error (especially whether it obviously misused its discretion in setting a specification, selecting a candidate or awarding a contract). This role is consistent with the aim of Directive 89/665/EEC, which is to allow review bodies to check whether contracting decisions are well-founded and supported by evidence, but not to 're-decide' a contracting decision, which is within the scope of the contracting authority's discretion. Review of reasonableness is particularly important in the context of procedures where the contract is awarded to the most economically advantageous offer, as in that case the discretion of the contracting authority is wide, since it decides and applies the criteria constituting an advantageous offer, and there is therefore a probability of abuse of discretion. However, such a review must be limited to a 'reasonableness' test, as otherwise it might lead to speculative litigation aimed at convincing the review body to second-guess the decision of the contracting authority. Localisation required.

(e) Aim

The aim of set-asides is to correct proven irregularities. It goes without saying that this aim is only achieved if the local legal system provides an effective possibility of cancelling an unlawful specification or contracting decision and if the competent review body reviews the reasonableness of (but not the choices made by) contracting decisions.

(f) Use

For set-asides, as for interim measures, the fact that legal action has been instituted means that the matter is out of the hands of the contracting authority, which can only try to argue its case. The whole procedure, up to and including a decision to set (or not to) aside a contracting decision, can be time-consuming. From the point of view of contracting authorities, therefore, this remedy can cause long delays in their award procedures, which is why it is best if matters can be resolved, to the extent that they can, during the review of pre-trial complaints brought by economic operators. From the point of view of the lawfulness of the award procedure, the set-aside is a useful remedy, as it can correct an infringement, provided that review bodies use their powers reasonably.

Directive 89/665/EEC allows local legislation to stipulate that public procurement contracts that have been concluded may not be set aside in certain cases where an alternative sanction is applied. In that case, the rights of economic operators and the powers of the local review body are limited to asking for, and awarding, compensation to economic operators for any harm caused to them by infringements of the public procurement rules. This provision makes sure that concluded contracts are not affected and that performance can take place immediately following conclusion, notwithstanding any defects of the procedure leading up to the conclusion. However, there have been many instances of abuse of this option by contracting authorities. In particular, contracting authorities have been quick to conclude contracts, knowing that, as soon as they were concluded, such contracts would be allowed to stand, even if the award procedure was unlawful. It was therefore important to provide for the challenging of contract award decisions, so as to ensure that contracts would ultimately be awarded to the tenderer that had made the best offer.

Alcatel case - Judgment of the ECJ on the distinction between award decision and conclusion of contract and on challenging an award decision

(C-81/98, *Alcatel Austria AG and Others, Siemens AG Österreich, Sag-Schrack Anlagen Technik AG v. Bundesministerium für Wissenshaft und Verkehr*, available at http://curia.europa.eu/jcms/jcms/)

Facts

In 1996 the Austrian Federal Ministry of Science and Transport ran an open procedure for the supply, installation and demonstration of hardware and software components of an electronic system for automatic data transmission on Austrian motorways.

Under Austrian law, the contract between the contracting authority and the tenderer was concluded when the tenderer received notification by the contracting authority of the acceptance of its offer. The contracting authority did not have the obligation to notify the other tenderers of its intention to award the contract before it notified the successful tenderer. Therefore other tenderers did not have the opportunity to challenge the award decision before the contract was concluded. Also, in Austria concluded procurement contracts could not be reversed. Unsuccessful tenderers in award procedures in which the award decision was taken unlawfully could only seek compensation.

On 5 September 1996 the contract in question was awarded to one of the tenderers and was signed on the same day. The other tenderers learned of the contract through the press. They then applied to the Austrian Bundesvergabeamt (the Austrian Federal Procurement Office, competent for hearing applications for set-aside and interim measures) to review the award. The Federal Procurement Office requested the ECJ to give a preliminary ruling on several issues concerning the interpretation of Directive 89/665/EC.

The first preliminary question was whether EU Member States were obliged, under Directive 89/665/EC, to provide for the remedies of set-aside and interim measures against the award decision, notwithstanding the possibility provided for in the Directive of limiting the available remedies to compensation for damages after a contract was concluded.

Decision:

The ECJ ruled that Directive 89/665/EC should be interpreted to mean that EU Member States had to ensure that the remedies of set-aside and interim relief could be used against an award decision. According to the ECJ, Directive 89/665/EC sought to reinforce the effective enforcement of the procurement rules, in particular at a stage where infringements could still be rectified. The award decision was the most important contracting decision, and it had to be possible to have it suspended or set aside. Therefore, the award decision and the conclusion of contract had to be distrinct, and the award decision had to be open to challenge, notwithstanding any local rules to the effect that concluded contracts could not be reversed.

The ECJ was silent on the way in which EU Member States should fulfil this obligation and whether there should be a delay between the award decision and the conclusion of the contract or the length of such a delay. Instances of contracts being concluded without any possibility of challenging the award decision beforehand, continued to occur. For this reason, in late 2007, Directive 2007/66/EC was adopted to amend Directive 89/665/EEC (as well as Directive 92/13/EEC on remedies in utilities award procedures). Among other provisions, the new Directive 2007/66/EC set out the requirement for a standstill period between the contract award decision and the conclusion of the contract with the successful tenderer and established the right to challenge the award decision.

2.4.4 Directive 2007/66/EC and the standstill period

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

Directive 2007/66/EC requires public authorities to wait for a certain number of days between the contract award decision and the conclusion of the contract with the successful tenderer. This standstill period allows rejected tenderers to challenge the contracting authority's decision not to award the contract to them, if they think that such a decision was unlawful, and therefore to prevent the contract from being concluded on the basis of an improper award decision.

Not only during the standstill period but also *during legal proceedings*, instituted by means of either an application for interim measures or an application to set aside the contract award decision, *and until the review body* has issued a decision, the contracting authority may not conclude the contract, according to article 2(3) of Directive 89/665/EEC.

Concluded vs signed contracts

It is important for contracting authorities to remember that what is required is to allow for a standstill period before the contract is concluded, *i.e.* before the contract is performed. Signature of the contract is immaterial, especially taking into account that under several legal systems a contract is concluded before it is actually signed, for example when the award decision is notified to the successful tenderer.

According to article 2a(2) of Directive 89/665/EEC, local law may provide that **contracting authorities do not have to observe the standstill period (or notify the award decision) where:**

- the decision is for the award of specific contracts under a framework agreement or a dynamic purchasing system;
- there is no obligation under Directive 2004/18/EC to publish a contract notice;
- there is only one tenderer/candidate left at the award stage of the procedure; in that case, there are no other persons remaining in the award procedure with an interest or right to challenge the contract award decision and to benefit from the standstill period.

If subsequently the derogation from the standstill period is found to be faulty, because either the specific contracts under a framework agreement or dynamic purchasing system have been awarded in violation of the applicable rules or a contract notice should have been published (but was not), the concluded contract is not protected, and review bodies are required to render it ineffective – see below under (d).

(a) Notification requirement

As soon as contracting authorities have made an award decision, they must notify all tenderers or candidates, including unsuccessful ones, of this decision and then allow a certain number of days to pass before they actually conclude the contract. The notification must include a summary of the reasons for this decision, as set out in article 41(2) of Directive 2004/18/EC, and in particular the name of the successful tenderer and the characteristics and relative advantages of the tender selected; certain information may be withheld. For the applicable information requirements under article 41 of Directive 2004/18/EC, see below in section 2.6.3. The exact duration of the standstill period must also be mentioned in the notification, so that tenderers/candidates know how much time they have to challenge the award decision, if they wish to do so.

Tenderers or candidates that were duly excluded or rejected previously do not have legal standing to challenge the award decision, and there is no requirement to notify them of the award decision. On this issue, see section 2.2. above.

(b) Length of standstill period

According to article 2a(2) of Directive 89/665/EEC, the standstill period must last at least 10 days, starting from the day following the date on which the contracting authority sends the notification of the contract award decision to tenderers or candidates, if fax or electronic means is used. If the contracting authority uses other means of communication (such as post) to send the notification of the contract award decision, then the standstill period must last at least 15 days, starting from the day following the date of dispatch of the notification of the contract award decision, or at least 10 calendar days starting from the day following the date of receipt by tenderers or candidates of the notification of the contract award decision.

These standstill periods are only the minimum requirements: local law may provide for longer (but not shorter) periods.

The shorter the standstill period, the more quickly the contract will be concluded, and so contracting authorities may opt to use fax or electronic means such as e-mail to take advantage of the shorter standstill period.

Days are calendar days, not business (working) days.

During this standstill period, rejected tenderers can apply for the review of the award decision, either first by the contracting authority (*i.e.* using a complaints procedure) and/or directly before the review body, asking for interim measures or for the setting aside of the award decision. This choice depends on whether there are pre-trial complaints under local law and whether these complaints are optional or compulsory prior to the use of other remedies.

Good practice note

It is useful to include in the notification material all documents supporting the award decision, such as opinions or recommendations by the tender evaluation panel. Requests for disclosure of supporting documents, as applicable under local law, may lead to an extension of the standstill period.

(c) Direct awards

When a contracting authority considers that it has the right to directly award a contract without publication of a contract notice, then under article 2d(4) of Directive 89/665/EEC, it may publish a simplified notice in the *Official Journal of the European Union (OJEU)* of its intention to award the contract and may also observe a standstill period of at least 10 days starting from the day following the date of publication of the notice before concluding the contract. If this procedure is followed, then the contract may be concluded without any risk of ineffectiveness. There is a new standard form Notice for this voluntary publication which can be accessed from the simap website.

(d) Ineffectiveness of concluded contracts

Article 2d(1) of Directive 89/665/EEC provides that local review bodies are to set aside or otherwise render ineffective a concluded contract when that contract has been concluded:

- **without the contracting authority publishing a contract notice and without running an award procedure**, despite an obligation to do so under Directive 2004/18/EC;
- **without the observation of a standstill period** for the award of specific contracts under a framework agreement or dynamic purchasing system and this award therefore breaches the relevant applicable rules under Directive 2004/18/EC;
- **during the automatic suspension period** when a pre-trial complaint is s ought against any contracting decision or **during the standstill or suspension period throughout legal proceedings against contract award decisions**, if the tenderer claiming to have been harmed is deprived of asking for interim measures or for the setting aside of the concerned contracting or award decision *and* the rules of Directive 2004/18/EC have been breached *and* the concerned tenderer's chances of obtaining the contract have been affected as a result.

The ineffectiveness sanction was adopted to prevent contracting authorities from hastening to conclude contracts, even in violation of the standstill or suspension periods or of basic procurement rules, assuming that they would be immune to any sanctions following conclusion of these contracts. It was intended to incite procurement officials to be very careful when applying the procurement rules. The risk of termination of unlawfully concluded contracts is a serious one. There is also a serious risk that the successful tenderer, for which the contract has been terminated in this way, would seek damages under local contracts law.

The legal action to set aside a signed contract (in the case described above) would be instituted by a tenderer claiming to be harmed as a consequence. Deadlines and procedures for such a request are governed by local law. However, minimum deadlines are 30 calendar days, starting from the day following the date of publication of the contract award notice (this notice must include a justification of the award of the contract without prior publication of a contract notice, if that was the case) or of the notification to tenderers/candidates by the contracting authority of the conclusion of the contract, provided that a summary of the reasons for the award decision were mentioned in the notification (see below in section 2.6.3. the relevant information requirements of Directive 2004/18/EC). Otherwise, deadlines may be extended. If no contract award notice was published or if there was no notification transmitted to tenderers/ candidates, the minimum deadline for legal action against a concluded contract is six months from the day following the date of conclusion of the contract.

These deadlines are only the minimum requirements; local law may provide for longer (but not shorter) periods.

Depending on local law, the setting aside of a signed contract may be retroactive (*i.e.* all contractual obligations, including those already performed, are to be cancelled, and the tenderer and contracting authority must settle their relationship under local rules) or prospective (*i.e.* only future and unperformed contractual obligations may be annulled). In the case of prospective cancellation, there must also be other penalties, such as fines imposed on the contracting authority, in accordance with article 2d(2) of Directive 89/665/EEC.

Unlawfully concluded contracts may be maintained, if the cumulative conditions are not met, *i.e.* breach of the standstill or suspension periods and breach of the rules of Directive 2004/18/EC, *and* possible harm of chances of obtaining the contract. Then, depending on local law, review bodies may have the discretion of deciding not to render ineffective an unlawfully concluded contract.

According to article 2d(3) of Directive 89/665/EEC, discretion may be granted to review bodies if they find that there are overriding reasons related to a general interest in maintaining the contract. This discretion must be used with care, as it is provided as an exception to the general rule that unlawfully concluded contracts must not be maintained.

Economic reasons – such as costs arising from delays in carrying out the project, restarting of the award procedure, changing of the contractor, or damages that may be sought by the successful tenderer of the cancelled contract – cannot be taken into account by review bodies, and contracting authorities therefore should not, and cannot, rely on them.

In cases such as those cited above, where unlawfully concluded contracts are allowed to stand, or in cases where the cancellation of an unlawfully concluded contract applies only for the future, *i.e.* not retroactively, the following alternative penalties must be imposed, in accordance with article 2e(2) of Directive 89/665/EEC:

- **Fines imposed on the contracting authority:** Such fines must be adequately high in order to punish the unlawfulness. Their amount should take into account both the seriousness of the breach as well as the contracting authority's conduct. The harmed tenderer is entitled to ask for compensation in any case.

or

- **Shortening of the duration of the contract.**

2.4.5 Damages

(a) What do damages consist of?

The compensation of economic operators harmed by an infringement of the public procurement rules should be available.

(b) Where is the remedy brought?

Claims for damages are brought before the local review body. Often, even if there is a procurement tribunal, the local review body will hear applications for interim measures and/or set-asides, while the regular courts will hear claims for damages.

(c) Procedure

The procedure for bringing claims for damages depends on local legislation, which sets the filing rules, deadlines, requirements of proof, and extent of compensation (for example, the conditions under which tendering costs can be recovered).

(d) Measures that can be ordered

The measures that are ordered if a claim for damages is successful is the compensation of all harms suffered by the economic operator, which usually includes actual costs incurred and, exceptionally, lost profits. The compensation must be full –however, it is very difficult to establish the extent of the damage suffered in a competitive process.

(e) Aim

This remedy aims to compensate harmed economic operators.

(f) Use

This remedy does not interfere with the contract award procedure, its progress or conclusion. It is of use to economic operators but is not used very often because it is difficult to prove actual harm and therefore difficult to be granted compensation. The award of damages as a result of an irregularity occurring in a contract award procedure would be relevant for the audit of award procedures by local audit bodies.

2.5 GENERAL PRINCIPLES TO BE OBSERVED BY REVIEW BODIES AND CONTRACTING AUTHORITIES WITH REGARD TO REMEDIES

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

The general principles below must be observed by local review bodies as well as by contracting authorities, which are obliged to follow the law (including legal principles) in their procedures.

2.5.1 Non-discrimination

Access to remedies should be open to all economic operators without discrimination, especially on grounds of nationality. Also, remedies to enforce EU public procurement rules and their conditions (procedural rules, such as deadlines and filing requirements) should be at least as favourable as those available to enforce domestic procurement rules. This principle is expressly stated in article 1(2) of Directive 89/665/EC.

The procedural rules themselves are a matter for local law to decide, on condition that the rules of Directive 89/665/EC as well as the legal principle of non-discrimination (and that of effectiveness, examined below) are complied with. If there are no remedies to enforce domestic procurement rules, then remedies for the enforcement of EU public procurement rules only have to comply with the rules of Directive 89/665/EC, as well as with the legal principle of effectiveness, since there is no scope for the application of the principle of non-discrimination.

From the point of view of contracting authorities, the principle of non-discrimination mainly means that they should treat all economic operators in the same manner, in particular with regard to their actions and duties, as set forth in section 2.6. below.

2.5.2 Effectiveness

Remedies must have sufficient power to ensure observance of EU public procurement rules, *i.e.* they must be effective.

This means that contracting authorities should try to facilitate the proper conduct of all legal procedures and should always comply with decisions concerning remedies.

One aspect of remedies that is extremely important in procurement is speed. The importance of speed is stressed in article 1(1) of Directive 89/665/EEC, which states that "decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible...".

In practice, for contracting authorities this means that even if there are no maximum deadlines within which they must respond to requests for information, complaints, etc., they must nevertheless in practice try to ensure speed by giving priority to dealing with such requests and to responding quickly.

More detailed information on the duties of contracting authorities is set forth in section 2.6. below.

2.5.3 Transparency

Transparency in the context of remedies and review procedures means, as far as the contracting authority is concerned, that through the tender documents themselves as well as in the notifications of contracting decisions, maximum information is provided to economic operators on:

- rights to remedies under the law, in particular remedies having to do with the conduct of the award procedure, *i.e.* interim measures and set-aside applications;
- relevant procedural rules, in particular deadlines and names of persons/committees receiving pre-trial complaints within the contracting authority; and
- all information on how contracting decisions were reached, to the extent that this information is relevant to economic operators.

More detailed information on the duties of contracting authorities is set out in section 2.6. below.

2.6 WHAT IS REQUIRED BY CONTRACTING AUTHORITIES WITH REGARD TO REMEDIES?

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

Some of the directions to contracting authorities that follow are legal duties arising from EU Directives or from the case law of the ECJ or the Court of First Instance. However, many of the directions are good practice rules. Where relevant, the applicable EU legal rules will be mentioned.

In many of the areas examined below, there will be local rules applicable to public authorities, defining the due manner of exercising their duties and specifying their powers and obligations in communicating with their counterparts (economic operators, tenderers and contractors), as well as relevant response, disclosure and co-operation rules. All such local rules should be observed.

2.6.1 Notification of available remedies in tender documents

It is very helpful if the tender documents clearly explain the remedies available to economic operators (both pre-trial complaints, if any, and legal actions), by summarising local law and including a reference to the applicable rules.

In particular with regard to pre-trial complaints, the tender documents should mention where to file such complaints (for example, with the competent committee and/or contact person in the contracting authority) and the forms of submission of complaints (for example, if submission of a complaint by fax is allowed).

2.6.2 Drafting of detailed and reasoned contracting decisions

All contracting decisions should set out clearly the grounds, manner and method that provided the basis on which each contracting decision was reached.

This information enables economic operators to understand the contracting decision and to make an informed opinion as to whether the decision was lawfully reached. If they consider that it was unlawful, then a detailed contracting decision would allow them to defend their rights and to prepare a reasoned and relevant complaint or action, which would then possibly allow the contracting authority to correct any involuntary mistakes that it had made. If, on the other hand, the contracting decision was lawful, the fact that it was reasoned and clear would dissuade economic operators from bringing unfounded complaints on the off-chance that the review body might take a different view from that of the contracting authority. As mentioned above in section 2.4.3. on the remedy of set-aside, persons sitting on review bodies, whether they be procurement tribunals or courts, are neither interested in nor empowered to second-guess contracting decisions and only can – or want to – make sure that the law is complied with.

Also, detailed contracting decisions enable supervisory authorities or audit bodies to exercise their duties.

2.6.3 Informing promptly and fully all tenderers or candidates of all contracting decisions (including the decision to abandon the award procedure) and of the general progress of the award procedure

Article 41(1) of Directive 2004/18/EC provides that contracting authorities should inform as soon as possible all candidates or tenderers of all decisions concerning the award of a contract, including the decision (and the underlying reasons) not to award the contract or to restart the procedure. Such a notification requirement should apply to all contracting decisions and therefore include decisions reached at the selection stage as well as other interim contracting decisions. See also module E6 on transparency and communication between the contracting authority and economic operators.

Usually, the time of notification of any contracting decision (including the decision not to award or to restart the procedure) is the starting date for the calculation of deadlines under local laws for the submission of complaints and/or legal remedies. This means that the contracting authority has an interest in notifying all economic operators *as quickly as possible* and at the same time of all contracting decisions so that deadlines start running, in order to see if there are any challenges and, if not, to lawfully proceed with the award procedure or conclusion of the contract or to relaunch the procedure. Economic operators that bring complaints outside such deadlines will normally be time-barred under local laws, and their complaints or legal remedies will be dismissed.

Care should be taken to contact tenderers at their *correct addresses and contact persons*, as stated in their tenders. Failure to observe this simple procedure would normally lead to an extension of deadlines for lack of proper notification.

Article 41(2) of Directive 2004/18/EC imposes a specific obligation on the contracting authority to indicate as soon as possible, on written request from the party concerned, the reasons why an application or tender was rejected. The time for the contracting authority's reply to such a request may not exceed 15 calendar days under any circumstances. See also module E6 on transparency and communication between the contracting authority and economic operators.

Stating the reasons for the decision rejecting a tender

***Adia Interim /Strabag* cases - Judgments of the Court of First Instance (CFI)**

T-19/95 *Adia Interim SA v Commission of the European Communities*, available at http://eur-lex.europa.eu.int/

Facts

The European Commission published an open invitation to tender for the conclusion of a framework agreement with three employment agencies for the supply of agency staff. In the contract notice, three award criteria were set, one of which was price.

Adia Interim was such an employment agency. It was at the time the main supplier of agency staff to the Commission and had worked well with the Commission. Adia Interim placed a tender in response to the contract notice. However, the tender contained a systematic error in the calculation of the offered price, which the selection committee of the Commission detected in the course of assessing the tenders. The Commission did not contact Adia Interim to correct this error. As a result of the error, Adia Interim was placed in tenth position and its tender was rejected. The Commission informed Adia Interim of the rejection of its tender by letter, without stating the reasons for the rejection; it only stated in the rejection letter that "following an in-depth comparative study of the tenders…. the Commission considered that it was unable to accept your proposal". Adia Interim asked by letter to be informed of the reasons for the rejection. The Commission by letter dated 15 days after the rejection letter explained to Adia Interim of the whole selection and award process and informed Adia Interim of the names of the three successful tenderers. However, it did not spell out the exact rejection reason (*i.e.* the calculation error that had made its price more expensive and therefore its tender less competitive than those of other tenderers).

Adia Interim applied to the Court of First Instance (CFI) to annul the Commission's decision rejecting the Adia Interim's tender and to annul the Commission's decision to award the contract to the three successful tenderers, pleading, on the one hand, that the Commission had a duty to state the precise reasons for the rejection in the letter of rejection and that the Commission had breached this duty. Adia Interim pleaded, on the other hand, that the Commission, by not asking it to clarify the systematic calculation error in the tender, had infringed the principles of equal treatment of tenderers and of sound administration.

What is relevant to our analysis is Adia Interim's first plea, *i.e.* the Commission's duty, as the contracting authority, to state the precise reasons for the rejection of Adia Interim's tender in the letter of rejection.

Decision:

The CFI ruled that contracting authorities had an obligation vis-à-vis eliminated tenderers to state the reasons for the rejection of their tenders. However, they would have fulfilled this obligation if they had first immediately informed eliminated tenderers of the fact that their tenders had been rejected, by means of a simple communication that did not set out any reasons, and had subsequently provided tenderers that had made a special request to that effect with a reasoned explanation within 15 days. The fact that tenderers received a reasoned rejection decision only if they had made a special request did not deprive them of legal protection, as deadlines for legal challenges (in the case before the CFI) started after notification of the reasoned decision.

The CFI also ruled that the Commission's second 'reasoned' letter had provided sufficiently detailed reasons for the rejection of Adia Interim's tender to allow the legal challenge of the award decision because it confirmed that the tender was less economically advantageous than the winning tenders.

In Case T-183/00 (***Strabag Benelux NV v Council of the European Union*** available at http://eur-lex.europa.eu.int/), the CFI found that the letter sent by the Council (as contracting authority for a framework agreement for general installation and maintenance works in the Council's buildings in Brussels) to the company Strabag Benelux BV (rejected tenderer for the agreement), stating that the company's tender had ranked highly for the qualitative evaluation criteria but had been unsuccessful because of its price provided an acceptable level of explanation of the reasons for the rejection of Strabag's tender (*i.e.* value not quality). However, that letter did not explain how the ranking had been done.

The amended Directive 89/665/EEC provide in article 2c that the communication of all contracting decisions is to be accompanied by a summary of the relevant reasons. Thus a contracting authority must provide a summary of the reasons for the rejection of an application or tender in the rejection letter itself, even if the candidate/ tenderer did not explicitly request it. For reasons of good practice and in order to comply with the general legal principles of transparency and effectiveness as well as with the rule set forth in article 1 of Directive 89/665/EC that the review of contracting decisions should take place effectively and as quickly as possible, it is recommended that decisions rejecting an application or tender mention the reasons for the rejection *clearly and precisely*.

In the case of the *contract award decision*, according to article 2a(2) of Directive 89/665/EEC, contracting authorities are not only required to notify concerned tenderers/ candidates of the award decision but also to include in the notification a summary of the information set out in article 41(2) of Directive 2004/18/EC, in particular the name of the successful tenderer and the characteristics and relative advantages of the selected tender, before/ without being requested by the concerned tenderer, and in sufficient detail to enable the concerned party to effectively seek review. How to comply with this requirement has to be assessed each time by the contracting authority. The most thorough way (but, to an extent, time-consuming and effort-consuming) is for the authority to compare rejected tenders against the winning tender on the basis of the award criteria. It should be noted that both Directives 2004/18/EC and 2007/66/EC were adopted after, and are stricter than, the CFI's decisions on Adia Interim and Strabag, which had accepted as sufficient information a reference that the rejected tender had been less economically advantageous than the winning tenders (in the case of Adia Interim) or had been more expensive (in the Strabag case).

Mentioning precisely the reasons for the rejection of an application or tender or for the award of the contract to another tenderer/ candidate is required, first of all, because only a clear and precise decision can enable a candidate/tenderer to understand and assess the rejection and to decide which rights are jeopardized and whether or how it will defend them. Secondly, if a contracting authority gives summary information and waits for a special request to state the precise and detailed reasons for rejection and then, by a second communication, states such reasons, it may waste time unnecessarily, since it is likely that candidates/ tenderers will wish and will request to be informed. Also, if this information is adequate and convincing, it is also likely to dissuade a tenderer from pursuing legal action if it is not certain of its grounds.

Article 41(3) of Directive 2004/18/EC allows contracting authorities to admissibly withhold certain information regarding contracting decisions in some restricted cases mentioned in that article. See also module E6 on transparency and communication between the contracting authority and economic operators. Reasons for withholding information linked to prejudice concerning the legitimate commercial interests of economic operators or to fair competition between them are more likely to relate to pre-award circumstances. In post-award circumstances, *i.e.* when the competition is over and at least certain technical characteristics of the winning tender have been made public, contracting authorities would have fewer reasons to withhold information. This essentially means that the reasons for rejecting a tender and in particular the reasons for selecting another tender should always be notified to the rejected tenderer or tenderers (unless commercially sensitive information or trade secrets are involved).

Regarding in particular the decision not to award the contract or to restart the award procedure concerning a contract for which a contract notice has already been published, contracting authorities have the obligation under article 41(1) of Directive 2004/18/EC to inform all candidates or tenderers and to provide reasons for this decision, even without a request by a concerned candidate or tenderer. Therefore, the mere communication that the award procedure has been abandoned or restarted is not sufficient, according to the Directive. The decision not to award must be open to legal challenge, and it must be possible to suspend or annul this decision where appropriate, *i.e.* if it has infringed public procurement law, in the same way as any other contracting decision. Review of the decision to terminate an award procedure should be full and not limited to a mere examination of whether the decision was arbitrary or fictitious (*i.e.* a pretext, hiding a non-stated reason for termination of the procedure).

Review of the decision to abandon the award procedure / extent of review

HI case - Judgment of the ECJ

(C-92/00 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien*, available at http://eur-lex.europa.eu.int/)

Facts:

The Mayor of the City of Vienna, acting on behalf of the contracting authority, the *Wiener Krankenanstaltenverbund* (Vienna Associated Hospitals), published an invitation to tender for project management of the catering supply in Viennese associated hospitals. After the submission of tenders, including the tender by HI, the City of Vienna withdrew the invitation to tender and informed HI that it had decided to abandon the procedure for compelling reasons. Namely, it was decided to develop the project in a decentralised manner, without the need for an outside project manager. HI then brought a number of claims, seeking, among other actions, the annulment of the withdrawal of the invitation to tender. The review body (the *Vergabekontrollsenat des Landes Wien*, *i.e.* the Public Procurement Review Chamber of the Vienna Region) requested the ECJ to give a preliminary ruling on several questions concerning the interpretation of Directive 89/665/EC, including whether that directive required the review of a decision of a contracting authority to cancel an award procedure and allowed the possibility of setting aside that decision, as well as whether the review could be limited to an examination of whether the cancellation of the award procedure was arbitrary or fictitious.

Decision:

The ECJ ruled that Directive 89/665/EC required that the decision of the contracting authority to withdraw an invitation to tender would have to be open to a review procedure and that the decision could be annulled where appropriate, on the grounds that it had infringed Community law on public contracts or national rules implementing that law.

The ECJ also ruled that the scope of the review of the decision to cancel an award procedure could not be limited to a mere examination of whether the decision was arbitrary. It had to be a full review, allowing the local review body to assess the compatibility of that decision with the relevant EU rules.

The ECJ referred to all legal principles (examined in section 2.5. above) in its decision (principles of equal treatment, transparency and effectiveness).

See also ECJ case C-15/04 *Koppensteiner GmbH v Bundesimmoliengesellschaft mbH*, available at http://eur-lex.europa.eu.int/.

Good practice note – Form of communication

Contracting authorities should communicate with tenderers/ candidates in writing in the interests of the principle of transparency as well as for record-keeping.

The *time limits* for challenges of notified contracting decisions should be communicated. This communication is only compulsory for the contract award decision, but it is good practice to communicate this information in all cases.

Contracting authorities should try, whenever possible, to use *fax or e-mail* to notify tenderers/ candidates of contracting decisions, so that they are informed of all decisions at the same time and that no time is lost in sending/ receiving documents. Often under local law the deadline date for receipt of documents is the starting date for the setting of deadlines for legal challenges (thus the earlier the receipt, the sooner the deadline will expire). Note that, as mentioned above, normally this would only be true if the notified contracting decision also stated specifically and precisely the reasons for the rejection of an application or tender, and otherwise deadlines would only be set once such reasons were duly notified.

In the case of the award decision, notification by e-mail or fax may mean that the shorter deadline for challenging the decision applies (10 days as opposed to 15, if notified by post), depending on local law.

With regard to informing candidates or tenderers of the general progress of an award procedure even if it was not contained in a contracting decision, see in module E6 the discussions on transparency and communication in the Embassy Limousine case (T-203/96, judgment of the Court of First Instance available at http://eur-lex.europa.eu.int/).

2.6.4 Providing all supporting documentation on all contracting decisions

The provision of supporting documentation is actually a duty linked to that of drafting reasoned and detailed decisions (such decisions should contain all elements showing how they were reached) and providing full information to all economic operators of all contracting decisions. Contracting authorities must provide all supporting documentation relevant to the contracting decision together with the notification to economic operators of the contracting decision. Supporting documentation includes opinions or recommendations by procurement officers, which served as a basis for the decision made by the decision-making officer, committee or body, subject to applicable disclosure rules and article 41(3) of Directive 2004/18/EC.

Contracting authorities should also respond promptly to requests by economic operators for disclosure of supporting documentation. Such requests are usually made and the relevant duty of the contracting authority applies:

- before the economic operator lodges a complaint; providing all documentation at this stage helps the economic operator to decide whether or not to lodge a complaint and also prevents allegations of withholding documents, obstructing use of remedies, etc.;
- during a complaint brought by an economic operator; often joined to complaints is a request for disclosure of documents;
- during litigation; requests for disclosure at this stage may come from the economic operator bringing the legal action or from the competent review body.

2.6.5 Providing access to other tenders – Localisation required

To enable economic operators to assess whether or not they have reasons to challenge contracting decisions, it may be regarded as good practice to provide them with the opportunity to check, at every stage of the contract award procedure, the terms of other applications/ tenders. They should therefore be granted access to the applications of other economic operators, as well as to their tenders, with the exception of information that is marked by the submitting economic operator as commercially sensitive. Regarding such commercially sensitive information, as suggested in module E6, contracting authorities should make the disclosure of certain information a condition of participation in the contract award procedure and require economic operators to designate only particular parts of their tender as confidential, so as to allow review of the other parts by other economic operators.

Where member states allow for such access then the terms of access to applications/ tenders of other economic operators should, ideally, be stated in the contract notice, for example the contracting authority could set a specific date, following the opening of the applications/ tenders, on which it would allow economic operators to inspect the applications/ tenders of other operators. Usually, a representative of each economic operator, possibly accompanied by a lawyer, would attend. A procurement officer of the contacting authority should also be present.

2.6.6 Replying to all pre-trial complaints and replying quickly

It may be that under local laws there is no legal requirement as such to reply to a pre-trial complaint. In such cases, the law would usually provide that if a certain period of time passed without a reply, then the complaint is considered to have been tacitly rejected and the economic operator that had submitted the complaint would be able to proceed with legal action. Notwithstanding such a lack of obligation, it is good practice and serves the purpose of sound administration to reply to all complaints within the period of time set for reply (or, as explained above, tacit rejection would apply). One reason for this practice is that if the reply is convincing, economic operators may not try to pursue the matter further before review bodies, not least because a convincing reply would also persuade the review body, which is not usually empowered to re-decide in the contracting authority's place but only seeks to be assured that the law has been followed. If economic operators do pursue the matter further, the response to the complaint will help the review body to understand the case and reach a decision. Also, responding to complaints is a good exercise for contracting authorities, which may find, when they examine the complaint in depth in order to reply, an irregularity that they had not noticed and can still correct (or they can make a note of avoiding such an error in the next award procedure).

Naturally, contracting authorities should respect all applicable local maximum deadlines for responding to complaints. However, even if there are no such deadlines, the competent procurement official should try to prioritise responses to these complaints and to act as quickly as possible.

2.6.7 Suspending the award procedure while a contracting decision is being challenged

We have seen that after an application for interim measures or application to set aside the contract award decision has been filed, the contract cannot be concluded until the review body has decided on the application. For other contracting decisions this is not a requirement under Directive 89/665/EEC; it may nevertheless be the case that local law provides for the suspension of contract award procedures during legal action.

In any event, also with regard to challenges to contracting decisions other than the contract award decision, proceeding with an award procedure before a review body has decided on applications pending before it, may lead to situations where, if the legal action succeeds, the unlawful contracting decision will have tainted the whole procedure. It is up to the contracting authority to assess whether going ahead with the procedure pending review of a complaint is safe or, inversely, whether this may cause future actions or decisions of the contracting authority to be tainted by the challenged contracting decision if it is found to be unlawful.

2.6.8 Notifying tenderers of the contract award decision and of the exact standstill period and observing the standstill period

This obligation is self-explanatory. Contracting authorities should comply with the relevant rules of Directive 89/665/EEC as amended in these respects by Directive 2007/66/EC. It should be kept in mind that contracts concluded in violation of the standstill period may be declared to be ineffective.

2.6.9 Complying with decisions on remedies

This is obvious, but all contracting authorities must comply strictly with all legal decisions and not try to work around them, as this would probably lead to more legal actions and further delays in the conclusion of the award procedure. It would also entail the risk of disciplinary action against the officials involved. EU Member States have an obligation to ensure the enforcement of decisions on remedies under article 2(8) of Directive 89/665/EEC.

2.7 DEFINING THE OVERALL STRATEGY FOR AN EFFICIENT AWARD PROCEDURE: MAIN POINTS THAT A CONTRACTING AUTHORITY SHOULD KEEP IN MIND

The following is a checklist of points that concern the efficient preparation of an award procedure and the minimisation of challenges.

2.7.1 Good preparation

This goes without saying, but the better the preparation of the award procedure, the less likely it is to be challenged. All steps and procedures must be followed, in particular steps mentioned in module E. It is particularly important to have very well thought out the procurement in advance so as to accurately reflect in the contract notice and tender documents the specifications, selection and award criteria, and documentation to be submitted by economic operators as evidence, as well as the procedure to be followed (not only the type – *i.e.* open, restricted, negotiated, etc. – but also the precise steps of each procedure). Then it will be a matter of the procurement officers following the law and the tender documents.

The simpler and clearer these documents are, the better. If the contract award procedure is carefully planned and implemented and the procurement rules are strictly followed, there will be few grounds for economic operators to complain or for review bodies to make a finding of unlawfulness. This does not mean that complaints by economic operators will be avoided entirely, as there may always be a question or doubt as to whether the rules were correctly interpreted, if the contracting assessments and decisions of the contracting authority were sound and/or lawful, etc., but if the contract award procedure is lawful and the contracting authority tries to remain available to explain this award to economic operators (see below in section 2.7.2.) it is possible to avoid, or at least minimise, legal actions before review bodies.

Good preparation is also relevant from the point of view of the relationship between contracting authorities and economic operators. Economic operators sometimes threaten to bring, and may actually bring, legal action, hoping that they can reach an arrangement with the contracting authority so as to secure work in exchange for dropping the claim. Such conduct is less likely when there are no significant uncertainties about the details of the contract award procedure or about compliance with the law, as legal action is unlikely to succeed and therefore unlikely to be effectively used as a threat.

2.7.2 Availability

Contracting authorities should try to keep all economic operators informed of the progress of the award procedure, answer their queries (in compliance with the law) and, in the event that their decisions are challenged, respond quickly and in detail to complaints and refrain from doing anything that could jeopardise the outcome of legal action.

All inefficiencies lead invariably to increased challenges, delays and possibly cancellation of award procedures. It does happen that economic operators initiate a case because they could not obtain adequate responses from contracting authorities.

2.7.3 Planning ahead

Challenges, if brought, lead to delays in the awarding of contracts. Contracting authorities should calculate these possible delays so that they are able to obtain their contracts when they need them. Contracting authorities should bear in mind that the contract notice and tender documents can be challenged and subsequently all contracting decisions (selection and award) as well. In a MEAT (most economically advantageous tender) procedure, there may be more challenges (in number) because the application of the award criteria is more open to interpretation.

2.7.4 Appointment of competent procurement officials

It is very important that competent and trained procurement officers are appointed, at least as leaders, assisted by less experienced staff. On this issue refer in particular to modules B1 and B2.

2.8 HOW DO ECONOMIC OPERATORS APPROACH REMEDIES?

Economic operators that have an interest in a contract want to obtain it. They are therefore more interested in pre-trial complaints (for which they may not even use lawyers and which may thus not be expensive to lodge) or interim measures, *i.e.* courses of action that can quickly correct irregularities in a contract award procedure and allow economic operators to compete fairly for the contract. As discussed in section 2.6.6., if an economic operator obtains a reasoned reply to its pre-trial complaint filed with the contracting authority, it may not pursue the matter further. If it does not obtain a reasoned reply or any reply at all or if it does not receive documents relevant to contracting decisions, the disclosure of which it has requested from the contracting authority, it would at least consider legal action. Depending on the characteristics of the local review system and the economic operator's particular case (*i.e.* cost and duration of proceedings and likelihood of success), it may also proceed to request disclosure, suspension and annulment of the contracting decision that it considers to have been harmful and/ or suspension and annulment of the contract award procedure.

Seeking or not seeking damages will depend on the local review system and on the facility to obtain compensation, as well as on the cost of legal advice. In any event, economic operators are primarily interested in obtaining work, *i.e.* contracts. See module H, which has been prepared for economic operators.

UTILITIES

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

Directive 92/13/EEC (amended by Directive 2007/66/EC) provides that the three remedies of interim measures, set-aside and damages must be available to any economic operator that has or has had an interest in obtaining a particular contract and that has been at risk or risks being harmed by an alleged violation of the applicable procurement rules, and therefore to any economic operator that has expressed an interest in participating in a contract award procedure or that might have done so if the contract had been advertised.

Directive 92/13/EEC gives EU Member States the option, instead of interim measures and the setting aside of unlawful decisions, of providing for the payment of a sum (such as a fine) when a breach of procurement rules occurs. This sum must be sufficiently high to dissuade contracting entities from committing (or assisting) a breach.

The standstill period, the obligation to notify concerning direct awards, and the sanction for ineffectiveness of contract also apply in the case of utilities.

SECTION 3
EXERCISES

Check each exercise for local relevance and adapt accordingly.

EXERCISE 1
ROLE-PLAY PREPARATION

Municipality Y is about to start a restricted procedure to procure digitisation services for the municipal library. It is known that the procedure will be very competitive, as several specialised IT companies are interested in the contract. To the extent it can, the Municipality would like to avoid litigation against the contract award procedure, and asks you, in your role as procurement officer, to advise on how best to avoid or minimise litigation and/or related delays.

1. The Municipality is considering using electronic or postal communication in its notifications of contracting decisions to tenderers. You are requested to advise on deadline implications.
2. Local law provides for a compulsory pre-trial complaints procedure, *i.e.* aggrieved tenderers must seek review with the contracting authority before they proceed with legal action. Under local law, if the contracting authority does not reply to the complaint within 10 days from its receipt, then such complaint is deemed to have been tacitly rejected and deadlines for legal action start to run. The Municipality anticipates receiving complaints due to the competitiveness of the award procedure, but is short on staff. Therefore, it is already considering allowing the 10-day reply deadline to lapse without replying to complaints it does not consider valid, in order not to allocate resources to such a task. You are requested to advise on deadline and
litigation implications.

EXERCISE 2

The Ministry of Culture is running a restricted procedure for the supply of books and provision of related library services to equip 25 museum libraries across the country. At the award stage, when the tender evaluation committee reviews the tenders of the selected tenderers, it discovers that, due to a mistake in the drafting of the tender documents, there is a discrepancy between the instructions to the tenderers in the tender documents and the electronic calculation tables, used for computation of the offered quantities and prices and included (as CD-ROMs) in the tender documents and filled in by tenderers as part of their tender. The discrepancy would lead to the rejection of most tenders as non-compliant, through no fault of the tenderers.

The Ministry of Culture is particularly keen to conclude the contract with the remaining tenderer, because it has obtained approval for a subsidy, which it will lose if the contract is not signed and performed in the relevant calendar year, and it cannot afford to cancel the award procedure and rerun it on the basis of corrected tender documents. The head of the tender evaluation committee asks you, in your role as procurement compliance officer, a number of questions.

1. The Ministry of Culture wishes to notify all tenderers of the contract award decision and immediately conclude the contract with the successful tenderer -if possible, on the same day as notification. Under local law, concluded contracts cannot, in principle, be reversed. You are requested to advise.
2. The Ministry of Culture, while wishing to notify tenderers of the contract award decision, does not wish to explain to them the way in which it has reached this decision, because it does not want to publicise its mistake. You are requested to advise.
3. The head of the tender evaluation committee asks whether the contract, if concluded immediately upon notification of the award, would be allowed to stand, on the ground that the approved subsidy would be lost if the contract is not concluded and performed within a set deadline (the end of that calendar year). The Ministry of Culture has documents proving the deadline and the sanction of losing the subsidy if the deadline is exceeded, as well as the impossibility to ask for an extension.

EXERCISE 3

The association of municipalities of a large city has run a restricted procedure to award the building and operation of a factory to treat the city's waste. It has reached the decision to award the contract to one of the tenderers and, as required under the law, has notified all tenderers of it, providing a summary of the relevant reasons and mentioning the exact standstill period. Because of the size and desirability of the contract due to its profit margins and the experience it offers, the association has already received several pre-trial complaints. The association considers that most complaints are inadmissible but would like to expressly reject them and provide clear reasons for such rejections, as a matter of good practice and sound administration but also to assist auditing procedures, which are likely to be strict due to the sheer size of the contract. You are requested to advise on a number of related questions in your role as procurement officer.

1. A waste treatment company that has not participated in the contract award procedure lodges a complaint, alleging defects in the assessments of the tender evaluation committee at both the selection and award stages and asking for the procedure to be cancelled.

2. A tenderer who was qualified at the selection stage but whose tender was unsuccessful has lodged a complaint against the contract award decision, alleging that the successful tenderer had not submitted sufficient proof of its past experience, which was one of the selection criteria. The tenderer claims that it refrained from challenging the selection decision, which was duly notified to all economic operators who had submitted expressions of interest, in order not to delay the award procedure.

3. A tendering consortium that qualified at the selection stage was unsuccessful; its tender ranked fourth. Out of its three members, two are local companies that work on a number of projects with the city. The third is a foreign company that participated in the consortium because it was eager to enter the country's waste treatment market, which has only recently started to develop and is likely to offer lots of business opportunities. There are doubts as to whether the award criteria were correctly applied as regards weighting of life cycle costs. The two local companies do not wish to lodge a complaint, because they do a large part of their business with several of the municipalities involved and feel that a complaint will harm their relationship with such municipalities. The foreign company wishes to lodge a complaint because it has allocated resources to the preparation of the complaint and considers that it has some valid grounds to ask for the setting aside of the contract award decision. In the end, the foreign company lodges the complaint on its own.

SECTION 4
THE LAW

Adapt all this section using relevant local legislation, processes and terminology.

This section presents and summarises the articles of Directive 89/665/EEC, as amended by Directive 2007/66/EC, on remedies available to economic operators during public sector contract award procedures. It also presents and summarises article 41 of Directive 2004/18/EC regarding provision of information to economic operators.

1. DIRECTIVE 89/665/EEC, AS AMENDED BY DIRECTIVE 2007/66/EC

Adapt all this section for local use – using relevant local legislation (including secondary legislation) and terminology.

Recital 3 (of Directive 89/665/EC) - refers to the requirement of transparency and non-discrimination in order for public procurement to be opened up to Community competition and to the requirement of rapid and effective remedies to achieve this goal.

Article 1 - Scope and availability of review procedures – explains that this Directive applies to all contracts falling within the scope of (and not excluded from) Directive 2004/18/EC, *i.e.* public contracts, framework agreements, public works concessions and dynamic purchasing systems. It also lays down some basic rules applicable to review procedures as follows:

Paragraph 1 (third sub-paragraph) provides that all decisions taken by the contracting authorities must be reviewed effectively and, in particular, as rapidly as possible, to assess if such decisions have infringed Community public procurement law or national rules transposing that law.

Paragraph 2 refers to the principle of non-discrimination.

Paragraph 3 provides that the review procedures must be available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement (of the applicable rules).

Paragraph 5 allows Member States to require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract. The suspension shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

Article 2 - Requirements for review procedures - sets forth the exact types of remedies which must be (at least) available and certain rules on Member Sates obligations or options regarding organisation and structure of the local remedies system, as follows:

Paragraph 1 provides that remedies must include powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

Paragraph 2 allows separate bodies to be responsible for different aspects of the review procedures.

Paragraph 3 provides that when a body of first instance reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period.

Paragraph 4 provides that other review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

Paragraph 5 allows Member States to provide that the review body may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

Paragraph 7 allows Member States to provide (except where a decision must be set aside prior to the award of damages) that concluded contracts are irreversible, unless the sanction of ineffectiveness is imposed in accordance with articles 2d to 2f of the Directive). In such cases, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

Paragraph 8 sets forth an obligation on Member States to ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

Paragraph 9 sets forth a series of obligations when the bodies responsible for review procedures are not judicial in character: such bodies must provide written reasons for their decisions, there must exist appeal procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it may be reviewed by a court or tribunal independent of both the contracting authority and the review body, members of such court or tribunal must be appointed and leave office under the same conditions as members of the judiciary, at least the president of such court or tribunal must have the same legal and professional qualifications as members of the judiciary, the procedure followed before such court or tribunal must be contradictory (*i.e.* both sides must be heard) and its decisions shall be legally binding.

Article 2a - Standstill period - sets forth requirements applying to the standstill period. In particular:

Paragraph 2 provides that a contract may not be concluded following its award before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned. The communication of the award decision to each tenderer and candidate concerned shall be accompanied by:

– a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive (which allows contracting authorities to withhold certain information), and,

– a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

Article 2b - Derogations from the standstill period - provides that Member States may provide that the standstill period does not apply in the following cases:

(a) if Directive 2004/18/EC does not require prior publication of a contract notice in the Official Journal of the European Union;

(b) if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned;

(c) in the case of a contract based on a framework agreement or on a dynamic purchasing system.

If this derogation is invoked, Member States shall ensure that the contract is ineffective where:

- there is an infringement of the second indent of the second subparagraph of Article 32(4) or of Article 33(5) or (6) of Directive 2004/18/EC (*i.e.* call-off contracts are not awarded according to the applicable rules), and
- the contract value is estimated to be equal to or to exceed the minimum thresholds (set out in Article 7 of Directive 2004/18/EC).

Article 2c -Time limits for applying for review - provides that where a Member State provides that any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The communication of the contracting authority's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for review concerning decisions that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

Article 2d – Ineffectiveness - provides for the sanction of ineffectiveness, if certain conditions are met. In particular:

Paragraph 1 provides that a contract shall be considered ineffective by a review body independent of the contracting authority or that ineffectiveness shall be the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2004/18/EC;

(b) if any of the following are not respected:

– the automatic suspensive effect of an application for pre-trial review (article 1(5) of the Directive), an application for interim measures or set aside against the contract award decision (article 2(3) of the Directive) or the standstill period (article 2a(2) of the Directive),

– if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies and, in addition, is combined with an infringement of the public procurement rules of Directive 2004/18/EC and has also affected the chances of the tenderer applying for a review to obtain the contract;

(c) if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement or a dynamic purchasing system (and the call-off contracts are awarded in breach of the applicable rules and also exceed the thresholds).

Paragraph 2 allows national law to regulate the consequences of ineffectiveness by either providing for the retroactive cancellation of all contractual obligations or by limiting the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties provided in article 2e(2) of the Directive such as fines.

Paragraph 3 allows Member States to provide that the review body may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), such as fines or shortening of the duration of the contract.

Paragraph 3 specifies that economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned (including the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness) shall not constitute overriding reasons relating to a general interest.

Paragraph 4 allows contracts awarded without prior publication of a contract notice to be free from the risk of ineffectiveness, if:

- the contracting authority considers that the award of a contract without prior publication of a contract notice is permissible;
- the contracting authority has published in the Official Journal of the European Union a notice expressing its intention to conclude the contract, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

Paragraph 5 allows call-off contracts based on a framework agreement or a dynamic purchasing system to be free from the risk of ineffectiveness, if:

- the contracting authority considers that the award of a call-off contract is in accordance with the applicable rules,
- the contracting authority has sent a contract award decision, together with a summary of reasons and a statement of the exact standstill period, to the tenderers concerned, and,
- the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Article 2e - Infringements of this Directive and alternative penalties - provides that in case of an infringement of the automatic suspensive effect of an application for pre-trial review (article 1(5) of the Directive), an application for interim measures or set aside against the contract award decision (article 2(3) of the Directive) or the standstill period (article 2a(2) of the Directive) not covered by Article 2d(1)(b), Member States may provide, instead of ineffectiveness, for alternative penalties. In particular:

Paragraph 1 allows Member States to provide that the review body shall decide (*i.e.* choose), after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

Paragraph 2 sets forth an obligation for these alternative penalties to be effective, proportionate and dissuasive. They shall be:

- the imposition of fines on the contracting authority; or,
- the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph (and is anyway open to harmed economic operators).

Article 2f - Time limits - provides that Member States may provide the request for a contract to be rendered ineffective must be made:

(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

- the contracting authority published a contract award notice, provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union, or
- the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive.

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

Article 3 of the Directive concerns the Commission's powers as regards enforcement of the public procurement rules.

Article 3a concern the contents of the voluntary notice expressing a contracting authority's intention to conclude a contract, when such contract was awarded without prior publication of a contract notice and the contracting authority considers that the award of a contract without prior publication of a contract notice is permissible. This voluntary notice, if complied with along with the standstill period of 10 days following publication, allows the concluded contract to be immune from the sanction of ineffectiveness.

The rest of the articles of the Directive concern Commission or monitoring procedures, as well as the amendment of Directive 92/13/EEC on remedies in the context of utilities contract award procedures.

2. **THE FOLLOWING ARTICLE OF DIRECTIVE 2004/18/EC IS ALSO RELEVANT:**

Adapt this section for local use – using relevant local legislation (including secondary legislation) and terminology.

Article 41 – Informing candidates and tenderers - establishes that contracting authorities must inform unsuccessful economic operators about the reasons for their rejection. In particular:

Paragraph 1 provides that contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system; that information shall be given in writing upon request to the contracting authorities.

Paragraph 2 provides that upon request from the party concerned, the contracting authority shall as quickly as possible inform:

- any unsuccessful candidate of the reasons for the rejection of his application,
- any unsuccessful tenderer of the reasons for the rejection of his tender, including the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,
- any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

The time taken may in no circumstances exceed 15 days from receipt of the written request.

Paragraph 3 allows contracting authorities to withhold certain information referred to in paragraph 1, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system where the release of such information would impede law enforcement, would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.

SECTION 4
CHAPTER SUMMARY

SELF-TEST QUESTIONS

Check each question for local relevance and adapt accordingly.

1. Is it permitted to deny the right to challenge a contracting decision (for example, the selection decision) to an economic operator who could have, but did not, participate in the award procedure?
2. Is it permitted to deny the right to challenge a contracting decision (for example, the award decision) to an economic operator who was excluded in a previous stage of the award procedure (*e.g.* at the selection stage)?
3. Is the answer to Question 2 the same if the economic operator was (a) lawfully or (b) unlawfully excluded?
4. What are the types of remedies that a state is required to make available?
5. Is it compulsory to provide for pre-trial complaints?
6. Is it permitted to continue with the award procedure after an application for a pre-trial complaint has been filed and before the decision on it is issued?
7. After an application for a pre-trial complaint has been filed, under which conditions can the contracting authority conclude the contract?
8. Must a contracting authority reply to a pre-trial complaint?
9. What is the effect of asking for interim measures or the set-aside of the contract award decision?
10. When we refer to a "concluded" contract, do we mean a "signed" contract? If not, what do we mean?
11. What is the minimum standstill period? Is the minimum length always the same? On what does such minimum length depend?
12. Must the standstill period be expressly mentioned in the communication of the contract award decision to a tenderer or candidate? Is it sufficient if the standstill period is expressly mentioned in the tender documents?
13. What is the effect of a violation of the standstill period on concluded contracts?
14. Are there any exceptions to the sanction of ineffectiveness of contracts concluded in violation of the standstill period? If so, what are they?
15. Is prospective cancellation (*i.e.* annulment of only future and unperformed contractual obligations) of an ineffective contract sufficient, or must the concerned state provide for additional penalties? If yes, what do such penalties consist of and on whom are they imposed?

16. Is there an obligation on contracting authorities to notify tenderers of the progress of the contract award procedure, even if no formal contracting decision is issued?
17. Is it compulsory to allow the decision to terminate the award procedure (without awarding the contract) to be challenged?
18. When a contracting decision is communicated to a tenderer or candidate, must it be accompanied by a summary of the relevant reasons, or does this depend on whether the tenderer or candidate asks for such a summary?
19. What is the likely consequence of omitting to inform tenderers or candidates fully as regards the reasons and grounds for a contracting decision?
20. What is the main difference as regards remedies available to economic operators in the context of public sector award procedures as opposed to utilities award procedures?

USER NOTE FOR INTEGRITY IN PUBLIC PROCUREMENT MATERIALS

This note is to assist users in navigating the materials on preventing corruption and safeguarding integrity in public procurement developed by the OECD Integrity Unit of the Public Governance and Territorial Development Directorate.

1. Principles for Enhancing Integrity in Public Procurement

These Principles were adopted as an OECD Recommendation in October 2008. They reflect a consensus on good practice amongst OECD Member and non-Member countries. The Principles are unique policy instrument that guides governments' practice in **preventing waste, fraud and corruption in the entire procurement cycle** from needs assessment to contract management and payment. The Principles are structured around **four pillars**: transparency, good management, prevention of misconduct, and accountability and control.

- **Checklist: Enhancing integrity at every step of the procurement cycle**

The Checklist provides policy tools to implement the Principles. It provides guidance to practitioners at every stage of the cycle on how to detect fraud, mismanagement and corruption.

- **Risk Mapping: understanding the risks of fraud and corruption in the procurement cycle**

The report equips procurement practitioners with an understanding of the type of risks they may face throughout the procurement cycle. It contains an inventory of "real-life" techniques used to misappropriate funds and also explores various types of fraud that have been uncovered.

2. Toolbox to safeguard integrity in procurement cycle

The Toolbox helps countries put the Principles into daily practice. The tools collected support public officials in designing and developing guidance and procedures to enhance integrity, transparency and accountability in their procurement systems, including tools to ensure integrity in accelerated procurement procedures. The OECD Global Forum on Public Governance: Building a Cleaner World: Tools and Good Practices for Fostering a Culture of Integrity held in Paris in May 2009 also served to collect good practice and tools from experts from Member and non-Member countries.

The Toolbox is a living on-line document that captures emerging good practices in OECD and non OECD countries. For more information http://www.oecd.org/governance/procurement/toolbox

3. Integrity in Public Procurement: Good practice from A to Z

The report is a compilation of good practices in both OECD Member and non-Member countries. The information was collected through a survey primarily targeting procurement practitioners in central governments. Based on the survey, good practices were identified by government officials, representatives from civil society and the private sector in the OECD Symposium on Mapping Out Good Practices for Integrity and Corruption Resistance in November 2006.

OECD Principles for Integrity in Public Procurement

OECD

OECD Principles for Integrity in Public Procurement

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The OECD is a unique forum where the governments of 30 democracies work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.

OECD Publishing disseminates widely the results of the Organisation's statistics gathering and research on economic, social and environmental issues, as well as the conventions, guidelines and standards agreed by its members.

Also available in French under the title:
Principes de l'OCDE pour renforcer l'intégrité dans les marchés publics

Corrigenda to OECD publications may be found on line at: *www.oecd.org/publishing/corrigenda*.

Foreword

At the OECD Symposium and Global Forum on Integrity in Public Procurement in November 2006, participants called for the creation of an international instrument in order to help policy makers reform public procurement systems and reinforce integrity and public trust in how public funds are managed.

Two years later, OECD countries demonstrated their commitment to take action in this major risk area by approving the Principles for Enhancing Integrity in Public Procurement *in the form of an OECD Recommendation. This Recommendation is a policy instrument to help governments prevent waste, fraud and corruption in public procurement. It represents a consensus from member countries that efforts to enhance good governance are essential in the entire public procurement cycle, from needs assessment to contract management and payment. In 2011, OECD countries will report on progress made in implementing the Recommendation.*

The OECD played a pioneer role in recognising the importance of good governance in public procurement. The Principles *are anchored in four pillars: transparency, good management, prevention of misconduct, accountability and control in order to enhance integrity in public procurement. The overall aim is to enhance integrity efforts so that they are fully part of an efficient and effective management of public resources.*

The Principles *reflect a global view of policies and practices that have proved effective for enhancing integrity in procurement. They are intended to be used in conjunction with identified good practices from governments in various regions of the world. Furthermore, a Checklist was developed to provide a practical tool for procurement officials on how to implement this framework at each stage of the procurement cycle. The report also gives a comprehensive map of risks that can help auditors prevent, as well as detect, fraud and corruption. Finally, it features a case study on Morocco, where a pilot application of the* Principles *was carried out.*

The Principles *provide policy guidance for governments in the implementation of international legal instruments developed in the framework of the OECD as well as other organisations such as the United Nations, the World Trade Organisation and the European Union. An extensive consultation was carried out in 2008 on the* Principles *and Checklist with various stakeholders. The consultation with representatives from international organisations confirmed that the* Principles *usefully complement international legal instruments.*

The Principles *also reflect the multi-disciplinary work of the OECD in analysing public procurement from the public governance, aid effectiveness, anti-bribery and competition perspectives. In particular, they build on OECD methodologies such as the Development Assistance Committee's Methodology for assessment of national procurement systems and the Working Group on Bribery's Typology of bribery in public procurement.*

The report was prepared by Elodie Beth, Innovation and Integrity Division of the Public Governance and Territorial Development Directorate. It draws heavily upon the insights gained during the regular meetings of the network of Experts on Integrity in Public Procurement.

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OECD Principles for Integrity in Public Procurement

Executive Summary

Public procurement: A major risk area

Governments and state-owned enterprises purchase a wide variety of goods, services and public works from the private sector, from basic computer equipment to the construction of roads. Public procurement is a key economic activity of governments that represents a significant percentage of the Gross Domestic Product (GDP) generating huge financial flows, estimated on average at 10-15% of GDP across the world.[1] An effective procurement system plays a strategic role in governments for avoiding mismanagement and waste of public funds.

Of all government activities, public procurement is also one of the most vulnerable to fraud and corruption. Bribery by international firms in OECD countries is more frequent in public procurement than in utilities, taxation, and judicial system, according to a survey of the World Economic Forum.[2] Bribery in government procurement is estimated to be adding 10-20% to total contract costs. Due to the fact that governments around the world spend about USD 4 trillion each year on the procurement of goods and services, a minimum of USD 400 billion per year is lost due to bribery (Peter Eigen, Transparency International, 2002).

Weak governance in public procurement hinders market competition and raises the price paid by the administration for goods and services, direct impacting public expenditures and therefore taxpayers' resources. The financial interests at stake, and the close interaction between the public and private sectors, make public procurement a major risk area.

Beyond the "tip of the iceberg": Addressing the entire procurement cycle

Although it is widely agreed that public procurement reforms should adhere to good governance principles, reform efforts at the international level have focused largely on the formation of contracts in the last decade, when tenders from suppliers are solicited and evaluated. These reforms were made in order to promote competitive tendering for the selection of suppliers, even

though rules also allow, in certain circumstances, less formal selection procedures.

So far, the formation of contracts – starting with the definition of requirements to the contract award – is the most regulated and transparent phase of the procurement cycle, the "tip of the iceberg". However, discussions at the 2004 OECD Global Forum on Governance highlighted the need for governments to take additional measures to prevent risks of corruption in the entire procurement cycle, in particular:

- At the stage of **needs assessment**, which is particularly vulnerable to political interference, and in **contract management and payment**. These stages are less subject to transparency as they are usually not covered by procurement regulations.
- When using exceptions to competitive procedures, for instance in **national security and emergency procurement**.

A commitment from OECD countries

Could countries do more to prevent mismanagement, fraud and corruption in public procurement? OECD countries demonstrated their commitment to take action in this area in October 2008. Following the proposal of the Public Governance Committee, they approved the OECD *Principles for Enhancing Integrity in Public Procurement* in the form of an OECD Recommendation. The Principles are primarily directed at policy makers in governments at the national level, but may also offer general guidance for sub-national government and state-owned enterprises.

The Principles provide a policy instrument for enhancing integrity in the entire public procurement cycle. They take a holistic view by addressing various risks to integrity, from needs assessment, through the award stage, contract management and up to final payment.

Procedures that enhance transparency, good management, prevention of misconduct, accountability and control contribute to preventing the waste of public resources as well as corrupt practices. Efforts to enhance good governance and integrity in public procurement are fully part of an efficient and effective management of public resources.

How to keep the public procurement process transparent?

Corruption thrives on secrecy. A key challenge across countries is to ensure transparency in the entire public procurement cycle, no matter what the stage of the process is or the procurement method used.

The first Principle for Enhancing Integrity in Public Procurement calls on governments to ***provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers***. There are several things governments can do to ensure this. For example, if key decisions on procurement are well-documented and easily accessible, inspectors are able to check whether specifications are unbiased or award decisions are based on fair grounds. The degree of transparency also needs to be adapted according to the recipient of information and the stage of the cycle. In particular, governments should protect confidential information, such as trade secrets of tenderers, to ensure a level playing field.

The second Principle stresses that governments should ***maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering,*** such as extreme urgency or national security. To ensure sound competitive processes, governments should provide clear rules, and possibly guidance, on the choice of the procurement method. No matter what the procedure used, maximising transparency is key, for example through the publication of notices on-line for low-value purchases. Governments could also set up procedures to mitigate possible risks to integrity. In the case of a hurricane or a flood, a risk mitigation board could be set up to bring together key stakeholders to allow for clear policy directions and increased communication during the emergency.

How to achieve value for money?

Common shortfalls in the planning and management of procurement include needs that are not well estimated, unrealistic budgets or officials who are under skilled. Governments realise that procurement should be integrated into a more strategic view of government actions to improve value for money.

The third Principle states that governments need to ***ensure that public funds are used in procurement according to the purposes intended.*** Procurement plans generally include the related budget planning, formulated on an annual or multi-annual basis, with a detailed and realistic description of the financial and human resource management requirements. The management of public funds should be monitored by internal control and internal audit bodies, supreme audit institutions and/or parliamentary committees. When a bridge is to be built, for example, a court of audit may verify not only the legality of the spending decision but also whether the planned bridge responds to a real need.

The fourth Principle calls on governments to ***ensure that procurement officials meet high professional standards of knowledge, skills and integrity.*** Recognising working in public procurement as a profession is critical to reducing mismanagement, waste and corruption. Just like the medical or legal professions, public procurement officials could benefit from well-defined curricula, specialised knowledge, professional certifications and integrity guidelines. For example, if a public official sitting on a tendering commission finds that one of the tenderers is someone with whom he or she has a personal relationship, the official should be able to identify the potential conflict of interest and take action.

How to improve resistance to fraud and corruption?

There is increasing recognition that specific measures are needed in the public and private sectors to identify and address risks of fraud and corruption in public procurement.

The fifth Principle requests governments to ***put mechanisms in place to prevent risks to integrity in public procurement.*** Risks to integrity can pertain to potentially vulnerable positions, activities, or projects. For instance, an anti-corruption agency could draw a "risk map" that identifies the positions of officials who are vulnerable, activities in the procurement where risks arose in the past, and the particular projects at risk due to their value or complexity. These risks can be addressed through mechanisms that foster a culture of integrity in the public service such as integrity training, financial disclosure, or the management of conflict of interest.

The sixth Principle ***encourages close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management***. Governments should set clear integrity standards for the private sector and ensure they are followed. For example, officials who systematically record feedback on experience with individual suppliers are in a better position to evaluate future tenders. Potential suppliers should also be encouraged to take voluntary steps to reinforce integrity in their relationship with the government. These include codes of conduct, integrity training programmes for employees, corporate procedures to report fraud and corruption, internal controls, certification and audits by a third independent party.

The seventh Principle calls on governments to ***provide specific mechanisms for the monitoring of public procurement and the detection and sanctioning of misconduct.*** For example, a public procurement agency could have "blinking" indicators that track decisions and identify potential irregularities by drawing attention to transactions departing from established norms for a project. Procedures for reporting misconduct could also be established, such as an internal complaint desk, a hotline, an external

ombudsman or an electronic reporting system that protects the anonymity of the individual. Governments should not only define sanctions by law but also provide the means for them to be applied in an effective, proportional and timely manner.

How to ensure that rules are followed?

A key condition for a public procurement system to operate with integrity is the availability and effectiveness of accountability and control mechanisms.

The eighth Principle highlights the importance for governments to ***establish a clear chain of responsibility together with effective control mechanisms.*** A clear chain of responsibility is key for defining the authority for approval and based on an appropriate segregation of duties, as well as the obligations for internal reporting. In addition, the regularity and thoroughness of controls should be proportionate to the risks involved. For example, probity advisors could be called upon for purchases that are high value/volume, complex or sensitive in order to advise the procuring authority at key stages of the process and provide a level of independent assistance about the fairness of the procurement.

The ninth Principle stresses that governments should ***handle complaints from potential suppliers in a fair and timely manner***. To ensure an impartial review, an independent body with the power to enforce its decisions should rule on procurement decisions and provide adequate remedies. In particular, potential suppliers should be able to refer to an appeal body. In addition, establishing alternative dispute settlement mechanisms can also be a way to avoid formal litigation and reduce the time for solving complaints. For example, the government could set up an advisory complaint board or a contact point for advice to companies facing problems in cross-border cases.

Last, but not least, the tenth Principle calls on governments to ***empower civil society organisations, media and the wider public to scrutinise public procurement***. Civil society organisations, media and the wider public should have access to public information on the key terms of major contracts. The reports of supreme audit institutions should also be made widely available to enhance public scrutiny. Reviews of procurement activities could also be undertaken. For example, an *ad hoc* parliamentary committee may investigate large infrastructure projects. Direct control by citizens can complement these traditional accountability mechanisms, for example through the monitoring of high-value or complex procurements by a representative from a civil society organisation.

Implementing the Principles

The OECD Principles provide a policy framework for enhancing integrity in the entire public procurement cycle. However, following such principles in real-life situations is the true test.

From simple mistake to deliberate act: Adapting the response

Government contracts can give rise to mistakes, anomalies, fraud, and misappropriation of public funds or instances of corruption. Some of these problems can be avoided through adequate guidance for public procurement officials. Accordingly, the OECD developed a Checklist to help procurement officials implement the *Principles for Enhancing Integrity in Public Procurement*.

The Principles and Checklist are based on acknowledged good practices from governments in various legal and administrative systems. They are intended to be used in conjunction with identified good practices, which provide concrete options for reform for policy makers together with their underlying context (see *Integrity in Public Procurement: Good Practice from A to Z*, OECD (2007), available at *www.oecd.org/gov/ethics*).

For cases when fraud, misappropriation and corruption are the result of an official's deliberate act to circumvent the rules for illicit gain, the government's response needs to be adapted accordingly. A comprehensive map of risks to integrity can help auditors detect misappropriation of public funds, in particular fraud or corruption.

A practical Checklist for procurement officials

The *Checklist for Enhancing Integrity in Public Procurement* provides a practical tool for the implementation of the Principles. The Checklist provides guidance to practitioners at every stage of the public procurement cycle, from needs assessment to contract management and payment. The procurement cycle is defined as three main phases:

- pre-tendering, including needs assessment, planning and budgeting, definition of requirements and choice of procedures;
- tendering, including the invitation to tender, evaluation and award; and
- post-tendering, including contract management, order and payment.

Risk mapping

Gaining a better understanding of risks can help auditors detect fraud and corruption. The report provides insights into risks to integrity at key points of the public procurement process, that is:

- During the needs assessment, this could take the form of studies that are repeated, never delivered, or useless.
- During the planning, the estimate for the project is for instance over or undervalued, unnecessary documents are billed or project specifications are prepared in a way to allow for future gains.
- In relation to the selection method, this may take the form of reduced publicity, abuse of emergency procedures, or a misrepresented operation to split up contracts. For instance, during the contract management, discounts are provided to an "association" registered under the same address of a company, services are modified, invoices are overvalued or work unrelated to the contract is added.

A benchmark for OECD and non-member countries

The Principles are a point of reference with which policy makers can review, assess and further develop existing policies both in OECD and non-member countries.

Promoting policy dialogue

The Principles are used for conducting Joint Learning Studies and formulating capacity development plans in various regions of the world such as the Middle East and North Africa, South East Europe and Asia Pacific. A pilot application of the Principles was carried out in Morocco in 2007 that helped the government strengthen its public procurement procedures in the wider context of the fight against corruption. Highlights of the study on Morocco are presented in the report, in particular key findings and policy recommendations to improve the procurement system.

Acceding to OECD membership

The Principles are also used for countries in the accession process to OECD membership, in particular Chile, Estonia, Israel, Russia and Slovenia, in order to benchmark with OECD standards.

Reporting on progress in 2011

With regard to OECD countries, they will report on progress made in implementing the Recommendation in 2011.

Notes

1. Quantifying the size of public procurement is a difficult task because of the absence of detailed and consistent measurements of government procurement markets for a large number of countries. It is estimated to be the equivalent of 10 to 15% of GDP in OECD countries, depending on whether the compensation for employees is included.
2. Kaufmann, World Bank (2006), based on Executive Opinion Survey 2005 of the World Economic Forum covering 117 countries.

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PART I

Principles for Enhancing Integrity in Public Procurement

Introduction

The Principles guide governments in developing and implementing an adequate policy framework for enhancing integrity in public procurement, while at the same time, taking into account the various national laws and organisational structures of member countries. They are primarily directed at policy-makers in governments at the national level but they also offer general guidance for sub-national government and state-owned enterprises.

Box I.1. **Aim of the Principles**

The overall aim of the Principles is to guide policy makers at the central government level in instilling a **culture of integrity throughout the entire public procurement cycle**, from needs assessment to contract management and payment.

Key pillars of the Principles

The Principles provide a policy framework with ten key Principles to reinforce integrity and public trust in how public funds are managed (see key pillars of the Principles in Box I.2).

Box I.2. **Key pillars of the Principles for enhancing integrity in public procurement**

The Principles stress the importance of procedures to enhance transparency, good management, prevention of misconduct as well as accountability and control in public procurement.

A. Transparency

1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.

2. Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

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Box I.2. **Key pillars of the Principles for enhancing integrity in public procurement** *(cont.)*

B. Good management

3. Ensure that public funds are used in procurement according to the purposes intended.

4. Ensure that procurement officials meet high professional standards of knowledge, skills and integrity.

C. Prevention of misconduct, compliance and monitoring

5. Put mechanisms in place to prevent risks to integrity in public procurement.

6. Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.

7. Provide specific mechanisms to monitor public procurement as well as detect misconduct and apply sanctions accordingly.

D. Accountability and control

8. Establish a clear chain of responsibility together with effective control mechanisms.

9. Handle complaints from potential suppliers in a fair and timely manner.

10. Empower civil society organisations, media and the wider public to scrutinise public procurement.

Public procurement is at the interface of the public and private sectors, which requires close co-operation between the two parties to achieve value for money. It also requires the sound stewardship of public funds to reduce the risk of corrupt practices. Public procurement is also increasingly considered a core element of accountability to the public on the way public funds are managed. In this regard, the Checklist emphasises how governments could co-operate with the private sector as well as with stakeholders, civil society and the wider public to enhance integrity and public trust in procurement.

Defining integrity

Integrity can be defined as the use of funds, resources, assets, and authority, according to the intended official purposes, to be used in line with public interest. A "negative" approach to define integrity is also useful to determine an effective strategy for preventing integrity violations' in the field of public procurement. Integrity violations[1] include:

- corruption including bribery, "kickbacks", nepotism, cronyism and clientelism;

- fraud and theft of resources, for example through product substitution in the delivery which results in lower quality materials;
- conflict of interest in the public service and in post-public employment;
- collusion;
- abuse and manipulation of information;
- discriminatory treatment in the public procurement process; and
- the waste and abuse of organisational resources.

Legal, institutional and political conditions for the implementation of the Principles

In order to implement the Principles, governments should ensure that the effort to enhance integrity in public procurement at the policy level is also supported by the country's leadership and by an adequate public procurement system. The following items are commonly regarded as the essential structural elements of a public procurement system:[2]

- an adequate legislative framework, supported by regulations to address procedural issues not normally the subject of primary legislation;
- an adequate institutional and administrative infrastructure;
- an effective review and accountability regime;
- an effective sanctions regime; and
- adequate human, financial and technological resources to support all elements of the system.

In the following sections the Principles are complemented by annotations that provide options for reform in the implementation of the Principles.

Notes

1. Based on L. Huberts and J.H.J Van den Heuvel, *Integrity at the Public-Private Interface*, Maastricht 1999: Shaker.
2. Based on *United Nations Convention against Corruption: Implementing Procurement-Related Aspects*, paper submitted by the United Nations Commission on International Trade Law at the Conference of States Parties to the United Nations Convention against Corruption in Indonesia in January 2008.

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PART I

Chapter 1

Transparency

Principle 1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.

Governments should provide potential suppliers and contractors with clear and consistent information so that the public procurement process is well understood and applied as equitably as possible. Governments should promote transparency for potential suppliers and other relevant stakeholders, such as oversight institutions, not only regarding the formation of contracts but in the entire public procurement cycle. Governments should adapt the degree of transparency according to the recipient of information and the stage of the cycle. In particular, governments should protect confidential information to ensure a level playing field for potential suppliers and avoid collusion. They should also ensure that public procurement rules require a degree of transparency that enhances corruption control while not creating red tape to ensure the effectiveness of the system.

Governments should ensure access to laws and regulations, judicial and/or administrative decisions, standard contract clauses on public procurement, as well as to the actual means and processes by which specific procurements are defined, awarded and managed. Information on procurement opportunities should be disclosed as widely as possible in a consistent, timely and user-friendly manner, using the same channels and timeframe for all interested parties. Conditions for participation, such as selection and award criteria as well as the deadline for submission should be established in advance. In addition, they should be published so as to provide sufficient time for potential suppliers for the preparation of tenders and recorded in writing to ensure a level playing field. When using national preferences in public procurement, transparency on the existence of preferences or other discriminatory requirements also enables potential foreign suppliers to determine whether they have an interest in entering a specific procurement process. In projects that hold specific risks because of their value, complexity or sensitivity, a pre-posting of proposed tendering documents could provide an opportunity for potential suppliers to ask questions and provide feedback early in the process. This allows the identification and management of potential issues and concerns before the tendering.

Transparency requirements usually focus on the tendering phase. However, transparency measures such as recording information or using new technologies are equally important in the pre-tendering and post-tendering phases to prevent corruption and enhance accountability. Without recording

at decision making points in the procurement cycle, there is no trail to audit, challenge the procedure, or enable public scrutiny. Records should be relevant and complete throughout the procurement cycle, from needs assessment to contract management and payment and include electronic data in relation to the traceability of procurement. These records should be kept for a reasonable number of years after the contract award to enable the review of government decisions. New technologies can also play an important role in providing easy and real-time access to information for potential suppliers, track information and facilitate the monitoring on procurement processes (see also Recommendation 10). Electronic systems, for instance in the form of "one-stop-shop" portal, can be used in addition to traditional off-line media to enhance transparency and accountability throughout the procurement cycle.

Restrictions should apply in the disclosure of sensitive information, that is, information the release of which would compromise fair competition between potential suppliers, favour collusion or harm interests of the State. For instance, disclosing information such as the terms and conditions of each tender helps competitors detect deviations from a collusive agreement, punish those firms and better co-ordinate future tenders. The need for access to information should be balanced by clear requirements and procedures for ensuring confidentiality. This is particularly important in the phases of submission and evaluation of tenders. For instance, procedures to ensure the security and confidentiality of documents submitted could help guide officials in handling sensitive information and in clarifying what information should be disclosed. Furthermore, closer working relationships between competition and procurement authorities should be developed to raise awareness about risks of tender-rigging, as well as prevent and detect collusion.

Ensuring an adequate degree of transparency that enhances corruption control, while not impeding the efficiency and the effectiveness of the procurement process, is a common challenge for governments. Procurement regulations and systems should not be unnecessarily complex, costly or time-consuming, as this could cause excessive delays to the procurement and discourage participation, in particular for small and medium enterprises. Excessive red tape may also create possible opportunities for corruption, for instance in the case of regulatory instability, or when leading to requests for exceptions to rules. Furthermore, special attention should be paid to ensuring the overall coherence of the application of procurement regulations across public organisations.

Principle 2. Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

To ensure sound competitive processes, governments should provide clear rules, and possibly guidance, on the choice of the procurement method and on exceptions to competitive tendering. Although the procurement method could be adapted to the type of procurement concerned, governments should, in all cases, maximise transparency in competitive tendering. Governments should consider setting up procedures to mitigate possible risks to integrity through enhanced transparency, guidance and control, in particular for exceptions to competitive tendering such as extreme urgency or national security.

Open tendering contributes to enhancing transparency in the process. However, a key challenge for governments is to ensure administrative efficiency, and therefore the procurement method could be adapted to the type of procurement concerned. Procurements, irrespective of whether they are competitive or not, should be managed in a clear and transparent framework and grounded in a specific need.

To ensure sound competitive processes, governments should provide clear and realistic rules on the choice of the optimum method. This choice could be governed primarily by the value and the nature of the contract, that is the type of procurement concerned (*e.g.* different procurement methods should apply for goods and for professional services such as the development of computer applications). They could also pro-actively establish additional guidelines for officials to facilitate the implementation of these rules, specifying criteria for using different types of procedures and describing how to use them. Competition authorities may be consulted to determine the optimum procurement method to be used to achieve an efficient and competitive outcome in cases where the number of potential suppliers is limited and where there is a high risk of collusion.

Ensuring a level playing field also requires that exceptions to competitive tendering are strictly defined in procurement regulations in relation to:

- the value and strategic importance of the procurement;
- the specific nature of the contract which results in a lack of genuine competition such as proprietary rights;
- the confidentiality of the contract to protect state interests; and
- exceptional circumstances, such as extreme urgency.

Similarly, when negotiations are allowed, the basis for negotiations should be clearly defined by regulations, so that they can only be held under exceptional circumstances and within a predefined timeframe.

Although the procurement method could be adapted to the type of procurement concerned, governments should, in all cases, maximise transparency in competitive tendering. For instance, in the case of framework agreements, guidance could be provided to ensure adequate transparency throughout the process, including in the second stage that is particularly vulnerable to corruption. Furthermore, governments should consider setting up complementary procedures for mitigating risks of corruption, in particular for exceptions to competitive tendering, such as extreme urgency or national security:

- *Transparency*. Restricted or limited tendering does not necessarily justify less transparency. On the contrary, it may require even more transparency to mitigate risks of corruption. For instance, in the case of limited tendering, the requirements of a contract may be publicised for a short period of time when there is a possibility that only one supplier can perform the work. This could provide suppliers with a chance to prove that they are able to satisfy requirements, which may lead to the opening of a competitive procedure. Similarly, amendments to the contract could be publicised through the use of new technologies. The derogation from competitive tendering should be justified and recorded in writing to provide an audit trail.
- *Specific guidance*. Guidelines and training materials, as well as advice and counselling, provide examples of concrete steps for handling limited or non-competitive procedures for both procurement and finance officials. Restrictions are also important for setting clearly defined boundaries. For instance, follow-on contracting may be allowed only under strict conditions defined in the contract, taking into account the amount of the procurement.
- *Additional or tightened controls*. The independent responsibility of at least two persons at key points of the decision making or in the control process contributes to the impartiality of public decisions. In addition, other measures could be used, such as independent review at each stage of the procurement cycle, specific reporting and public disclosure requirements, or random audits to check compliance on a systematic basis.
- *Enhanced capacity*. The best available skills and experience could be deployed depending on the assessment of the potential risk of the project. For large procurements, independent validation may be necessary through a probity auditor or the involvement of stakeholders. For emergency procurement, a risk mitigation board may be set up bringing together key actors – procurement, control officials and technical experts – to allow for clear policy direction and increased communication.

The procurement capacity available in the country and, in the case of post-conflict countries, the urgency of fulfilling needs, should be taken into account before introducing these procedures for mitigating risks of corruption.

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PART I

Chapter 2

Good Management

Principle 3. Ensure that public funds are used in public procurement according to the purposes intended.

Procurement planning and related expenditures are key to reflecting a long-term and strategic view of government needs. Governments should link public procurement with public financial management systems to foster transparency and accountability as well as improve value for money. Oversight institutions such as internal control and internal audit bodies, supreme audit institutions or parliamentary committees should monitor the management of public funds to verify that needs are adequately estimated and public funds are used according to the purposes intended.

Public procurement systems are at the centre of the strategic management of public funds to promote overall value for money, as well as help prevent corruption. To reflect government needs and provide a strategic outlook in relation to the attainment of government or department objectives, procurement planning is a key management instrument. Procurement plans – generally prepared on an annual basis – may include the related budget planning, formulated on an annual or multi-annual basis (often as part of a department investment plan), with a detailed and realistic description of financial and human resource requirements. Planning requires that officials are adequately trained in planning, scheduling and estimating projects costs so that projects are well co-ordinated and fully funded when works need to begin. Procurement plans could also be published to inform suppliers of forthcoming opportunities providing that the information released is carefully selected to avoid possible collusion. Project-specific plans may be prepared for purchases of goods and services that are considered high value, strategic or complex to establish project milestones and an effective structuring of payment. Performance reporting can also contribute to aligning procurement activities with expected outputs or outcomes, particularly when it is linked to associated expenditures.

Public procurement should be considered an integral part of public financial management and to the fostering of transparency and accountability from expenditure planning to final payment. Transparency and accountability begin with the budget process, with the full disclosure of all relevant fiscal information in a timely and systematic manner.[1] Electronic systems can help connect with the overall financial management system to ensure that procurement activities are conducted according to plans and budgets, and that all necessary information on public procurement is made available and

tracked. To enhance the responsibility of high-ranking officials, fiscal reports may contain a statement of responsibility by the Minister and the senior official responsible for producing the report. The budget should be implemented in an orderly and predictable manner with arrangements for the exercise of control and stewardship of the use of public funds, taking into account the whole life of the contract.

Sound reporting is fundamental throughout key management processes to support investment decisions, asset management, acquisition management, contract management and payment. A dynamic system of internal financial controls, including internal audit, helps ensure the validity of information provided. Budget, procurement, project and payment verification activities should be segregated. These activities should be conducted by individuals or entities from separate functions and distinct reporting relationships. Electronic systems can provide a way to integrate procurement with financial management functions while providing a "firewall" between individuals, as direct contact is not required.

The management of public funds in procurement should be monitored not only by internal auditors but also by independent oversight institutions, such as Supreme Audit Institutions and Parliamentary Committees depending on the country context. Oversight institutions should have the opportunity and the resources to effectively examine fiscal reports. In particular, they may verify not only the legality of a spending decision but also whether it has been carried out in line with government needs. Reports may be audited on a random basis by the Supreme Audit Institution, in accordance with generally accepted auditing practices. Parliament can also play a role in scrutinising the management of public funds in procurement, particularly by reviewing the reports of the supreme audit institution and calling upon the government for action, where necessary. Fiscal reports should be made publicly available to enable stakeholders, civil society and the wider public to monitor the way public funds are spent (see also Recommendation 10).

Principle 4. Ensure that procurement officials meet high professional standards of knowledge, skills and integrity.

Recognising officials who work in the area of public procurement as a profession is critical to enhancing resistance to mismanagement, waste and corruption. Governments should invest in public procurement accordingly and provide adequate incentives to attract highly qualified officials. They should also update officials' knowledge and skills on a regular basis to reflect regulatory, management and technological evolutions. Public officials should be aware of integrity standards and able to identify potential conflict between their private interests and public duties that could influence public decision making.

Public procurement is increasingly recognised as a strategic profession (rather than a simple administrative function) that plays a central role in preventing mismanagement, waste and potential corruption. Adequate public employment conditions and incentives – in terms of remuneration, bonuses, career prospects and personnel development – help attract and retain highly skilled professionals. Capacities should also be sufficient to ensure that procurement officials are able to fulfil their various tasks. Mobility in the administration should also be encouraged to the extent possible and supported by adequate training. Human resource management policies may encourage exchanges between the public and private sectors to cross-fertilise talent and commercial know-how, provided that public service regulations define an adequate framework for preventing conflict-of-interest situations, especially for post-public employment.

In light of new regulatory developments, technological changes and increased interaction with the private sector, it is essential that a systematic approach to learning and development for procurement officials be used to build and update their knowledge and skills. Governments should support officials with adequate information and advice, through guidelines, training, counselling, as well as information sharing systems, databases, benchmarks and networks that help them to make informed decisions and contribute to a better understanding of markets. To prevent risks to integrity, guidance is all the more important in countries that put emphasis on managerial approaches and that provide more discretion and flexibility to officials in their daily practice.

Training plays an important role in helping officials recognise possible mistakes in performing administrative tasks and improving their practices accordingly. Formal and on-the-job training programmes should be available for entry-level as well as more experienced procurement officials, to ensure

that officials involved in public procurement have the necessary skills and knowledge to carry out their responsibilities and keep abreast of evolutions. In addition, certification programmes, established in co-operation with relevant stakeholders such as institutes or universities, help ensure that both programme managers and contractors have acquired an appropriate level of training and experience. Officials, as well as suppliers' organisations, may also be consulted in the revision of procurement standards to ensure that the policy's rationale is understood and accepted and that the standards can be realistically implemented.

Integrity standards are a core element of professionalism, as they influence the daily behaviour of procurement officials and contribute to creating a culture of integrity. To prevent the influence of individual private interests on public decision making, officials should be aware of the circumstances and relationships that lead to conflict-of-interest situations. These situations may be the reception of gifts, benefits and hospitality, the existence of other financial and economic interests, personal and family relationships, affiliations with organisations, or the promise of future employment. The communication of integrity standards is essential to raise awareness and build officials' capacity to handle ethical dilemmas and promote integrity. This is equally important for managers, high-level officials, as well as external employees and contractors involved in procurement. Furthermore, detailed guidelines could be provided for officials involved in public procurement, for instance in the form of a code of conduct. These guidelines help ensure impartiality in their interactions with suppliers, manage conflict of interest and avoid the leak of sensitive information.

Note

1. See also OECD *Best Practices for Budget Transparency*, May 2001 (*www.oecd.org/dataoecd/33/13/1905258.pdf*).

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PART I

Chapter 3

Prevention of Misconduct, Compliance and Monitoring

Principle 5. Put mechanisms in place to prevent risks to integrity in public procurement.

Governments should provide institutional or procedural frameworks that help protect officials in public procurement against undue influence from politicians or higher level officials. Governments should ensure that the selection and appointment of officials involved in public procurement are based on values and principles, in particular integrity and merit. In addition, they should identify risks to integrity for job positions, activities, or projects that are potentially vulnerable. Governments should prevent these risks through preventative mechanisms that foster a culture of integrity in the public service such as integrity training, asset declarations, as well as the disclosure and management of conflict of interest.

To protect procurement officials from undue influence, in particular political interference and internal pressure from high-level officials, public organisations should have adequate institutional or procedural frameworks, sufficient resources to effectively carry out responsibilities and supportive human resource policies. For instance, providing guarantees to ensure that a public procurement official can appeal against a decision of dismissal contributes to the impartiality of the official in making decisions by protecting him or her from undue influence. In addition, merit-based selection procedures and integrity screening processes for senior officials involved in procurement enhance resistance to corruption. This is particularly important as senior officials serve as a role model in terms of integrity in their professional relationship with political leaders, other public officials and citizens. More generally, there should be a clear commitment from senior officials in the administration to set the example and provide visible support to the fight against corruption.

A "risk map" of the organisation(s) could be developed to identify the positions of officials which are vulnerable, those activities in the procurement where risks arise, and the particular projects at risk due to the value and complexity of the procurement. This risk map could be developed in close co-operation with procurement officials. On that basis, training sessions could be developed to inform officials about risks to integrity and possible preventative measures. Suppliers could also follow integrity training to raise awareness of the importance of integrity considerations in the procurement process. In addition, specific procedures may be introduced for officials in positions that are especially vulnerable to corruption, such as regular performance appraisals, mandatory disclosure of interests, assets, hospitality

and gifts. If the information disclosed is not properly assessed, risks to integrity, including potential conflicts of interests, will not be properly identified, resolved and managed. This information should be recorded and kept up-to-date. Integrity procedures should be clearly defined and communicated to procurement officials and to other stakeholders when relevant.

Avoiding the concentration of key areas in the hands of a single individual is fundamental in the prevention of corruption. The independent responsibility of at least two persons in the decision making and control process may take the form of double signatures, cross-checking, dual control of assets and separation of duties and authorisation (see also Recommendation 3 in relation to the budget). To the extent possible, separating the responsibilities for authorising transactions, processing and recording them, reviewing the transactions, and handling related assets also helps prevent corruption. A key challenge with the separation of duties and authorisation is to ensure the flow of information between management, budget and procurement officials and to avoid the fragmentation of responsibilities and a lack of overall co-ordination. The separation of duties and authorisation should be organised in a realistic manner in order to avoid creating overly burdensome procedures that may create opportunities for corruption.

Depending on the level of risk, a system of multiple-level review and approval for certain matters, rather than having a single individual with sole authority over decision making, may introduce an independent element to the decision making process. These reviews may focus for example on the choice of competitive and non-competitive strategies prior to the tendering or on significant contract amendments. They may be carried out by senior officials independent of the procurement and project officials or by a specific contract review committee process. However, multiple-level reviews often involve officials with less detailed knowledge of individual procurements and hold the risk of fragmenting accountability.

Prolonged contact over an extended period of time between government officials and suppliers should also be avoided. The rotation of officials – involving when possible new responsibilities – could be a safeguard for positions that are sensitive or involve long-term commercial connections. However, sufficient capacity and institutional knowledge should be ensured at the government level over time. Electronic systems also provide a promising instrument for avoiding direct contact between officials and potential suppliers and for standardising processes. The use of new technologies may require security control measures for the handling of information, such as: the use of unique user identity codes to verify the authenticity of each authorised user; well-defined levels of computer access rights and procurement authority; and the encryption of confidential data. A cost-benefit analysis of technical solutions should be carried out early in the process, especially for low-value procurement.

Principle 6. Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.

Governments should set clear integrity standards and ensure compliance in the entire procurement cycle, particularly in contract management. Governments should record feedback on experience with individual suppliers to help public officials in making decisions in the future. Potential suppliers should also be encouraged to take voluntary steps to reinforce integrity in their relationship with the government. Governments should maintain a dialogue with suppliers' organisations to keep up-to-date with market evolutions, reduce information asymmetry and improve value for money, in particular for high-value procurements.

Governments should set clear standards for integrity throughout the entire procurement cycle starting with the selection process. The selection of tenderers should be based on criteria, which are defined in a clear and objective manner, are not discriminatory and cannot be altered afterwards. Requirements could be placed on potential suppliers and contractors to show evidence of anti-corruption policies and procedures and to contractually commit them to comply with anti-corruption standards. This could be accompanied by a contractual right to terminate the contract in the event of non-compliance. Several options could be considered for taking into account integrity considerations in the selection process. For instance, potential suppliers may make declarations of integrity in which they testify that they have not been involved in corrupt activities in the past. Alternatively, governments may also lead by example by using "Integrity Pacts" that require a mutual commitment by the government and all tenderers to refrain from and prevent all corrupt acts and submit to sanctions in case of violations.

The information provided by potential suppliers needs to be verified and compared with other internal and external sources of information, such as government databases. Databases may include information such as past performance, prices, and possibly a list of suppliers that have been excluded from procurement with the government. Furthermore, suppliers should be closely monitored in contract management to maintain high standards of integrity and ensure that they are kept accountable for their actions. For instance, there could be a rigorous verification of identity of contractors and sub-contractors early in the process, based on reputable sources of information, to avoid that subcontracting is used as a means to conceal fraud or corruption. More generally, feedback on the experience with individual suppliers should be kept to help public officials in making decisions in the future.

It is also the responsibility of the private sector to reinforce integrity and trust in its relationship with government through robust contractor integrity and compliance programmes. These programmes include codes of conduct, integrity training programmes for employees, corporate procedures to report fraud and corruption, internal controls, certification and audits by a third independent party. They should apply equally to contractors and sub-contractors. Voluntary self-regulation can be undertaken by individual suppliers or members of an industry or a sector, which pro-actively engage in the adoption of integrity measures, in particular by committing to anti-corruption agreements. It is essential that the information is accurate and maintained up-to-date to ensure the effectiveness of voluntary self-regulation by the private sector.

Fostering an open dialogue with suppliers' organisations contributes to improving value for money by setting clear expectations and reducing information asymmetry. For instance, engaging representatives of the private sector in the review or the development of procurement regulations and policies helps ensure that the proposed standards reflect the expectations of both parties and are clearly understood. To foster a more strategic approach to public procurement, governments could provide the opportunity for the industry to discuss innovative solutions so that governments know how marketplaces operate and align with those markets and the opportunities they create. Similarly, governments should regularly conduct market surveys and dialogue with the private sector to keep abreast of suppliers, products and prevailing prices for goods and services.

This dialogue is critical throughout the procurement cycle, from needs assessment to contract management in order to foster a trustful relationship between government and the private sector. Potential suppliers may have the possibility to seek clarification before the tendering, especially for high-value procurements, for instance in the form of public hearings to clarify what is needed. This disclosure of information should be carefully considered, taking into account possible risks of collusion between private sector actors. In order to clarify expectations and anticipate possible misunderstanding with potential suppliers, elements of good practice include prompt responses to questions for clarification and the availability of dispute boards to prevent or resolve disputes on major projects. In the case of responses to questions for clarification, the information should then be transmitted to potential suppliers in a consistent manner to provide a level playing field. The grounds for selecting the winner could be made public, including the weighting given to qualitative tender elements. At a minimum, debriefing should be provided to unsuccessful tenderers on request so that they understand why their proposal fell short in relative terms of other tenders, without disclosing commercially-sensitive information about other tenders. In the contract management, dialogue between both parties is also needed to enable problems to be quickly identified and resolved.

Principle 7. Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly.

Governments should set up mechanisms to track decisions and enable the identification of irregularities and potential corruption in public procurement. Officials in charge of control should be aware of the techniques and actors involved in corruption to facilitate the detection of misconduct in public procurement. In order to facilitate this, governments should also consider establishing procedures for reporting misconduct and for protecting officials from reprisal. Governments should not only define sanctions by law but also provide the means for them to be applied in case of breach in an effective, proportional and timely manner.

The public procurement process should be closely monitored to detect irregularities and corruption. Governments should set up mechanisms that help track decisions and enable the identification of potential risks. Management controls, approval and reporting are key to monitoring public procurement. In addition, the use of electronic systems increases transparency and accountability while allowing officials to use their discretion and judgement for achieving value for money. For instance, a set of "blinking" indicators could be developed in relation to existing computer data-mining to draw attention to transactions that appear to depart from established norms for a project. These indicators, developed on the basis of risks identified, would preferably not be communicated to procurement practitioners to avoid influencing their behaviour. When a number of indicators start "blinking", follow-up should be initiated by auditors to facilitate the detection of irregularities or corrupt practices (see also Recommendation 8). Where justified, this information could be brought to the attention of law enforcement authorities to enable possible investigations.

Officials in charge of control should be aware of the techniques and actors involved in corruption in public procurement to facilitate the detection of misconduct. These officials could follow specialised training on a regular basis to inform them about corrupt techniques used in procurement. Knowledge of the actors involved in corruption and the understanding of their underlying motivations, as well as the techniques used to carry out corrupt agreements also assists in detecting potential corruption. Given the capacity of criminals to devise new techniques, these training sessions could be updated and carried out at regular intervals.[1] Experts' assistance could also be

required to examine a particular technical, financial or legal aspect of the procurement process and gather evidence that could be presented in court.

Public authorities may also develop clear procedures to report misconduct, such as an internal complaint desk, or a hotline, an external ombudsman or an electronic reporting system that protects the anonymity of the individual who reports misconduct yet allows clarification questions. A key challenge is to ensure the protection of public officials who report misconduct against retaliation, in particular through legal protection, protection of privacy information, anonymity or the setting up of a protection board. At the same time, particular attention should be paid to ensuring that the management of complaints is well documented and impartial to avoid harming unnecessarily the reputation of individuals affected by allegations.

Effective, proportional and timely redress, as well as sanctions should not only be defined by law but also promptly applied in case of irregularities, fraud, as well as active and passive corruption in public procurement. Governments should enforce administrative, civil and criminal sanctions.[2] Traditional redress and sanctions include the denial or loss of the contract, liability for damages and the forfeiture of tender or performance bonds. In addition, these could include confiscation of ill-gotten gains and debarment from future contracts to deter private sector actors from engaging in corrupt practices.[3] With regard to officials, redress, consequences and sanctions could encompass administrative, civil and criminal sanctions, including confiscation of ill-gotten gains. Administrative consequences may also exist at the organisational level to punish the contracting authority, for instance in the form of a pecuniary fine in proportion to the value of the contract.

Notes

1. See *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, OECD, 2007.
2. For further information about country practices in relation to sanctions in Asia and the Pacific, see *Curbing Corruption in Public Procurement in Asia and the Pacific: Progress and Challenges in 25 Countries*, ADB/OECD, 2007.
3. For further information on the challenges of introducing debarment, see *Fighting Corruption and Promoting Integrity in Public Procurement*, OECD, 2005.

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PART I

Chapter 4

Accountability and Control

Principle 8. Establish a clear chain of responsibility together with effective control mechanisms.

Governments should establish a clear chain of responsibility by defining the authority for approval, based on an appropriate segregation of duties, as well as the obligations for internal reporting. In addition, the regularity and thoroughness of controls should be proportionate to the risks involved. Internal and external controls should complement each other and be carefully co-ordinated to avoid gaps or loopholes and ensure that the information produced by controls is as complete and useful as possible.

Defining the level of authority for approval of spending, sign off and approval of key stages, based on an appropriate segregation of duties, is essential to establish a clear chain of responsibility. Internal guidelines should clarify the level of responsibility, the required knowledge and experience, the corresponding financial limits and the obligation of recording in writing of key stages in the public procurement cycle. In the case of delegated authority, it is important to explicitly define the delegation of power of signature, the acknowledgement of responsibility and the obligations for internal reporting. These processes should be embedded in daily management and supported by adequate communication and training. Managers play an important role in leading by example and enhancing integrity in the culture of the organisation. They are in charge of setting expectations for officials in performing to appropriate standards and are ultimately responsible for irregularities and corruption.

Regular internal controls by officials independent of those undertaking the procurement may be tailored to the type of risk; these controls include financial control, internal audit or management control. External audits of procurement activities are important to ensure that practices align with processes; they are carried out to verify that controls are being performed as expected. Financial audits help detect and investigate fraud and corruption while performance audits provide information on the actual benefits of procurements and suggest systemic improvements. Performance audits review not only compliance with expenditure rules but also the attainment of the physical and economic objectives of the investment. It is important to ensure that external audit recommendations are implemented within a reasonable delay.

The frequency of audits could be determined by factors such as the nature and the extent of the risks, that is the volume and associated value, the various types of procurement, the complexity, sensitivity and specificity of the

procurement (for instance for exceptions to competitive tendering). There should be no minimum threshold for conducting random audits. For instance, for procurements that are particularly at risk, the use of a probity advisor or a probity auditor may be considered. On the one hand, probity advisors give advice during the procurement to provide a level of independent assurance about the openness and fairness of the process. On the other hand, probity auditors are an external party that is engaged to verify afterwards that a procurement activity was conducted in line with good practice.

Given that public procurement is subject to various controls, attention should be paid to ensuring that controls complement each other and are carefully co-ordinated to avoid gaps and overlaps in controls. A systematic exchange of information between internal and external controls could be encouraged to maximise the use of information produced by different controls. Auditors should promptly report to criminal investigators for follow-up investigation when there are suspicions of fraud or corruption. Information from external audits on procurement should be publicised to reinforce public scrutiny. Furthermore, public disclosure of internal controls may also be considered.

Principle 9. Handle complaints from potential suppliers in a fair and timely manner.

Governments should ensure that potential suppliers have effective and timely access to review systems of procurement decisions and that these complaints are promptly resolved. To ensure an impartial review, a body with enforcement capacity that is independent of the respective procuring entities should rule on procurement decisions and provide adequate remedies. Governments should also consider establishing alternative dispute settlement mechanisms to reduce the time for solving complaints. Governments should analyse the use of review systems to identify patterns where individual firms could be using reviews to unduly interrupt or influence tenders. This analysis of review systems should also help identify opportunities for management improvement in key areas of public procurement.

Providing timely access to review mechanisms contributes to ensuring the overall fairness of the procurement process. A key challenge for governments is to resolve complaints in a fair manner while ensuring administrative efficiency, that is the delivery of goods and services to citizens in a timely manner. Decisions that could be challenged should include not only the award decision but also key decisions in the pre- and post-award phases, such as the choice of the procurement method or the interpretation of contract clauses in the management of the contract. To enable the timely resolution of complaints, a range of measures may be used, for example:

- Using e-procurement, when possible, to ensure that the information on the award is communicated in a prompt manner to all tenderers and that they have a reasonable delay to challenge the decision.
- Providing remedies to challenge the decision early in the process, such as the setting aside of the award decision, the use of a standstill period for challenging the decision between the award and the beginning of the contract, or the decision to suspend temporarily the award decision when relevant. In all cases, a sufficient period of time to prepare and submit a challenge should be provided to unsuccessful tenderers.
- Reviews could also be allowed during contract management and after the end of the contract for a reasonable time in order to claim damages.

To ensure the impartiality of review mechanisms, review decisions should be ruled upon by a body with enforcement capacity that is independent of procuring entities. As a first stage, potential suppliers should have an opportunity to submit their complaints to the procuring authority in

order to prevent confrontation and the costs of a quasi-judicial or judicial review. Officials participating in the review should be secure from external influence. Their decisions may also be published, possibly on-line. In all cases, potential suppliers should be able to refer to an appeal body – administrative and/or judicial – to review the final decision of the procuring authority.

Efficient and timely resolution for complaints is essential for the fairness of public procurement. Different approaches may be used to ensure the enforcement of procurement regulations within a reasonable delay. For example, using a review body with specific professional knowledge in dealing with complaints may reinforce the legitimacy of decisions and reduce the time for solving complaints. Similarly, alternative resolution mechanisms may be established to encourage informal problem solving and prevent a formal review.

Finally, the use of review systems could be analysed to identify opportunities for management improvement in key areas of public procurement as well as patterns where individual firms may be using them to unduly interrupt or influence tenders. In addition, cases of undue pressure on officials from individual firms, such as intimidation and threats of physical harm, should be closely reviewed and handled.

Adequate remedies should be available for tenderers, such as setting aside of procurement decisions, interim measures, annulment of concluded contracts, damages and pecuniary penalties.[1] The review body could have the authority to define and enforce interim measures, such as the decision to discontinue the procedure, taking into account the public interest. The review body should have the authority to enforce final remedies to correct inappropriate procuring agency actions and apply sanctions accordingly, in particular the annulment of a concluded contract. Potential suppliers may be compensated for the loss or damages caused, not only through the reimbursement of tendering costs but also through damages for lost profits. Pecuniary penalties could be applied to force contracting authorities to adhere strictly to their legal obligations.

Principle 10. Empower civil society organisations, media and the wider public to scrutinise public procurement.

Governments should disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption.

Scrutiny practices enhance assessment and review of government actions focusing on the power of information to enhance accountability. Governments should enable civil society organisations, media and the general public to scrutinise public procurement through the disclosure of public information. Freedom of information laws represent a key instrument for enhancing transparency and accountability in the public procurement process. For instance, records could be made available for civil society organisations, media and the wider public, to uncover cases of mismanagement, fraud, collusive behaviour and corruption. In addition, electronic systems are a useful tool for governments to disseminate information on major contracts and therefore enable public scrutiny.

The effective implementation of freedom of association laws and the existence of strong civil society organisations, including trade unions in the public and private sectors, contribute to a broader institutional environment that is conducive to enhanced transparency and accountability in public procurement. This also facilitates civil society initiatives that track the management of public funds in procurement by disseminating information relative to budgetary and financial execution. A promising mechanism is the "open agenda", which obliges procurement officials to disclose every meeting they have with the private sector, in order to ensure a level field for competition. Education of civil society organisations, media and the wider public, for instance through awareness-raising programmes and communication campaigns, is crucial in supporting the integrity of the procurement process.

Oversight institutions such as Parliament, Ombudsman/Mediator and Supreme Audit Institution play an important role in enhancing public scrutiny through their reports on public procurement (see also Recommendation 3). Oversight bodies may undertake reviews of procurement activities, through an *ad hoc* parliamentary committee or a review by the Supreme Audit

Institution, for investigating a specific issue. In addition, an Ombudsman/ Mediator should examine the legality of public administration actions, in particular with respect to laws on access to information, and undertake investigations.

Scrutiny practices may also require the involvement of other stakeholders in the public procurement process. For development assistance programmes, bilateral and multilateral donors could play a role in strengthening and assessing the quality and functioning of public procurement systems.[2] For procurements that involve important risks of mismanagement and possibly corruption, governments should consider the possibility of involving representatives from civil society, academics or end-users in scrutinising the integrity of the process. "Direct social control" mechanisms encourage their involvement as external observers of the entire procurement process or of key decision making points.[3]

This practice of "direct social control" could complement more traditional accountability mechanisms under specific circumstances. Strict criteria should be defined to determine when direct social control mechanisms may be used, in relation to the high value, complexity and sensitivity of the procurement, and for selecting the external observer. In particular, there should be a systematic verification that the external observer is exempt from conflict of interest to participate in the process and is also aware of restrictions and prohibitions with regard to potential conflict-of-interest situations, such as the handling of confidential information. Governments should support these initiatives by ensuring timely access to information, for instance through the use of new technologies, and providing clear channels to allow the external observer to inform control authorities in the case of potential irregularities or corruption.

Notes

1. See *Public Procurement Review and Remedies Systems in the European Union*, SIGMA Paper No. 41, 2007.
2. For instance, the OECD-DAC Joint Venture for Procurement has developed with donor members and partner countries a common country-led approach to strengthening the quality and performance of public procurement systems.
3. This practice is used in particular by Transparency International as part of Integrity Pacts to involve an independent monitor in the process. The independent expert, who may be provided by civil society or commercially contracted, has access to all documents, meetings and parties and could raise concerns first with the principal, and of no correction is made, with the prosecution authorities.

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PART II

Implementing the Principles

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PART II

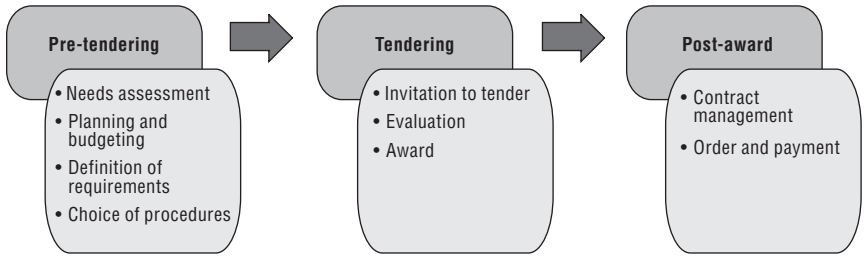
Chapter 1

Enhancing Integrity at Each Stage of the Procurement Cycle: A Checklist

This Checklist provides a practical tool for implementing the policy framework for enhancing integrity at each stage of the public procurement cycle, from needs assessment to contract management and payment. The procurement cycle comprises three main phases:

- pre-tendering, including needs assessment, planning and budgeting, definition of requirements and choice of procedures;
- tendering, including the invitation to tender, evaluation and award; and
- post-tendering, including contract management, order and payment (see Figure II.1.1).

Figure II.1.1.



For each stage of the procurement cycle, practical guidance is provided concerning common risks to integrity and precautionary measures to reduce these risks.

The Checklist focuses on concrete processes and measures that can set up or developed by practitioners to enhance integrity in the public procurement cycle. Governments should ensure that these measures are adequately supported by wider legal, institutional and political conditions in the country.

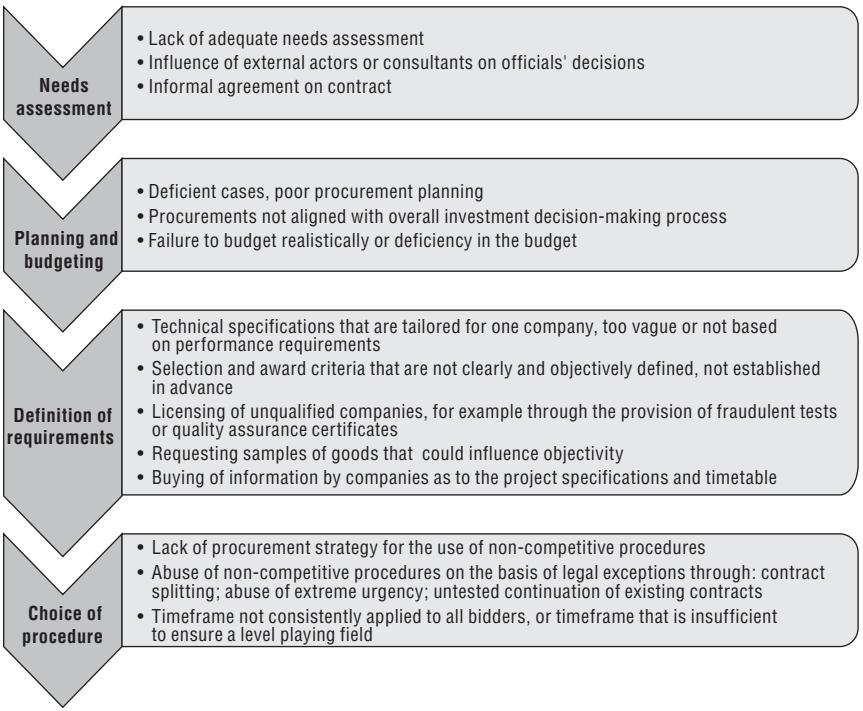
1. Pre-tendering phase

Risks to integrity in pre-tendering

In the pre-tendering phase, common risks to integrity include:

- the lack of adequate needs assessment, planning and budgeting of public procurement;
- influence of external actors, including political interference;
- requirements that are not adequately or objectively defined;
- an inadequate or irregular choice of the procedure; and
- a timeframe for the preparation of the tender that is insufficient or not consistently applied.

Figure II.1.2. **Pre-tendering: Risks to integrity at each stage of the procurement**



Source: Based on Integrity in Public Procurement: *Good Practice from A to Z*, OECD, 2007.

Precautionary measures in pre-tendering

Stage 1. Needs assessment

- **Reduce information asymmetry with the private sector to take a strategic approach to the management of procurement markets based on government needs, for instance:**

  a) gather as much information as possible on the industry or the goods and services (*e.g.* through a market study, existing databases); and

  b) organise consultations with the private sector where appropriate, in cases where a large number of potential suppliers could be involved in relation to a specific procurement project. Attention should be paid to ensuring that the information exchange is organised in an open, structured and ethical manner to avoid collusion between potential suppliers and that the outcomes of discussions are recorded.

- **Provide an assessment of the need for the procurement, in particular whether:**

  a) the need is for the replacement or enhancement of existing resources or to meet an entirely new requirement;

  b) there are no alternatives, including the use of in-house resources or the enhancement of existing capacity through enhanced efficiency;

  c) procurement would be essential for the conduct of business or to improve performance; and

  d) the planned capacity or size is actually needed.

- **Use a validation system that is independent from the decision maker, in particular:**

  a) ensure that decisions to launch a specific procurement are taken by more than one official to the extent possible, especially for projects of high value, to minimise the risk of lobbying or collusion with a specific firm;

  b) for projects at risk because of their value, complexity or sensitivity, consider the use of independent validation of the process (*e.g.* approval by a review committee, use of a probity advisor), and

  c) consult representatives from end-user organisations and the wider public in the needs assessment (*e.g.* in the form of a survey of public utility).

Stage 2. Planning and budgeting

- **Ensure that the procurement is aligned with:**
  - *a)* the strategic priorities of the organisation; and
  - *b)* the overall investment decision making process and the general budget process which should be completed prior to the commencement of the tendering process.

- **As part of the planning, ensure clear and reasonable time frames for each stage of the procurement process by:**
  - *a)* ensuring that these timeframes can be consistently applied; and
  - *b)* taking into account the value, complexity and sensitivity of the contract when fixing the timescale for responses.

- **Provide a realistic estimation of the budget and ensure its timely approval, in particular by:**
  - *a)* preparing a realistic estimate of all phases of the procurement, based on sound forecasting methods;
  - *b)* verifying that funds are available to meet the procurement to the extent possible;
  - *c)* requesting the budget holder to approve expenditure; and
  - *d)* taking into account possible variations over time, which could have an impact on the contract.

- **Prepare a business case for major projects that are particularly at risk because of their value, complexity or sensitivity by:**
  - *a)* taking specialised advice from project and technical experts to assess costs and benefits in a realistic manner. Also possibly request independent peer review of economic, environmental, and social forecasts (*e.g.* involve independent oversight body, specialised public agencies, panel of experts or representatives from civil society, or academic institutes or think tanks, etc.);
  - *b)* ensuring a sound project management regime. In particular: make sure that project management costs are properly funded, that dedicated project officials are in place, and that key stages of the project are appropriately documented;

c) preparing project-specific procurement plans to determine the level of risk of the project and plan precautionary measures accordingly (*e.g.* use of gateway reviews to provide an independent review at each stage of the procurement cycle, probity auditor, etc.); and

d) ensuring that criteria for making procurement decisions are defined in a clear and objective manner, included in the tendering documents, and that decisions demonstrate that criteria have been respected.

- **Clearly define responsibilities taking into account possible risks by:**

  a) attributing the responsibility of project development and implementation to one project organisation, with directors being held accountable;

  b) defining the delegated levels of authority for approval of spending, sign off and approval of key stages;

  c) performing an assessment of the positions of officials which are vulnerable and those activities in the procurement where risks may arise; and

  d) planning senior-level review within the organisation at key stages of the procurement process and considering additional control depending on the value, complexity and sensitivity of the procurement.

- **Make sure that officials are aware of the requirements for the transparency of the procurement system and well prepared to apply them by:**

  a) designating the official(s) in charge of ensuring publicity over government decisions;

  b) publishing any law, regulation, judicial decision, administrative ruling, standard contract clauses mandated by law or regulation, and procedure regarding procurement, and any modifications thereof;

  c) using an electronic and/or paper medium that is widely disseminated and remains readily accessible to the public;

  d) ensuring adequate record storage and management for recording key decisions throughout the procurement cycle; and

  e) reaping the benefits from the use of new technologies that can automatically process and record transactions while avoiding human intervention.

- **Ensure separation of duties and authorisation, which can take several forms such as:**

  a) ensuring segregation of technical, financial, contractual and project authorities for the approval process when possible. The following functions could be handled by different personnel: issue of purchase orders; recommendation of award; certification of the receipt of goods and services; and payment verification; and

  b) identifying separate personnel with clear responsibility for key stages of the procurement process, including definition of requirements, evaluation, control of performance and payment. When these duties cannot be separated, compensating controls should be put in place (*e.g.* random audit).

Stage 3. Definition of requirements

- **Take precautionary measures to prevent conflict of interest, collusion and corruption and promote integrity, in particular by:**

  a) obtaining declarations of private interests from officials involved in the procurement process and, in case of consultation, of other parties involved where appropriate;

  b) ensuring that officials are informed and have received guidance about how to handle conflict-of-interest situations. For officials and other actors involved in the process (*e.g.* civil society monitors), make them aware of restrictions and prohibitions (*e.g.* receipt of gifts, handling of confidential information);

  c) ensuring that officials are familiar with identified risks to integrity in the procurement process (for instance through a risk map or training) and encourage them to liaise with competition and/or enforcement officials in case of doubt of collusion or corruption; and

  d) promoting integrity, not only by delineating minimal standards but also by defining a set of values that officials should aspire to.

- **Take into account integrity considerations in the selection process, in particular by:**

  a) establishing satisfactory evidence of identity of potential suppliers and sub-contractors, including documentary evidence of the identity of key actors who have the legal power to operate in the business;

  b) where applicable, collecting declarations of integrity from potential suppliers in which they testify that they have not been involved in corrupt activities in the past. Consider possible sources of information to verify the accuracy of the information submitted. In addition, consider the possibility of placing requirements on potential suppliers/contractors to show evidence of anti-corruption policies and to contractually commit to complying with anti-corruption standards;

  c) when selecting tenderers on the basis of criteria that include integrity considerations, ensure that this information can be collected and that it can be obtained from a reputable source (*e.g.* official certificate of absence of convictions in Court);

d) considering the use of Integrity Pacts to ensure the mutual commitment of officials and potential suppliers to integrity standards; and

e) where applicable, excluding tenderers who have been involved in corruption or debarred on corruption charges.

- **Make requirements available to all parties by:**

  a) publishing requirements for participation and recording them in writing; and

  b) where possible, providing potential suppliers with the right to seek clarifications, especially for high-value procurements, while ensuring that the answers are widely shared and recording them in writing.

- **When considering the use of a list of suppliers, ensure that:**

  a) inherent risks to competition and transparency are taken into account before deciding to use a list of suppliers;

  b) the list of suitable suppliers is published on the basis of a set of criteria that are clearly defined and stated;

  c) the list is updated on a regular basis (at least on a yearly basis) and that a clear channel and sufficient timeline is advertised for application; and

  d) proposed prices are compatible with goods and services, in reference to established market prices or based on the knowledge of prior procurements of a similar nature (*e.g.* through a database or data mining).

- **Ensure that specifications are:**

  a) based on the needs identified. Suppliers and end-users may be consulted in the drafting of specifications, provided that the number of participants is sufficiently large and representative, and that the results are reviewed in light of market analysis done by the procuring authority to provide objective analysis;

  b) designed in a way to avoid bias, in particular that they are clear and comprehensive but not discriminatory (*e.g.* no proprietary brands or trade descriptions). It is necessary to avoid any form of specification that favours a particular product or service; and

  c) designed in relation to functional performance, with a focus on what is to be achieved rather than how it is to be done in order to encourage innovative solutions and value for money.

- **Ensure that award criteria are clearly and objectively defined by:**

  a) using evaluation criteria on the basis of the economically most advantageous, unless this is a commodity purchase for which the basis of the lowest price may be used;

  b) specifying the relative weightings of each criteria and justifying them in advance;

  c) specifying to what extent these considerations are taken into account in award criteria when using economic, social or environmental criteria; and

  d) including any action that the procuring agency is entitled to make in the criteria (such as negotiations, under what conditions, etc.) and recording them.

Stage 4. Choice of procedures

- **Guide officials in determining the optimum procurement strategy that balances concerns of administrative efficiency with fair access for suppliers, in particular by:**

  a) making sure that the choice of the method ensures sufficient competition for the procurement and adapting the degree of openness depending on the procurement concerned;

  b) providing clear rules to guide the choice of the procurement method, ensuring a competitive process and developing additional guidelines for officials to help the implementation of these rules;

  c) reviewing and approving procurement strategies for all procurements, to ensure that they are proportional to the value and risk associated to the procurement; and

  d) considering consulting with officials in competition authorities to ensure that the procurement strategy adopted is the one that is most likely to achieve an efficient and competitive outcome.

- **Take precautionary measures for enhancing integrity where competitive tendering is not required by regulations. These measures may be proportionate to the value of the contract and include for instance:**

  a) clear and documented requirements;

  b) the justification of the choice of procedure (when using non-competitive procedures) and the appropriate records;

  c) a specification of the level of the authorising personnel;

  d) planning of random reviews of results of non-competitive procedures;

  e) a consideration of the possibility of involving stakeholders and civil society to scrutinise the integrity of the process, especially for exceptional circumstances such as extreme urgency or for high-value contracts;

  f) the publication of the criteria to be applied for the selection of the supplier, and the expected terms of the contract; and

  g) after the award of contract, a publication of the contract agreement.

- **For restricted/selective tendering methods, specific measures could be taken to enhance integrity, such as:**

  a) considering the minimum number of suppliers to be invited for tendering according to regulations, estimating the maximum number of suppliers that could be realistically considered for the specific procurement, and recording justifications if the minimum number of tenders cannot be met; and

  b) conducting spot checks to confirm suppliers' offers and contacting suppliers who do not respond to repeated invitations to tender with a view to detecting potential manipulation.

- **For negotiated/limited tendering methods, specific measures could be taken to enhance integrity, such as:**

  a) providing more detailed record, including for instance the particular supplier who was selected; and

  b) including the terms agreed upon in the contract, with a specification reflecting the supplier's solution.

- **Ensure transparency for qualification processes that cover multiple procurements and are not open at all times for application (*e.g.* framework agreements) by:**

  a) publishing the current list of qualified suppliers;

  b) publishing the invitation to apply for qualification on a regular basis, including the qualification criteria;

  c) ensuring that specifications are set up in advance and published; and

  d) publishing all awards under framework agreements, either per order or on a regular basis.

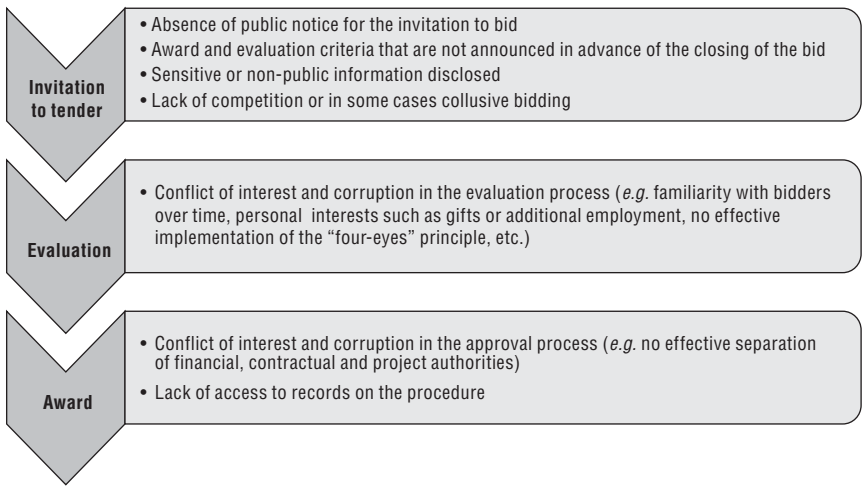
2. Tendering phase

Risks to integrity in tendering

In the tendering phase, common risks to integrity include:

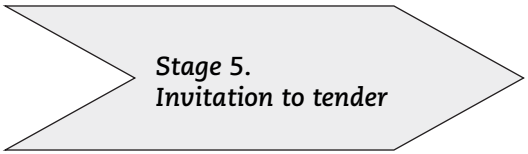
- inconsistent access to information for tendering in the invitation to tender;
- lack of competition or, in some cases, collusive tendering resulting in inadequate prices;
- conflict-of-interest situations that lead to bias and corruption in the evaluation and in the approval process; and
- lack of access to records on the procedure in the award that discourages unsuccessful tenderers to challenge a procurement decision.

Figure II.1.3. **Tendering: Risks to integrity at each stage of the procurement**



Source: Based on Integrity in Public Procurement: *Good Practice from A to Z*, OECD, 2007.

Precautionary measures in tendering



- **Ensure a sufficient level of transparency in the procurement opportunity:**
  - *a)* for open tendering: make the information on the procurement publicly available, including related evaluation criteria; and
  - *b)* for restricted/selective and negotiated/limited methods: publish information on how to qualify in a readily available medium within a timeframe and in a manner that would reasonably allow eligible suppliers to apply.

- **Publish a tender notice that includes:**
  - *a)* information on the nature of the product or service to be procured, specifications, quantity, timeframe for delivery, realistic closing dates and times, where to obtain documentation, and where to submit tenders;
  - *b)* a clear and complete description of selection and award criteria that is non discriminatory and cannot be altered afterwards;
  - *c)* details on the management of the contract and the plan and method for payment and possibly the guarantees when required; and
  - *d)* details of the contact point for enquiries.

- **Communicate to potential suppliers in the same timeframe and in the same manner, in particular by:**
  - *a)* encouraging information exchange on a formal basis (*e.g.* contact points for enquiries, information sessions, on-line module to observe clarification meetings, on-line posting of questions and answers);
  - *b)* ensuring that questions for clarification are promptly responded to and that this information is transmitted to all interested parties;
  - *c)* communicating changes immediately, preferably in the same channel originally used; and
  - *d)* publishing information, preferably on-line, to allow for external monitoring and public scrutiny.

Stage 6. Evaluation

- **Ensure security and confidentiality of information submitted, in particular by:**
  - *a)* ensuring that measures are in place for the security and storage of tendering documents (*e.g.* keeping a document register, numbering all documents or having a central storage area for all documents), as well as for limiting access to documents; and
  - *b)* considering electronic security issues and having documented processes for electronic storage and communication (*e.g.* tenders submitted electronically are safeguarded from access before the closing time; the system has the capacity to reject late tenders automatically).

- **Define a clear procedure for the opening of the tender, in particular by:**
  - *a)* having a team open, authenticate and duplicate sealed tenders as soon as possible after the designated time, immediately followed by public opening, if possible;
  - *b)* performing the opening of tenders, preferably before a public audience where basic information on the tenders is disclosed and recorded in official minutes;
  - *c)* specifying clear policy defining circumstances under which tenders would be invalidated (*e.g.* tenders received after the closing time are invalidated unless it is due to a procuring agency error);
  - *d)* ensuring that any clarification of submitted tenders does not result in substantive alterations after the deadline for submission; and
  - *e)* ensuring that a clear and formal report of all the tenders received is produced (including their date and time of arrival, as well as the comments received from tenderers) before passing them to the officers responsible for their evaluation.

- **Ensure that the evaluation process is not biased and confidential by:**
  - *a)* undertaking evaluations with more than one evaluating official or preferably a committee. Depending on the value of the procurement and the level of risk, the committee could include not only officials from different departments but also possibly external experts;
  - *b)* using notified evaluation criteria systematically and exclusively and assessing them independently (*e.g.* technical, project and risk criteria

could be assessed prior to and separately from financial criteria). Tenders should be evaluated against notified criteria, preferably on a "whole-of-life basis";

c) verifying that officials in charge of the evaluation are not in a conflict-of-interest situation (*e.g.* through mandatory disclosure) and are bound by confidentiality requirements. In the case of an evaluation committee, integrity and professional considerations must be taken into account in the selection of members and involve a member that is external to the procurement team when possible; and

d) including all relevant aspects of the evaluation in a written report signed by the evaluation officers/committee.

- **When allowing negotiations after the award to prevent waste and potential corruption (*e.g.* only one tender is received):**

  a) ensure that negotiations are conducted in a structured and ethical manner and are held within a predefined period of time so that they do not discriminate between different suppliers;

  b) handle information on tenders in a confidential manner; and

  c) keep detailed records of the negotiation.

Stage 7. Award

- **Inform tenderers as well as the wider public on the outcome of the tendering process by:**

  a) promptly notifying unsuccessful tenderers of the outcome of their tenders, as well as when and where the contract award information is published;

  b) publishing the outcome of the tendering process in a readily available medium. A description of goods or services, the name and address of the procuring entity; the name and address of the successful supplier, the value of the successful tender or the highest and lowest offers taken into account in the award of the contract, the date of award; and the type of procurement method used should be included. In cases where limited tendering was used, a description of the circumstances justifying the use of limited tendering should also be included;

  c) considering the possibility of publishing the grounds for the award, including the consideration given to qualitative tender elements. Do not disclose commercially-sensitive information about the winning tender or about other tenders, which could favour collusion in future procurements; and

  d) allowing the mandatory standstill period, where one exists, before the beginning of the contract.

- **Offer the possibility of debriefing to suppliers on request by:**

  a) withholding confidential information (*e.g.* trade secrets, pricing);

  b) highlighting the strengths and weaknesses of the unsuccessful tender;

  c) for debriefings in writing, ensuring that the written report is approved beforehand by a senior procurement official; and

  d) organising oral debriefings, provided that discussions are carried out in a structured manner so that they do not disclose confidential information, and that they are properly recorded.

- **Resolve possible disputes through constructive dialogue when possible, and provide an identified channel for formal review by:**

  a) in the case of problems with potential suppliers, making an effort to resolve disputes through negotiation as a first step;

b) providing information on how to lodge a complaint related to the procurement process;

c) providing the possibility to use dispute resolution mechanisms not only before but also after the award; and

d) considering the possibility of using interim measures to enable the prompt processing and resolution of complaints. The possible overriding adverse consequences for the interests concerned, including the public interest, should be taken into account when deciding whether such measures should be applied.

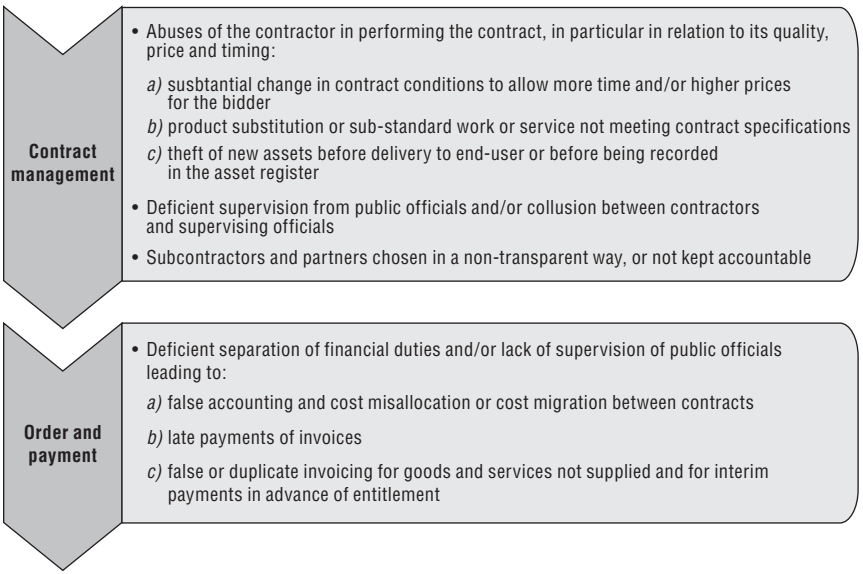
3. Post-tendering phase

Risks to integrity after the award

In the phase following the contract award, common risks to integrity include:

- abuse of the contractor in performing the contract, in particular in relation to its quality, price and timing;
- deficient supervision from public officials and/or collusion between contractors and supervising officials;
- the non-transparent choice or lack of accountability of subcontractors and partners;
- lack of supervision of public officials; and
- the deficient separation of financial duties, especially for payment.

Figure II.1.4. **Post-tendering: Risks to integrity at each stage of the procurement**



Source: Based on Integrity in Public Procurement: *Good Practice from A to Z*, OECD, 2007.

Precautionary measures in post-tendering

Stage 8.
Contract management

- **Clarify expectations, roles and responsibilities for the management of the contract by:**
  - *a)* ensuring that the contracting agency and the supplier are aware of policies in order to prevent conflict of interest and corruption (*e.g.* publication of the policies, reference in the contract) and that the supplier communicates this information to potential sub-contractors;
  - *b)* ensuring that contract and purchase orders provide sufficient information to enable the supplier to deliver the goods/services of the correct description and quantity within the specified time;
  - *c)* including models in the contract for appropriate risk sharing between the contracting authority and the contractor, especially for complex procurements (*e.g.* performance bond, penalty for late delivery and/or payment);
  - *d)* including the payment in the contract, and where this is not possible, informing suppliers of the payment period following approval of invoice; and
  - *e)* stating in the contract possible compensation in case of undue withholding of payment by contracting officials.
- **Supervise closely the contractor's performance and integrity, in particular by:**
  - *a)* monitoring the contractor's performance against specific targets and levels laid down in the contract at regular intervals;
  - *b)* ensuring that costs are monitored and kept in line with contract rates and approved budgets;
  - *c)* organising inspection of "work-in-progress" (especially regarding structural elements that could be hidden by ongoing construction) and completing work and random sample checks;
  - *d)* using electronic systems to monitor progress of contract and timely payment and sending warnings regarding possible irregularities or corruption;
  - *e)* involving third parties to scrutinise the process (*e.g.* selected member from an end-user organisation); and

f) where possible, testing the product, system or other results in a real-world environment prior to delivery of the work.

- **Control change in the contract by:**
  - *a)* ensuring that contract changes that alter the price and/or description of the work are supported by a robust and objective amendment approval process;
  - *b)* ensuring that contract changes beyond a cumulative threshold are monitored at a high level, preferably by the decision making body that awarded the contract;
  - *c)* allowing contract changes only up to a reasonable threshold, and changes that do not alter the quality of the good or service. Beyond this threshold, a review system could be set up to understand the reasons for these changes and consider the possibility to re-tender;
  - *d)* clearly tying in the variation with the main contract to provide an audit trail; and
  - *e)* recording changes to the contract and possibly communicating them to unsuccessful tenderers as well as other stakeholders and civil society.

- **Enable stakeholders, civil society and the wider public to scrutinise public procurement by:**
  - *a)* recording, co-ordinating and communicating information in relation to contract management;
  - *b)* organising regular review meetings between the customer and contractor, and recording end-user satisfaction with the service; and
  - *c)* ensuring access to records for stakeholders and possibly civil society and the wider public for a reasonable number of years after the contract award.

Stage 9. Order and payment

- **Verify that the receipt of goods/services is in line with expected standards by:**
  - *a)* inspecting the goods against the purchase order and the delivery invoice before payment. It is also necessary to assess and certify the standard of service to ensure quality;
  - *b)* when possible, involving at least two officials in the verification that the receipt of goods/services is in line with expected standards; and
  - *c)* involving, in addition to procurement officials, end-users when possible to enhance checks and balances.

- **Ensure that the final accounting or audit of a project is not carried out by personnel involved in former phases to ensure the separation of duties and authorisation, for instance:**
  - *a)* officials who examine the invoice against the goods and orders/delivery note should differ from those officials who give the payment order to the accounting department; and
  - *b)* payments should be cross-checked by the accounting entity afterwards.

- **Ensure that the budgeting system provides for a timely release of funds to make payment against contractual conditions, in particular by:**
  - *a)* committing budget funds promptly prior to or during the award of the contract;
  - *b)* using innovative methods such as purchase cards for small value procurements, provided that their use is limited to purchases of specified items and that expenditure is limited;
  - *c)* organising random supervisory checks on payments and, where financial systems permit, monitor outstanding payments; and
  - *d)* preparing systematic completion reports for certification of budget execution and for reconciliation of delivery with budget programming.

- **Consider the possibility of a post project assessment, in particular by:**
  - *a)* selecting projects for post project assessment on the basis of identified criteria, including the value of the procurement as well as its

complexity, sensitivity and specificity (*e.g.* exceptions to competitive procedures);

b) reviewing the procurement process, drawing lessons that can be learned for any future contracts and placing this information on record;

c) considering the possibility of a "feedback loop" through the consultation of end-users in the post project assessment, particularly for high-value procurements, and involving civil society representatives who monitored the project, if applicable;

d) including information on discrepancies and abnormal trends in procurement (*e.g.* possible collusion, split orders) in the report for information management as well as liaising with competition and/or law enforcement agencies, when relevant; and

e) transmitting information on high-value procurements to the supreme audit institution or other oversight bodies.

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PART II

Chapter 2

Risk Mapping: Understanding Risks of Fraud and Corruption in the Public Procurement Cycle

Public procurement is an activity particularly vulnerable to fraud and corruption. With the governments of countries – developed and developing alike – facing the same problem, it is important to explore crackdown and prevention techniques for reducing such misconduct. To be able to tackle a problem, however, any good practitioner must first study and understand it. This chapter will therefore explore the techniques used to misappropriate funds, and will also look at the various types of fraud that have been uncovered. The aim is to make stakeholders (public procurement practitioners, elected officials, businesses, investigators, magistrates and so forth) aware of the risks of fraud and corruption.

This chapter strives to offer the most comprehensively possible (albeit non-exhaustive) inventory of the means detected to date by which the main types of procurement contracts have been tainted by corruption or fraud. The examples have been chosen from European Union member states, and they span many years. This is no accident: they show that fraud is possible even in countries with longstanding and abundant legislation, and in which numerous checks are performed by officials whose honesty is beyond reproach. They reveal that fraud can strike even at the heart of European Union services.

Despite the controls in place, a number of government contracts give rise to errors, anomalies, fraud, misuse of public funds or corruption. Most errors and anomalies can be explained by a lack of awareness on the part of the people involved – purchasing agents, accountants, auditors, etc. – and this can be put right through training. However, misappropriation – for instance in the form of fraud and corruption – is more difficult to correct because it results from a deliberate desire to circumvent the rules for illicit gain, and to cover up the perpetrator's actions.

This research has focused primarily on:

- methods used, at each stage of the procurement cycle, to make a fraudulent transaction look legitimate to observers or auditors; and
- techniques for misappropriating funds initially earmarked for a transaction, how the funds are used (whether there is personal gain or not), and the networks that make it possible to arrange such dealings.

In describing these mechanisms, it is useful to distinguish between risks of fraud and corruption *i)* in the needs assessment; *ii)* in the planning; *iii)* in relation to the selection method; and *iv)* during the contract management.

1. Risks in the needs assessment

Even before a contract is signed, there are many different ways to misappropriate public funds in relation to scoping studies, timeliness, cost and so on. The amounts involved in this type of misappropriation are often smaller than can be extracted once a contract has been awarded, but they are easier to conceal. The number of payments can also be increased, since this type of misappropriation can take place at each stage of the contract-planning process.

Whatever the purpose of the scoping study, the mechanism for illegally diverting public funds remains the same. Procedures may differ, however, depending on the usefulness of the proposed study. If the purpose is to check out a hypothesis, choose an option or ensure that a decision is adopted, the study must be conducted with utmost seriousness, by a competent consultancy. If, however, the study serves no real purpose (for example, when such aspects are perfectly clear), it can be contracted out to any firm, which will provide a document that delivers the desired justification without having to expend much time or thought. In some cases it will provide nothing at all, simply collecting the agreed amount of money. Thus, the documents received can either be of high quality or else be "empty". Clearly it is easier to detect misappropriation if the studies are useless or of poor quality, or if they are not delivered at all. But the quality of the study and the amount of money diverted are not always correlated: very good studies may conceal major misappropriation, while poor-quality studies may have been conducted honestly. Above all, it is necessary to ascertain how much is at stake, and thus to tailor controls to the amount of money involved.

Minor studies

This category includes all studies for which the cost falls below the national regulatory threshold. In this case the official is generally free to deal with whomever they choose, practically without justification, since in most cases a simple voucher or order letter is all that is needed to commit to the expenditure. An invoice will trigger payment, provided that the amount and the description match the order. Conventional controls would be unlikely to detect any fraud.

There are a few ways the decision-maker can "divert" money for him or herself, for associates or relatives, or for a group with which he or she has connections, but he or she needs the help of a consultancy. Firstly, the money must leave the local authority or public body through the following "legitimate" channels before it can be "re-allocated" to the chosen recipient using one of the techniques described earlier:

- "Friendly" consultancies. The decision-maker can contact a "friendly" consultancy or organisation to ask it to perform the work. This is a

procedure that has been used extensively by certain political parties to collect funds. With this "friend", there is no problem of competition. The chosen firm can thus obtain a fee far in excess of the work performed (over-billing), corresponding to the normal cost of providing the study (whatever its quality) plus whatever amount the decision-maker would like to have.

- An entity belonging to the decision-maker. The decision-maker may ask an entity belonging to him or her, or to family members, to perform the study.

Duplicating studies

The decision-maker can also have the same study conducted by more than one party, either simultaneously or not. If they are to submit their studies simultaneously, firms may be prompted to get together and form a "cartel" (see Box II.2.1 for an example). Their prices will be "harmonised" to achieve a wide profit margin. They divide up contracts amongst themselves and in some instances call upon colleagues or competitors to subcontract out a part of the study. This benefits each party, including the decision-maker, who will receive the amount of money requested from a consultancy that did not take part in the selection process. If the decision-maker allows them to submit their work on different dates, the last parties to deliver their proposals may take advantage of the work done by the first consultancies; in the best-case scenario, the first, highly competent firm will prepare a study from which the others will copy extensively and thus be able to earn wide profit margins. In any event, this abnormally large margin will find its way back to the decision-maker, or to his designated beneficiaries, via the slush fund and using false-invoicing.

Box II.2.1. **Repeating the same study**

To prepare for a major public event, the organising body needed to calculate electricity requirements. A contract for an initial study was awarded to a highly specialised consultancy through a standard tender process. When the report was delivered, the decision-maker, claiming a need to verify the findings, hired two other consulting firms to conduct the same study for a price equivalent to the amount paid to the first firm. At the same time, he provided them with the findings of that first study. The other two companies copied the report already prepared, confirmed the findings, and sent their invoices to the decision-maker. The invoices were highly overpriced for the work involved, and the decision-maker recovered most of the money *via* a transfer to his bank account in a tax haven.

Studies never delivered

The decision-maker may order studies that will be paid for in instalments (which can theoretically amount to as much as 80% of the total contract prior to delivery, although most commonly the initial payment is half the total cost). It will then not be possible to obtain the commissioned study, either because the consultancy fails and vanishes, or because the decision-maker never asks for it (because it has "become unnecessary"), even if the firm has not shut down after collecting its down payments. In either case, none of the down payments are lost for the people involved in the fraud (the slush fund being used for a kickback to the decision-maker), as the (false) invoices enable the firm receiving the payments to show that the payments correspond to services that have in fact been performed and from which it derived no benefit.

Studies above the national threshold

If the cost of a study exceeds the national threshold, the decision-maker must launch a call for tenders or resort to the negotiated procedure (see Section 3).

Circumventing the procedure

In the event of a tendering process, in order to be sure of working with the firm that suits him or her, the decision-maker generally chooses the "economically most advantageous" tender, taking care to list a number of subjective elements[1] as additional selection criteria, such as the individual competence of study managers, the firm's reputation, past accomplishments in the region and so forth. Having taken these precautions, the decision-maker can decide to award the study to the firm he or she deems most "competent" and likeliest to respond to his solicitations.

If, because of intense competition, the stipulated price for the study is not high enough to generate the planned margin, the decision-maker will in many cases be "convinced" by the chosen consultancy to expand the study beyond its initial mission, so as to shed greater light, for example, on the implications of the proposed project. This triggers a spiral of contract amendments by the decision-maker or his designated representatives, the prices of which are set arbitrarily (*e.g.* unit prices are the same as in the initial contract, but the number of hours' work is set arbitrarily). Such amendments make it possible to create the additional margin, which will be redistributed to the decision-maker or his friends.

Altering the outcome of the selection process

Sometimes the decision-maker may also launch a conventional call for tenders and choose the lowest tenderer for his intended project. The

successful tenderer will then have a number of different ways to pay the decision-maker a commission:

- *If the successful tenderer has not been forewarned about the commission*, he or she is the victim of genuine extortion by the decision-maker, who has officially accepted the tender but will only allow the successful tenderer to begin work after paying an illegal commission. The tenderer then pays up to avoid losing the right to tender on future contracts. To be able to pay this unforeseen contribution to the decision-maker, the tenderer either: *i)* obtains an amendment whereby he or she can generate the amount needed *via* false invoices; *ii)* trims his or her margin but creates additional fictitious expenses (false invoices) to avoid being taxed on a profit that was never made; or *iii)* is forced to employ undeclared workers or, more frequently, *via* a subcontractor.
- *If the successful tenderer has been forewarned*, he or she will have already factored for the amount of the "commission" into his or her tender. There is no distortion of competition because all tenderers have been treated equally. The commission can be paid to the decision-maker via the classic procedure of false invoices which are generally channelled through another "friendly" consultancy specialising in such practices. The decision-maker imposes this consultancy on the contract-holder as a subcontractor before signing the contract. This subcontractor gets paid generously by over-billing for fairly useless work that requires no particular technical expertise (in many cases just re-arranging study findings) but that will generate the money ultimately destined for the decision-maker.

Above the European threshold, notification of the contract must be published in the *Official Journal of the European Union*. In many cases, the decision-maker then uses the above procedures to award the contract to the most accommodating consultancy. In other cases, the decision-maker makes sure (through underestimation) that the call for tender is unsuccessful, in which case he or she can then use the negotiated procedure with a variety of consultancies so as, ultimately, to select the "best" candidate, *i.e.* the one known to be most amenable to corruption practices. It should be noted that this procedure is also used extensively in connection with nationwide calls for tender.

2. Risks in the planning

Before the contract-awarding process is launched, and to complement the preliminary studies described above, decision-makers must call upon their own staff or specialised bodies to perform a number of other services. Here, the aim is to establish the precise cost of the project that has theoretically been given the go-ahead. This allows for a sound analysis of the tenders, as well as the preparation of the administrative and technical documentation needed for launching a call for tender that meets all needs and regulations. As laudable as these objectives are, however, they can be diverted from their true purpose by a dishonest decision-maker or business.

Estimating project costs

To decide in principle whether a proposed project is feasible, the decision-maker needs only the rough estimates that are provided by the preliminary studies. To move forward in the decision-making process, the decision-maker has to fine-tune the estimate. But the estimate presented to the decision-maker's superiors to justify the proposed option may be deliberately skewed in the following ways because of an intent to reap some personal financial or moral benefit from the deal.

Overvalued estimates

The estimate may be overvalued if the project concerned is of clear benefit to various stakeholders. The decision-maker may take advantage of the situation, for example, by turning the construction of essential infrastructure into more prestigious facilities that will enhance his or her fame (see Box II.2.2). More practically, the decision-maker may exhibit skills as a "good manager" – the cost having been grossly overestimated to begin with – by successfully completing the project within budget. Moreover, there can be no suspicion that he or she has subsequently enjoyed any "favours" from the firms awarded the contract (although the overestimation makes such favours perfectly feasible), since the actual price ends up being very close to the estimate.

Undervalued estimates

In most cases, estimates are undervalued because the decision-maker must win the approval of the group for which he or she acts, and to which he or she reports (*e.g.* the city council). The decision-maker does so by maximising the expected benefits while minimising the cost of the investment. This raises the risk of having to ask for additional finances during project execution, thus exposing the decision-maker's management to criticism. He or she nevertheless believes that once the project is underway such budget increases will not be called into question, as long as there was

Box II.2.2. **Overvaluing the estimate**

A city council decided to rebuild the city hall, which was outdated, too small and no longer met public access requirements. The estimated cost of refurbishing the existing building would be higher than the cost of building a new one, according to the city's technical departments. Therefore land was chosen for a new downtown location. However, it involved removing several thousand square metres of land from a public garden. Thus, the mayor was able to boast of a remarkable achievement: building a new city hall perfectly integrated with its surroundings, while keeping within the initial budget. He gained a reputation as a good mayor and a good manager.

The unvarnished truth was discovered a few years later by some of his opponents. Apart from the refurbishment, the initial cost had also included the purchase of land adjacent to the old city hall for building the planned extensions. Since this land was not vacant, it was necessary to factor in the cost of demolishing the existing structure. In the end, although these expenditures were never made, their costs were included in the budget for the new building. Moreover, a simple calculation using available prices showed that the construction costs amounted to more than double the usual amounts. And finally, a short time after the project was completed, the mayor acquired a splendid country house, and his re-election campaign the following year featured the use of especially glossy publications.

initial agreement on the principle of carrying it out. These increases, which will take the form of amendments to the initial contract, will also enable him or her to receive "commissions" from the firms to which contracts have been awarded (Box II.2.3).

Box II.2.3. **Undervaluing the estimate**

In the initial estimate for the construction of an underground car park, the cost of lighting was "forgotten". This was rectified later by adding nearly 20% to the value of the contract. But the omission, by keeping the initial costs low, helped to get the go-ahead for a project that was being challenged by the municipal opposition. It also helped in selecting the most accommodating contractor.

Immediate misappropriation during document preparation

Defining project specificities

After submitting a precise estimate of the project's cost, the main input from any service providers involves setting out the "specificities" of the proposed project and preparing documents for the selection process: specifications, technical clauses, administrative clauses, etc.

Since these documents are vital, one simple technique for misappropriating sums of money is for the decision-maker to have them prepared in-house, by his own staff, while at the same time commissioning identical work from an outside service-provider. The outside firm needs only to copy the documents prepared by the decision-maker's technical staff, affix its own logo and collect the fee stipulated in its contract. Without expending much effort, the outside firm submits a report that corresponds precisely to what the decision-maker wants. Substantially overpaid, it is in a position (via false invoicing, *inter alia*) to pay into a slush fund which will be used, among other things, to pass some of the money back to the decision-maker. A variation on this technique, and one which avoids any involvement of the decision-maker's technical staff, is to subcontract the preparation of projects for which there exist standard documents (contemporary works, licensed models, standard models, etc.), which enables the contractor to do his work easily and provide all the necessary regulatory guarantees.

Making project particulars and tenders understandable

Technical studies, even if done well, can sometimes be difficult to understand and even more difficult to explain to laymen (such as city councillors, for example). It is thus perfectly reasonable to hire an organisation to make the findings understandable. However, it is not necessary to commission a private company for this purpose, since usually the decision-maker's technical staff and the office handling the project study are fully capable of explaining complex documents and making their work understandable to anyone. Hiring a private company can therefore be used to camouflage commission payments to the decision-maker or his friends, as discussed in the previous section on minor studies.

"Ordinary" commissions

Lastly, irrespective of the chosen service-provider, and whatever the quality of the services rendered, the decision-maker can always arrange to be paid "commissions" by using the technique of over-billing, as long as the potential providers have been informed of his intention and the amount of his needs before taking part in a regular call for tenders. Thus all tenderers will

have factored the cost of the commission into their proposals and there is no discrimination since all of them have been informed.

Arranging for misappropriation in the future

Not all misappropriation is necessarily immediate. There are far more subtle techniques, which are used, for example, when preparing project specifications to arrange for future diversions of funds. These can be organised in a virtually scientific manner to avoid any risk of detection over the life of the contract (see also Section 4 on the management of the contract).

Affiliated entities

The first opportunity for this type of misappropriation arises when a decision-maker commissions a service-provider to prepare some or all of the tender documents. If this service provider is affiliated to a group that includes another subsidiary likely to submit a tender on the future project, it might be tempted to favour companies in its own group by providing them with exclusive information that would enable them to get the contract, or by inserting specifications that companies in its group alone would be able to meet. This situation is not unusual. Cross-shareholdings, takeovers and mergers have mushroomed in recent years to the point that decision-makers and their staff often do not know which group of companies might stand to benefit from the information and specifications. This is because each company within a group generally retains its own identity and a certain degree of independence (Box II.2.4).

Box II.2.4. **Using affiliated entities**

A local government needed to install a new computer system. The work was commissioned to a specialised company which recommended the use of specific products, materials and software. All of these proposals involved supplies for which one firm held exclusive rights. On investigation, it turned out that this firm was another subsidiary of the group to which the specialised company belonged.

Two scenarios are possible when there is dependency or collusion among the company establishing the tender specifications and certain firms planning to compete for the contract. If the decision-maker has not been informed of these ties, and if he or she fails to take the precaution of checking whether any exist, he or she may be "manipulated" (even if the decision-maker was contemplating being paid "commissions" when the contract was awarded). If the decision-maker has in fact been informed of the connection between the

service-provider and one or more tenderers, and if, having that information, the decision-maker attempts to capitalise on it by soliciting a "commission" payment, the collusion, which in this case becomes especially important, is very difficult to prove. It can only be proved if it is revealed by an unsuccessful tenderer, or if an external auditing body looks into any ties between the firm compiling the specifications and the company whose offer, being especially well-matched to the decision-maker's requirements, was successful and thus won the contract.

Another technique is to persuade the decision-maker or his staff to specify services that only particular companies can provide because of their exclusive rights to a material, product or manufacturing process. The use of the phrase "Product N or the equivalent" attempts to reduce the number of cases in which a particular supplier or manufacturer is given the upper hand. Nonetheless, it is still not uncommon for specifications to name a certain service, giving one particular firm an edge over all others (see Box II.2.5).

Box II.2.5. **Using exclusive rights**

Specifications for computer equipment should not state "Windows operating system", since this would automatically eliminate a number of competitors, including those that use the Linux system or the system developed by Apple.

Non-standard specifications

Apart from particular specifications that certain firms alone can meet, specifications sometimes stipulate values far in excess of prevailing standards. Obviously, there could be many reasons for this. However, one should ask whether these specifications will in fact be used in the implementation of the project (Box II.2.6).

Box II.2.6. **Using non-standard specifications**

Specifications for reinforcing concrete in a particular project called for steel bars with a diameter of 12 mm, justified on the grounds that the height of the proposed building might be increased. When the work was carried out, inspectors were informed that the building could not be made any higher. They therefore checked the building's safety against conventional standards, which required only 10 mm-diameter bars. Nevertheless, the company billed for 12 mm bars. On this item alone, the savings amounted to 44% of the price of the steel bars.

This scheme would be impossible without the complicity of the decision-maker's representative who certifies the work that is carried out. The scheme allows the holder of the contract to generate sums of money, part of which can be used to "compensate" dishonest inspectors. The balance can be recovered in full by the company without the decision-maker being informed,or shared with the decision-maker if the latter has approved the scheme.

Another approach is for a company, acting together with the decision-maker, to submit a tender that does not adhere to standard specifications and, as a result, is lower than those of the other competitors. This proposal generally enables the firm to get the contract and to pay a "commission" to the decision-maker without trimming its margin.

Lastly, it is worth mentioning that there may be a technician on the decision-maker's staff who "operates" for his or her own benefit. Knowing that they have the employer's trust, technicians are in a good position to impose "exorbitant" specifications, to ensure that they are or are not factored in by certain companies when they submit their tenders, and then to check and certify whether or not they have been adhered to. The fact that the same technician is present throughout the entire process enables to engineer significant misappropriation for its own benefit, needing only the complicity of the firm's local manager, with the decision-maker not knowing about this.

"Errors"

Another misappropriation technique involves making "errors" in quantities or quality specifications. Any estimate will contain a provision of about 5 to 10% of the total amount of the contract to allow for unforeseen on-site incidents. For example, a road-building project may encounter an error in the volume of rock fill to be destroyed, or its hardness may not have been realised. Also, despite extensive geological studies, the full extent of certain pockets of clay that have to be removed before the road can be built may be underestimated.

But in some cases these "unforeseen" events may not be unknown at all; instead they have been deliberately concealed, or omitted from the documentation distributed to potential tenderers. This is one of the most effective means of misappropriating substantial amounts of money. While information that is known to be incomplete or erroneous is planted into specifications, the correct information is provided to a "privileged" enterprise. When the corrupt decision-maker or technician informs one of the firms about the actual quantities or quality specifications, the following scenarios are possible:

- The informed firm neglects to incorporate an especially costly requirement into its estimate and wins the contract thanks to an offer that is lower than

its competitors, yet which still leaves it with a wide profit margin. This type of favouritism is sometimes used to bolster the chances of local firms that are well acquainted with the territory, at the expense of outside firms that based their offers on the specifications alone.

- The firm submits a proposal with an attractive total price in order to win the contract and, in its price list, indicates high unit prices for work that it knows has been underestimated in terms of quantity (Box II.2.7). When the quantities stipulated in the specifications have been reached but the problem has not yet been solved, it will request a continuation of the work until the desired result is achieved. There will be no further tenders. The additional work is performed by the contract-holder and paid at the unit price stipulated in the initial price list submitted by the company. The profit margin will be restored, and then some, which will leave room for substantial rebates.

This system implies collusion between the official preparing the specifications and the firm that is favoured to get the future contract.

Box II.2.7. **Collusion between the official in charge of specifications and a supplier**

Along the planned route of a new roadway through a mountainous limestone area, there are caves, filled to varying extents with clay, that need to be "purged" (that is emptying the caves of their compressible clay content and subsequently filling them with an incompressible substance). Because this is a very expensive operation, exploratory boring is carried out prior to construction to determine the volume of purging necessary. However, the specifications are amended to indicate a smaller volume of boring.

If the volume indicated in the specifications is smaller than the estimated volume, the informed contractor will submit an overall offer that is lower than the others to get the contract but will state a high unit price for purges. Once the quantities mentioned in the specifications have been reached, further purges will then be necessary. Confronted with this totally "unforeseeable" situation, a contract amendment will be signed with the on-site contractor, using the unit prices stipulated in its offer. As a result, the contractor will more than cover its costs and be able to "reward" its informant.

If the volume indicated in the specifications is overstated, the contractor, thanks to its knowledge of the ground, will commit to a lower volume of purges, offering to cover the cost of any overruns from its estimate. It will underbid the others and get the contract while still having the resources to "reward" its informant.

"Omissions"

In many contracts, when disputes arise it can emerge that the decision-maker has no means of enforcing the terms of the contract because the "penalties" section has been deleted from the original document. As a result, if a contractor intentionally fails to meet its commitments, no penalties can be imposed on it.

There is nothing new about this procedure, which is used fairly often when there is collusion between decision-maker and contractor. It gives a firm a special advantage by waiving the obligations that bind its competitors, such as deadlines for project completion. It can also lead to payments of subsidies or advances with nothing in return.

"Imposed" maintenance

The final method commonly used to generate long-term substantial and steady inflows of cash is to acquire equipment or materials that can only be maintained either by the installer or an exclusive contractor. While the procurement contract can be negotiated on particularly attractive terms, the same cannot be said for the maintenance of the equipment or materials, since here the supplier imposes their own terms.

This scenario is especially prevalent in computer technology and office automation systems. Here, the acquisition of hardware, in some cases at highly competitive prices, is conditional upon acceptance of a multi-year maintenance contract for servicing the equipment, as well as the compulsory purchase of a range of specific maintenance products (without which the manufacturer's guarantee is null and void). These highly profitable sales enable the supplier to make steady and substantial profits, at least part of which they can return in any form to the decision-maker to retain his or her custom.

A similar approach is to sell equipment that is incompatible with the purchaser's existing stock. In time, the purchaser will have to make costly changes to its existing stock to make it compatible with the new devices or, more radically, will have to replace its stock entirely. It goes without saying that in either case, "aids to decision-making" (in the form of commissions or other benefits) are planned to help the decision-maker make the best choice, and that these "aids" are maintained over the entire life of the contract, thus ensuring years of income for both partners.

The cases so far are of services provided by entities independent of the decision-maker. However, similar situations can arise if work is performed in-house by the decision-maker's own staff if they have no choice but to implement their boss's instructions. They too, then, may be prompted to "skew" the results of their studies, *e.g.* by neglecting to enumerate all of the

consequences of a technological choice (materials currently used made obsolete; the need for periodic upkeep by the contractor; rewriting of computer software used until that point; "erroneous" estimates of certain items of expenditure, etc.).

In most cases, such voluntary omissions are used to justify subsequent contracts (using the negotiated procedure), which enables the decision-maker to look forward to "commission" payments for his personal benefit for many years to come.

3. Risks in relation to the selection method

The type of procedure chosen to launch the procurement process can indicate a desire to circumvent legislation. The procedures themselves are not at fault, since they are all designed to ensure fair access and equal opportunities to candidates for public procurement contracts. But in the wrong hands, each of these procedures can camouflage the misappropriation of public funds, corrupt practices, influence-peddling, and acquisition of illegal interests. They can also undermine the equality of tenderers. The risks are not always the same, however, depending upon whether the call for tenders is open or restricted, whether a negotiated procedure is followed or whether a group is used as an intermediary. Some procedures lend themselves more readily than others to misuse. In addition, the decision-maker can sometimes manage to avoid having to initiate a call for tender, which reduces the transparency of the procurement and creates opportunities for abuse.

Abuses involving buying groups

A buying group helps procurement managers with relatively low procurement requirements by circumventing the need to issue a call for tender. The mandatory call for tender is issued by the group, and the public procurement manager simply chooses which goods to buy from a catalogue. In addition, if only a small volume of goods is needed, the prices offered by the group are usually lower than those that the public procurement manager would be able to obtain directly from suppliers. In return for dispensing with the procedure and in order to cover expenses, the group charges a commission on the goods it sells.

This simple and useful mechanism can nonetheless be abused. There are two practices in particular that can lead to the genuine misuse of the procedure.

A buying group customer may want one of their own suppliers to be benchmarked by the group to avoid having to issue a call for tender every time when ordering a product. He or she may therefore ask the group to issue a "tailor-made" call for tender – a call for tender for a highly specific product. Regardless of the number of offers received, only one product is capable of meeting all the requirements given that the specifications were tailored for that particular product. The product is therefore benchmarked and can be used by the customer. If, despite all these precautions, another supplier still submits an equivalent offer, it would always be possible to charge a slightly higher than normal commission in order to "erode" the profit margin and thereby make it of little interest to the supplier to be benchmarked. Such procedures have been reported in countries where the buying group has a virtual monopoly on procurement.

The group may also decide to favour suppliers who are already benchmarked at the expense of new arrivals. This process can be used when an innovative tender is submitted. The group draws up, usually with the firm proposing the new product, a specification corresponding precisely to the distinctive characteristics of the new product. This unofficial document is then discreetly circulated to the group's friends and the group only initiates the tendering procedure once its usual suppliers are ready to respond to the call for tender. Several products therefore correspond to the tender specification and, for a variety of reasons, the contract is always awarded to one of the group's usual suppliers with which it has agreed various "arrangements", such as kickbacks on commissions.

Abuses of open calls for tender

Although an open call for tender implies that all candidates are entitled to submit offers, various techniques can bias the equality of access to public procurement contracts. The following techniques are the most noteworthy.

Reduced publicity

Where publication of a notice in the *Official Bulletin of Publication of Public Procurement Notices Contracts* (BOAMP) is not mandatory, the call for tender may be published in journals or reviews with very limited circulation (Box II.2.8). In some cases, regardless of the value of the contract in question, an "oversight" can mean that the call for tender is not published at all, whether at local, national or international level. Thus only a few privileged firms who are "in the know" will be able to respond to the notice or submit a tender.

Box II.2.8. **Reducing publicity**

In the 1990s, a large number of the calls for tender for constructing a metro in a European city were only published in the national press, not in the *Official Bulletin of Publication of Public Procurement Notices*.

Subjective criteria

Although selection criteria for tenders must be justified, certain additional criteria may be more subjective, which may skew the assessment of tenders. This is the case, for example with the "architectural aspect" or "environmental appropriateness" of a project, which are a matter of subjective, personal choice.

Unrealistic deadlines

Despite all the precautions set out in the regulations, the deadlines for disseminating information may be too short to allow firms not notified in advance to submit a credible tender or even to study the project. Indeed, in some cases even the regulatory notice periods are too short to allow potential tenderers to carry out a serious cost appraisal.

Decision-makers often justify shortened deadlines on the grounds of urgency, if not compelling urgency, but experience has shown (Box II.2.9) that in fact such excuses are only given because short deadlines can exclude undesirable candidates. National regulations should give an exact definition of the conditions under which the concept of urgency may be applied.

Box II.2.9. **Abusing the use of urgency**

In the extension of a university, the increase in the number of students at the start of the academic year in September was put forward as an urgency to use non-competitive procedures. However, as it was already known two years previously therefore it could not be held to be an unforeseeable event.

Difficult conditions for obtaining documents

Even when the minimum regulatory deadlines are respected, the conditions for obtaining the specification may mean that only local firms or very large groups can obtain it. For example, it might have to be obtained on the spot (with no provision made for posting it to tenderers) or the cost of making specifications available may be very high. In addition, in some calls for tender, important documents included in the specification (drawings, geological studies, etc.) may not be ready at the start of the selection process. They are sent later, but even when the deadline for submitted tenders is extended (which is not always the case), there is often not enough time to study these documents properly to submit a technically well drafted tender. The only firms that can study their tender properly and submit prices within the deadlines are therefore firms which had prior knowledge of the contents of these documents.

Information leaks

The person drawing up the specification or the decision-maker may release, in advance to certain suppliers, important information on the content of the call for tender (Box II.2.10). This contravenes the principle that all candidates should be dealt with equally.

Box II.2.10. **Leaking information**

During a call for tenders for constructing a building near a watercourse, the competitors were not informed of the construction of a dam upstream of the future construction site. By lowering the level of the water table, the dam avoided the need for special foundations, which all of the competitors, apart from the local firm involved in the construction of the dam, had included in their tenders.

Restricted calls for tender

Calls for tender are known as "restricted" when only a short-list of candidates is permitted to submit a tender. In principle, this procedure is used when the work can only be performed by a limited number of firms or for low value contracts. However, it is also misused to exclude firms that may be less favourably disposed towards the decision-maker (*e.g.* those that will not accept being discriminated against) or that are less familiar with local "practices" (*e.g.* foreign firms).

Drawing up a list of candidates

The most important step in a restricted call for tender is to make a list of candidates, based solely on technical criteria, who could be consulted. Failure to issue a notice of the call for candidates or failure to call for candidates are the most commonly observed infringements of the regulations and are done to avoid too many candidates coming forward for inclusion in the list of firms invited to tender.

The decision-maker (the person in charge of the contract or the tender review board) chooses firms from this list, without having to state the criteria on which the selection is based. These firms will be asked to submit a tender. If these firms should fail to give the decision-maker satisfaction, he or she can deselect them or invite new candidates (increased competition) to submit proposals in subsequent consultations.

As a general rule, everything proceeds "smoothly" and the contracts are split among a restricted number of selected suppliers. In reality, the decision-maker prefers to select firms that he or she knows because he or she has already used them (for example) and because they provide the guarantees of quality, compliance or procurement that he or she expects. For their part, the firms on the list have no interest in seeing new competitors added to their group. They thus seek to retain the trust of the decision-maker by supplying suitable services and by sometimes offering, in addition, some personal "advantages".

Conspiracy

When the decision-maker always consults the same firms, he or she obtains satisfactory service within reasonable deadlines and consequently feels that he or she is making the best use of the community's resources by taking few risks. Indeed, in many cases he or she justifies the policy in terms of safeguarding local jobs. However, this approach can encourage some corrupt practices amongst the firms in the favoured group, which usually involve the following steps.

Group agreement. Firms that are regularly selected sometimes agree among themselves on a "*modus vivendi*" which will allow them to satisfy the decision-maker without having to compete fiercely to secure contracts. This practice allows them to divide contracts among themselves according to their own criteria (work planning, difficulty of the work, deadlines, etc.), provided that the decision-maker makes no changes to either the selection method or the list of candidates. Any firm that does not play along is excluded from the public procurement contract, whereas those which do play the game increase their prices to reflect the constraints imposed upon them and are therefore able to "compensate" both their colleagues who have not been selected (through sub-contracting or various forms of compensation) and the decision-maker (via commissions). Ultimately, it is the taxpayer who foots the bill for all these additional expenses.

Decision-making approach. This conspiracy between firms (which in most cases arises without any prompting by the decision-maker) can take various forms: an official association; a secret association to nominate the firm that will submit the "best" tender and agree on an acceptable contract price; or a secret association to choose which members will alone be in a position to obtain the contract, while the others receive kickbacks from this or subsequent transactions. A number of the members in charge of such transactions set out the rules to be followed in forthcoming projects or projects already in progress, note the operations in a book and discuss the tenders that will be submitted. Such meetings can be held at several levels: national, regional and local. Members are organised according to both table and trade in order to respond to the technical complexity of operations. Such groups are therefore highly corporatist organisations.

To ensure that the system works properly, prior knowledge of forthcoming contracts (the type of operation and provisional cost) is required. Thus if firms are informed beforehand or if information is leaked on other offers, the association has at its disposal, before the call for tender is issued, details that will aid internal discussions. Such discussions allow contracts to be shared out in advance.

Implementation of decisions. When the call for tender is issued, the review of candidates' proposals must be purely formal. The "competitors" (the other members of the group) have submitted unusable quotations or have proposed prices that are too high.[2] The firm selected by the group is the only one to submit a satisfactory tender and therefore wins the contract. Sometimes, the decision-maker is confronted with a conspiracy between firms in which all submit tenders far higher than the price estimate drawn up by his or her departments. The decision-maker therefore has to declare the call for tender inconclusive and commit to a negotiated procedure (see next Section). However, irrespective of the firm with which the decision-maker will subsequently negotiate, he or she will be dealing with one of the members of the conspiracy. The outcome of this will therefore be an increase in the cost of the operation, which will ultimately be borne by the taxpayer.

It should be noted that while these behaviours may not be qualified as corrupt, they nonetheless seriously compromise the equality of candidates' access to public procurement contracts and the overall integrity of the process.

Kickbacks. The competitors who have deliberately ruled themselves out of the contract will receive kickbacks. For example, they may be actively involved in the operation as sub-contractors, they may benefit indirectly from the operation or they may be awarded (by the group) another national or local contract. In the event that they cannot receive compensation in the form of a contract within a short period of time, they may receive, almost officially, compensation through an invoice (obviously false) for services supplied or work carried out.

Stock market manipulation and insider dealing. A conspiracy, in the case of major work contracts, can also give rise to stock market manipulation. If a major group listed on the stock exchange is awarded a large contract obtained through a conspiracy, those in the know can use this information to their own advantage. They may decide, for example, to purchase cheap shares in the successful company before the outcome of the call for tender has been announced. The value of these shares will automatically increase when the good news over the contract is released. All they have to do then is to immediately sell the shares to cash in their profits.

Likewise, the sale of shares in a company before official notification of its failure to win a major contract is a way of avoiding the loss in share value that will automatically follow the announcement. If circumstances permit, using these two levers can be doubly rewarding. In addition, provided only a small number of shares are involved, these activities are very difficult to detect. However, such practices cannot be overlooked as they offer scope for substantial earnings and, if the conditions are right, constitute insider dealing.

The negotiated procedure

All negotiated contracts – when only chosen suppliers are invited to negotiate a contract – are suspect in the eyes of inspectors because direct negotiation between a decision-maker and a supplier can give rise to all sorts of manipulation leading to fraud, misappropriation of public funds and corruption. This is why use of this procedure has only been permitted in a number of specific cases (those listed in EU Directives and various national regulations). Of these permitted cases, special attention should be paid to the following because they are susceptible to abuse.

Tests, research and experiments

Although this technique requires the decision-maker to prove that the work, supplies or services being ordered are to be used for experimental or R&D purposes, any major civil work or specialised building can easily fall into this category. However, while such justification is acceptable for this type of civil work, it is not acceptable in the case of common or customary construction work (typical civil works, construction of residential buildings based on a specific model or conventional industrial workshops, etc.).

After an unsuccessful call for tender

This is the most common case. It can easily occur; all that is required to have a call for tender declared inconclusive is to specify stringent technical requirements and a low contract price. In the course of the "negotiation", it is then a straightforward matter to reduce the services to the level of the standards that usually apply and/or to increase the initial financial package so that, in return for "compensation", the contract can be awarded to the most amenable firm.This is one of the easiest forms of misappropriation and inspectors should give priority to investigating such cases.

In the event of urgency or compelling urgency

This process is used frequently, even though national and EU case history has helped to considerably reduce the cases that can be covered by this provision (totally unforeseeable events and serious risks if the work or the procurement is not carried out immediately).

National security or military secrecy

European Court of Justice case history has, in a number of cases, helped to curtail use of this concept, significantly reducing the frequency with which it is invoked at both the national and EU level. We should therefore no longer see purchases of blankets for the army covered by the provisions of military secrecy or painting work in a consulate for which the interests of the nation are invoked.

There is no consultation procedure that can effectively avoid all risks of fraud or corruption. Dishonest individuals will always try to use the loopholes in different types of procedure for fraudulent ends that are likely to be punished by criminal law.

Procedures to avoid issuing a call for tender

A call for tender must be issued for any contract whose value exceeds a level set by a member country. However, decision-makers may use certain techniques to avoid having to follow this procedure, which they feel leaves too much to chance given that their aim is to choose a firm that is friendly to them. They may therefore try to arrange things so that the code no longer applies, in the ways described below.

Splitting-up contracts

A common technique is to ensure that public procurement procedures no longer apply by awarding contracts whose value does not exceed the specified thresholds. For example, an attempt may be made to misrepresent a building or operation (Box II.2.11), or to split projects into smaller components.

Box II.2.11. **Misrepresenting an operation to split up contracts**

In the building industry, instead of issuing a call for tender for the entire operation, consultations are carried out by activity: plumbers, glass-fitters, painters, carpenters, etc. While such practices are banned, the waters can be muddied to avoid detection by using different addresses for the same building, first specifying the address on one street and then on another. In addition, contracts can be staggered over time and, if necessary, guarantees can be provided that the building is usable in its current state, that the various work contracts are not linked and that they do not have an impact on its use.

Splitting-up invoices

It is also possible to use the fact that, following a merger or a take-over, the same firm may have a number of different trading names. Consequently, when the number of orders placed during the same financial year is about to exceed the threshold, which would at the very least require the signing of a contract to ensure compliance with the regulations, the supplier is asked to submit his invoices under another of his trading names. Each "different firm" is then awarded a volume of contracts that falls short of the threshold and can therefore continue to work under the shorter consultation procedures.

4. Risks during the management of the contract

The preceding chapter primarily described "subtle" forms of misappropriation, such as fraudulent intellectual services, false projects, illegal commissions and fraudulent arrangements to facilitate misappropriation during the management of the contract. In most cases these take the form of tangible services that have not been supplied or that have been poorly carried out, use of illegal (or undeclared) workers, overseers and inspectors who are accomplices in misappropriation, as well as a series of practices and tricks of the trade. All these "tricks" allow the contract holder to generate the financial flows required to fund a bribery pact.

Once the contract has been awarded, there are several other possible ways that misappropriation can occur during the execution of work, the supply of a service or the purchase of supplies.

Delivery of supplies

Misappropriation during the delivery of supplies is relatively easy to detect or uncover. It may take several forms.

Discounts

When the government buyer obtains promotional discounts, in quantitative terms or otherwise, they are usually incorporated into the invoice in the form of reductions or increases in the quantities delivered. This is not always the case, however, as these discounts are sometimes offered directly to the buyer:

- The supplier opens an account in the name of the buyer. This account is credited with amounts corresponding to the discounts omitted from the invoices. Using this account, the buyer purchases additional goods sold by the firm. Sometimes it is used to purchase equipment for which the buyer does not have credit or which is subject to administrative licences that are not readily obtainable. In some cases the buyer may make purchases for him or herself, family members or friends. The goods concerned will not be listed in any inventory because they do not legally exist.
- The discount is paid by transferring the sum into an account that does not belong to the buyer's administration but to an association with a very similar name with which the buyer is linked (Box II.2.12). This process can be used to endow parallel structures (associations linked to the buyer, for example) with financial or material assets. Its main advantage is to give such structures the means to buy everything they may need and not only the products listed in the supplier's catalogue.

- Part of a deal offered to the buyer (*e.g.* buy three products and receive a fourth one free) is shared with a friendly organisation. So three products may be bought, delivered and paid for by the purchaser at the normal rate; the fourth, which is free, is delivered later and to another address. This process thus also provides a friendly organisation, or individuals, with equipment or operating resources.

Box II.2.12. **Providing discounts to an association**

As part of a major sporting event, contracts were awarded to a well-known company by a public body called XYZT. In agreement with the managers, quantitative discounts were invoiced separately, under the name XYZt, an association registered at the same address and whose chairman was an elected official.

Amendments to the order

Amending the order is another technique used to misappropriate funds. A product is ordered and an invoice raised. Just before the product is due to be delivered, the supplier is asked to modify the order and supply a cheaper product, but the original invoice is sent to the local authority. Since the price paid is higher than the value of the goods delivered, the supplier provides the customer with a credit voucher or a cheque to make up the difference. However, the credit voucher or cheque is made out to a similar beneficiary that resembles, but is not the same as the purchaser. This process requires the purchaser to collude with the person in charge of verifying the service supplied (since the invoice does not match the goods supplied). It also means there will be irregularities in the books, in that the reimbursement is not made out in the name of the customer, even though such similar names are sometimes used so that a "mistake" can easily be made.

Another, much simpler, process involves giving the product purchased a generic name which does not exactly match the product desired (for example, a printer will be described as a "typewriter"), but which has exactly the same reference as the product supplied, the price having been agreed beforehand by the purchaser and the supplier. This system is used to acquire equipment that could not otherwise be bought due to a lack or shortage of specific funds. However, it can also be used to misappropriate public funds for personal profit.

Part-exchange of equipment

When buying new equipment, the purchaser must often dispose of the old equipment because it is worn out, broken, unsuitable or has simply

become obsolete (although often still in good working order). As a general rule, the purchaser gets rid of these old products by selling them at a very low price, either directly, if his or her status allows, or through a middleman in the form of a specialist agency. In the latter case, the purchaser does not profit from the sale because the income goes straight into the public purse. However, in some cases the purchaser can come to an arrangement whereby the supplier buys the now useless goods from the purchaser. A part-exchange price, generally very low, is agreed from which, in certain cases, the costs of disconnecting, dismantling and removing the equipment must be deducted. The final sum, usually fairly small, is then deducted from the price of the new equipment or offered as a credit to the purchaser of the new equipment.

When the equipment in question consists of computer or office equipment that is still in good working order, slightly more complicated arrangements may be found which will put a higher value on the transfer of ownership. The old equipment is dismantled and transported to a depot for destruction but is not actually destroyed. The price of dismantling and transporting the equipment corresponds to a set part-exchange price. The firm that has signed the contract (to supply the new equipment) therefore finds itself in the possession of goods that have a zero book value (purchase price equal to the costs of dismantling and transporting the goods) but which are nonetheless in perfect working order. The firm can therefore dispose of this equipment without entering the transfer into its books. It thus sells these goods on to a buyer specialised in buying unwanted stock (a broker) who, depending on his or her status, can either sell it on as second-hand equipment or dismantle the equipment to sell on as spares. The declared price of this transaction between the firm and the broker will be zero. In contrast, the firm will be given a sum of money in cash which it can either keep for use as a slush fund or, more probably, partly hand over to the original owner (the purchaser of the new goods) as a "thank you" present.

Supply of services

The supply of services may also give rise to misappropriation, although the mechanisms are usually more sophisticated than for the procurement of goods. This discussion is limited to phenomena internal to the service provider, since such practices take the form of tax evasion (concealing profits) which is not necessarily linked to corruption, even though in some cases the need to increase income and profits is imposed by the need to pay "compensation" after securing the contract.

Modification of services

In a number of cases, once the contract has been awarded the decision-maker and the service supplier agree to downgrade the services specified in

the contract. The aim here is to reduce the quality of the services the supplier is required to provide so that a commission can be paid to the decision-maker (Box II.2.13).

Box II.2.13. **Modifying services**

A contract was awarded for office cleaning services. This contract called for full, daily cleaning of the furniture in each office. Afterwards, following negotiation, it was agreed that only wastebaskets and ash-trays would be emptied every day, while the offices would be cleaned once a week rather than once a day. A share of the resulting savings made would be remitted to the decision-maker either in the form of cleaning services (for his personal residence), or as cash which would ensure regular income for him for several years given that the contract, which was multi-year from the very onset, would be regularly renewed.

In the case of intellectual services, a verbal agreement between the decision-maker and the service supplier may be sufficient for the latter to reduce the supply of services. In this way, the planned work-load can be significantly reduced, the requirements restricted and the supplier of services freed of contractual obligations to his or her advantage, while still respecting the obligation to provide progress reports which are usually used to authorise the payment of advances. The supplier then pays the agreed "contribution" requested by the decision-maker.

Double (or multiple) payments

Another technique consists of ordering a study that already exists. The intention here, once the contract has been awarded, is to rewrite a study that the decision-maker or supplier already possesses. This practice, known as "recycling", allows a share-out of substantial gains because the decision-maker purchases, under another name, a service which has already been received and paid for. This process can even be repeated several times in a row. This procedure is easy to use but difficult to detect unless one has already been informed of the existence of the first study, prepared under a different name.

Carrying out the work

This is the most complex technique to detect because public works and buildings are constructed in stages, each of which may be awarded to different contractors who may or may not be linked to each through group or sub-contracting contracts. Misappropriation arises from the existence of many types of so-called preparatory works which are often dealt with independently

of the contract itself; additional work, regardless of the reasons for such work; and work which will not be carried out or which will not comply with the selection process specifications. It should also be noted that the same people are involved in all operations: site manager, foremen, representative of the design office heading the operation. All of these people are, to a lesser or greater extent, subordinated to the contract holder and undoubtedly find it easier not to oppose any misappropriation they may see or in which they may be involved, but rather to exact, in their turn, their own benefits. Alternatively, they themselves may be the organisers of the misappropriation.

Preparatory work

The construction of a building or a civil work often requires some initial land preparation (for example, ground preparation and demolition) and other construction-related activities (rubble clearance, traffic deviation and restoration of traffic flows, landscaping, etc.). The contract holder could sub-contract these operations, which are usually covered by private law contracts. The contract holder selects the first tier of sub-contractors and submits his or her selection to the official for approval. Subsequently, each of these sub-contractors can choose other contractors to carry out part of the work contract. These cascaded sub-contracts can be used to produce sums that will then be remitted to the decision-maker using the system of false invoices or undeclared work.

However, the decision-maker may also decide to carry out this preparatory work since it is often independent of the main contract. In order to obtain commissions on these contracts, the decision-maker may use a number of specific practices. In the case of demolitions or ground preparation (grubbing up tree stumps), contracts are awarded as lump-sums that are often determined purely arbitrarily. If there are several firms competing for the contract, which would mean lower lump-sums, the number of units can be increased (*e.g.* trees to be felled) or reference made to unexpected difficulties (*e.g.* need to use more powerful plant) in order to obtain the payment of additional sums that will allow the firm awarded the contract to maintain its profit margin while still paying a commission to the decision-maker (Box II.2.14).

The removal of rubble, particularly for major building projects in urban areas, can be a fundamental issue for the local authority. For example, as part of the preparatory work for building a major library, 900 000 tons of gravel were excavated and removed by waterway to avoid nuisance and the destruction of highways surrounding the site. Such contracts, paid on a unit basis (per cubic metre or tonne transported) may give rise to corrupt misappropriation, regardless of the mode of transport used.

Box II.2.14. **Overvaluing invoices**

As part of the preparatory work for which contracts were awarded on a lump-sum basis, the specification called for the felling and grubbing up of trees and removal of the ground cover along the route of a future road. The estimates called for the removal of ground cover to an average depth of 20 cm and the felling of 2 000 trees more than 30 cm in diameter. Oddly, the invoices submitted six months later referred to the removal of ground cover and soil to a depth of 40 cm and the felling of 4 000 trees.

Additional work

Contractors are often asked by the decision-maker to perform additional work during the term of the contract. This work is covered either by riders to the original contract or by service orders. In any event, such work should be justified on technical grounds.

Additional work commissioned by a "service order". Where an incorrect estimate means that the work originally planned is not sufficient (greater volume of drainage effluent than initially foreseen, poor quality of local sub-soil requiring larger foundations, deeper or greater number of footings, etc.), the prime contractor orders the work to be carried out by means of a service order, provided that the additional quantities do not exceed 20% of the initial estimate. Since it is very difficult, under the circumstances, to determine whether the wrong initial estimate was established deliberately or accidentally, it is clear to see how, for work covered by such a service order, all types of misappropriation would be possible.

Additional work covered by a rider. When the volume of additional work exceeds the initial estimate, perhaps because the estimate was not drawn up properly or unforeseen events occur or come to light during the project, a rider to the contract must be drawn up. For example, land was found to be polluted by oil products to a greater depth than initially foreseen during construction of a stadium, which led to the drawing up of a rider to increase the level of decontamination work required.

However, the grounds for issuing such riders are not as clear-cut as might seem at first; this process is sometimes used to enable the firm to pay large commissions to the decision-maker. For example, the establishment of a rider may be the result of a deliberately undervalued estimate for certain work items or a deliberate failure to take account of the inclusion of a civil work or building in the site (no car parks, access road, etc.). In this type of work, we are faced with either a genuinely unforeseeable technical difficulty or a study in

which certain items have been deliberately miscalculated or omitted so that it is technically possible for the contract-holder to establish or re-establish sufficient margins that will be used in part to pay commissions to the decision-maker.

In both cases, the work continues without a new call for tender being issued at the unit price set by the contract-holder in his or her tender. Since the contractor has been told that the quantities have been deliberately underestimated, he or she specifies high unit prices for the work in question and is able to tender a low bid in order to win the contract. Although the overall proposal is cheaper than that of competitors, the contractor is sure to be able to recover and generate profits without too many risks. The same would be true if the documents had deliberately overpriced certain jobs that were hard to complete. Being aware of these "deviations", the contractor would have been able to hone his or her tender price and obtain the contract while still being able to make a profit. Since it is always hard to distinguish between a deliberate mistake and an unforeseeable event, the contractor can easily release the financial resources which will allow him or her to express gratitude to the decision-maker.

"Extensions" to the initial contract are another form of additional work that are encountered frequently. In such cases, the decision-maker, who agrees with the quality of the service supplied by the firm, decides to extend the scope of the contract: instead of resurfacing the road over two kilometres, it will now be resurfaced over three, for example. This practice, commonly employed by certain decision-makers, distorts the rules of competition and is increasingly condemned by the competent authorities – when they notice it.

Far more serious is the case of additional work unrelated to the contract but which is demanded by decision-makers (Box II.2.15). It may be performed

Box II.2.15. **Adding work unrelated to the contract**

After the construction of a motorway, a general finance inspectorate strongly criticised the financial misappropriation, disavowal of responsibilities and lack of realism that often surrounds major development projects. In detail, it criticised the construction of a luxurious operating centre in which each employee (in principle working on the motorway) had over 17 m^2 of office space, the existence of five full motorway interchanges in a valley inhabited by only 41 000 people, the financing of a sports club by the firm, etc. In contrast, the technical manuals describe this motorway as an "exemplary construction project completed on time and to very high standards in terms of its architectural design and integration into the environment".

for the good of the community (surfacing a public square, for example) but may also be for the personal benefit of the decision-maker, such as the construction of a private swimming pool, restoration of a building, etc. In both cases, if corruption is involved, there will be false documents in the firm's accounts.

Modified or incomplete work

Through the "skewed" drafting of the technical specifications used solely for work performance, there are two other types of misappropriation possible that were mentioned earlier in the section on the planning of the contract. Work that has been planned to specific, and sometimes exacting, standards is either not performed at all or performed to only conventional standards. This allows the contracted firm to realise large profit margins that it can appropriate or remit to the decision-maker. The connivance of the departments responsible for inspecting the work and certifying the service rendered is essential, since the work actually carried out is different to that specified in the contract. In practice, the firm which does not perform a given number of services sees its profits rise without having to resort to a system of false invoices. It is the decision-maker who instigates all the actions since he or she has taken it upon themselves to certify, through a "friendly" inspection agency, that the work has been performed in compliance with the document submitted to the firm.

Notes

1. The use of such criteria is theoretically prohibited, but it is sometimes difficult to distinguish between specified criteria that are objective and those that are subjective.
2. These quotations may have been "fabricated" for them by the candidate chosen to win the contract, notably through the use of specialised software.

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OECD Principles for Integrity in Public Procurement

PART II

Chapter 3

A Pilot Application of the Principles in Morocco

Introduction

The economic interests at stake of public procurement in Morocco are considerable. In terms of transactions, 11 614 government contracts were awarded in 2007 and 10 143 in 2005, 88.8%[1] and 88.9% respectively, through open tendering.

Public procurement plays an important strategic role in sustaining growth through investment projects initiated and financed by the government and carried out by market actors. Both Moroccan and foreign firms are potential tenderers for public procurement contracts. Recent statistics indicate that public procurement accounts for 70% of the business of construction firms in Morocco and 80% of the business of engineering firms.

Given the financial interests at stake, public procurement is one of the areas of government activity exposed to the risk of corruption, both in OECD member countries and in Morocco. A perception study carried out by *Transparency Maroc* in 2002 revealed that 60% of firms taking part in the survey considered that public procurement in Morocco was not systematically transparent and that illegal payments were frequent.

Recent reforms

The government has gradually come to realise the scale of the problem and the issues involved. Although public procurement has not been a policy priority in the past – no reforms were made between 1976 and 1998, the measures taken in 1998 and 2007 underline the State's growing determination to reform this area of its action.

The current reform of public procurement in Morocco is based on a set of government modernisation measures, including:

- Decree 2-06-388 of 5 February 2007 setting conditions and terms for the award of government contracts and certain rules relating to their management and control (referred to in the report as the "2007 Decree").
- Dahir[2] 1-02-25 of 3 April 2002 promulgating Act 61-99 on the responsibility of public authorising officials, controllers and accountants.
- Decree 2-01-2332 of 4 June 2002 approving the general administrative terms and conditions applicable to service contracts for studies and general contracting awarded on behalf of the State.

- Dahir 1-03-195 of 11 November 2003 promulgating Act 69-00 on state financial control of state-owned enterprises and other bodies.
- Decree 2-99-1087 of 4 May 2000 approving the general terms and conditions of contract applicable to work performed on behalf of the State. And
- Decree 2-98-884 of 22 March 1999 regarding the system for approving design and main contractor services.

Objectives of the study

The objective of the study was to examine Morocco's progress in modernising public procurement, placing particular emphasis on fighting corruption and enhancing integrity. The government aims at reducing the risks of corruption, while ensuring that the procedures in place contribute to overall value for money in public procurement, in order to enhance integrity and optimise the use of public resources in the production of goods and services.

The study covers the entire public procurement process from needs assessment to award and contract management. It seeks to identify the strengths and weaknesses of the system and to frame policy recommendations for improvement.

Fighting corruption and enhancing integrity in public procurement involves not only formulating and implementing a solid legal framework for procurement but also enforcing it and imposing sanctions in the event of non-compliance. This study seeks to identify and examine the legislative, institutional and practical aspects of the management and control of public procurement in Morocco within the broader framework of improving the probity of public life.[3]

Analytical framework

The OECD Principles for Enhancing Integrity in Public Procurement provide the analytical framework for the study. They guide governments in the preparation and implementation of a policy framework that enables them to enhance integrity in public procurement.

The Principles define integrity as the use of funds, resources, assets, and authority for the official purposes for which they are intended to be used, in line with public interest. The offering and acceptance of bribes, conflicts of interest, nepotism, the abuse and manipulation of information, discriminatory treatment and the waste and abuse of organisational resources are actions and situations that can compromise integrity in public procurement.

Methodology

The Joint Learning Study, which is a pilot project for the region, was prepared in several phases.

- The first phase consisted of preliminary research work conducted by the OECD Secretariat and the preparation of a questionnaire framework for interviews.
- Next, experts went on a fact-finding mission in October 2007 to conduct an initial assessment of the system and the progress made. One noteworthy feature of the mission was the involvement of government experts from OECD countries (Canada and France) and the region (Dubai, United Arab Emirates) in order to provide a variety of viewpoints for the analysis. Interviews were conducted with officials from the various Moroccan government agencies concerned, and meetings were held with representatives of the private sector, civil society and international organisations.
- Preparation of the draft study in close co-operation with the government experts who took part in the fact-finding mission.
- Validation of the draft study with representatives from the government, private sector and civil society that had been met during the field mission.[4]
- Further to this pilot project in Morocco, a workshop was organised in Morocco in April 2008 on the theme of integrity in public procurement to discuss the results of the study done with stakeholders, as well as to allow exchanges between experts from the region. On this occasion, participants showed they were in favour of the Joint Learning Study's methodology, with certain countries in the Middle East and North Africa region expressing an interest in a study of their system.

1. Overview of the 2007 Decree on public procurement

The 2007 Decree on public procurement

Reasons for the reform

The Decree setting conditions and terms for the tendering phase and certain rules relating to their management and control, which came into effect on 1 October 2007, seeks to address:

- the shortcomings and loopholes of the 1998 Decree (*e.g.* absence of procedures for the settlement of disputes, limited public notification, lack of clarity in relation to selection criteria, etc.);
- the need to update and modernise public spending management tools;
- developments in international standards and the government's international commitments (*e.g.* European Union, World Bank and Free Trade Association); and
- firms' and citizens' demands for and expectation of better quality service.

The principles

The principles of the 2007 Decree are consistent with those that guide reforms at the international level such as the WTO Agreement on Public Procurement and EU Public Procurement Directives, *i.e.* increased transparency and competition as well as the equal treatment of tenderers. The simplification of procedures and improved probity in public life are also stated objectives of the 2007 Decree.

Main advances

The main advances of the 2007 Decree are:

- increased transparency with regard to potential suppliers and within the administration (*e.g.* wider publication of tender notices, automatic notification of unsuccessful tenderers of the reasons for non-selection and a more systematic requirement to keep documents relating to awarded contracts for a minimum period of five years);
- introduction of specific anti-corruption measures for both tenderers and the contracting authority;
- better regulation of certain at-risk practices, such as the use of sub-contractors and negotiated contracts; and
- better co-operation with the private sector by simplifying administrative procedures and introducing forms of recourse.

Scope of the 2007 Decree

The 2007 Decree provides a detailed framework for regulating the public procurement procedure in Morocco at central government level and regional and local level. It applies to local authorities by virtue of Article 48 of Decree 2-78-576 of 30 September 1976 regulating the accounts of local authorities and their consolidation. In the case of public establishments operating under the oversight of the Ministry of the Economy and Finance, each establishment is required to draw up its own regulations on public procurement in compliance with the basic rules of transparency, competition and fair treatment. Because they did not have regulations of their own, some public enterprises have decided to apply the 2007 Decree. Some enterprises which already had their own regulations, such as the National Electricity Board and the National Water Board, are thinking about harmonising their regulations, in light of recent developments.

It was said during the interviews that local authorities may well find it hard to implement the provisions of the 2007 Decree. To overcome any such difficulties, fresh thought is being given to introducing supplementary regulations for local procurement, within the broader framework of modernising and upgrading the organisation, financing and staffing of local government. Although public procurement is decentralised from a technical and managerial standpoint, financial decisions on the commitment of funds are taken centrally. The situation of Rabat, the capital city, is more complex and unique, since the presence of a mayor and a prefect *(Wali)* with different responsibilities means that the procurement process is split in two.

The 2007 Decree contains more exceptions than the 1998 Decree. For example, the 2007 Decree does not apply to:

- agreements and contracts concluded by central government under the rules of ordinary law;
- delegated management contracts for public services and infrastructure;
- asset disposals and services provided between government agencies under the prevailing regulations; and
- concessions and delegated management contracts are regulated by the February 2006 Act on the delegated management of public services.

REMARK. Steps to harmonise the provisions of the 2007 Decree with the regulations applicable to public establishments and state-owned enterprises is necessary to make the regulation of public procurement more coherent. The role of the Government General Secretariat could be enhanced in this context to ensure intergovernmental co-ordination to facilitate the harmonisation or even standardisation of regulatory provisions whenever possible. In some OECD member countries, a single regulatory text applies to the State, local authorities and public

establishments. Moreover, it will be essential to put in place the means to implement the 2007 Decree; to do this, adequate human and financial resources will have to be provided at both central and local level.

Actors in the reform and supporting texts

Actors

Several public sector actors are involved in the planning, tendering, performance and control of public procurement contracts. Only senior officials – ministers at national level, and regional council presidents and governors at local level – have the power to authorise budget commitments. Authorising officials entrust the procurement procedure to contracting authorities. The contracting authorities in turn draw up, manage and monitor procurement contracts, from the preparation of specifications and award of the contract to the monitoring and control of contract implementation. Control staff is responsible for ensuring the compliance of the process in terms of budgetary and regulatory procedures. The payment office's staff is responsible for settling the corresponding expenditure and discharging the public entity's debts. Budgetary commitment, planning and expenditure payment functions are therefore kept separate.

Supporting texts

In order to supplement and the specific provisions of the 1998 Decree and other regulations relating to public procurement, a number of supporting texts are being created, notably through:

- the adaption of the general conditions of contracts applicable to works and design contracts (2000 and 2004); and
- the standardisation of other terms and conditions, like the common conditions of contract and the special conditions of contract.

It was also pointed out in interviews that several projects were planned in this respect, such as a standard format for special specifications, the amendment of general terms and conditions of contract in order to ensure compliance with the provisions of the 2007 Decree, a guide to public procurement drawn up by the General Treasury and a common classification for documentary evidence of commitments and payments.

REMARK. These measures to support implementation of the 2007 Decree in the form of explanatory notes, manuals and standardised documents for contracts relating to the provision of work, supplies and services must be continued. These texts will play an essential part in clarifying the provisions of the regulations, ensuring consistent interpretation at central government level and defining the implementing conditions for the 2007 Decree.

Raising awareness

In order to advertise the content of the new public procurement reform, the General Treasury of the Kingdom of Morocco organises training days for the departments affected by the reform. The experts trained will assist with awareness-raising days organised at local level by territorial authorities in several regions of Morocco. Led by experts and practitioners, these workshops, which explain the new regulations, are designed to provide training in the new regulations to central and local government officials responsible for public procurement. An information day for the private sector has been organised by the General Treasury. This training is essential in order to facilitate harmonised interpretation and implementation of the 2007 Decree.

2. Strengths and weaknesses of the public procurement system

The following points sum up the identified strengths and weaknesses of the public procurement system in Morocco.

The 2007 public procurement regulations: A detailed framework for public procurement

The 2007 Decree setting conditions and terms for public procurement, which came into effect on 1 October 2007 in Morocco, seeks to remedy the shortcomings of the 1998 Decree. It provides a detailed framework for public procurement and is conform to principles of good governance, which guide efforts at an international level.

The 2007 Decree applies to central government and local authorities. Public enterprises and establishments can adopt their own specific regulations provided that they comply with regulations regarding competition and transparency. Authorities that do not have their own regulations in place must apply the 2007 Decree. It will important in the future to harmonise existing regulations for all public enterprises and establishments with the provisions of the 2007 Decree.

In addition, although the 2007 Decree partly covers the needs assessment (Article 4) and contract performance (Articles 91 and 92) phases, more emphasis could be placed on the pre- and post-tendering phases in order to ensure the integrity of the entire procurement process. In particular, it would be advisable that regulations and additional guidelines such as the General Terms and Conditions of Contract, provide further details on the preventative mechanisms that apply to these grey zones.

Lastly, attention should be paid to ensuring that the 2007 Decree is effectively implemented at central, regional and local levels. In particular, adequate human and financial resources must be provided at the regional and local levels to allow implementation of the 2007 Decree.

More transparency in the procurement cycle

The 1998 Decree already reflected the principle of increased transparency in public procurement. The 2007 Decree introduces new features such as increased scope for informing firms of tender notices, increased transparency for negotiated contracts and automatic notification of unsuccessful tenderers and more systematic conservation of documents relating to awarded contracts in order to facilitate any subsequent research.

While the aim is to make the best purchase possible (work, supply of goods or services), one of the challenges of implementation lies in striking the right balance between increased transparency and procedural efficiency. Care

must be taken to ensure that the implementation of provisions regarding transparency do not lead to delays in the award of contracts and additional costs for the administration.

Electronic procedures: Creation of a national public procurement portal

The creation of the new electronic portal has particularly ambitious objectives, including publication on the portal of planned procurement programmes, tender notices, the results of tendering, excerpts from the minutes of tender review sessions and progress reports on the performance of contracts.

Further consideration should be given to ways of facilitating the transition from a paper-based system to a system that combines paper and electronic media, especially in terms of improving the management capacities of procurement departments and enterprises with regard to the electronic portal.

Introduction of anti-corruption measures in the 2007 Decree

The 2007 Decree introduces anti-corruption measures for the first time, both for the tenderer (sworn oath, undertaking not to use dishonest practices or corruption) and for the contracting authority (abstention from any relationship or action that could compromise its independence).

It is considered important that these measures should be applied within a solid legal framework that regulates conflicts of interest for the actors involved in public procurement in order to strengthen the integrity of the entire system. Some public enterprises such as the National Electricity Board in Morocco have taken the initiative to develop ethical rules and procedures (see Box II.3.1).

Besides this legislative framework, attention should also be paid to the effective implementation of sanctions against corrupt officials, regardless of their rank or seniority, in order to bolster confidence in this new system.

First step towards the introduction of an appeals mechanism

Any tenderer who challenges the outcome of a tendering procedure and is dissatisfied with the decision taken is entitled to take the matter up with the contracting authority. If the tenderer is not satisfied with the contracting authority's response, it may, as a second step, take up the matter with the minister concerned and, as a third step, with the presiding Government Secretary General over the Public Procurement Review Board to consider the request. The Public Procurement Review Board issues an opinion in an advisory capacity.

Box II.3.1. **Efforts to prevent risks of corruption in public procurement: The National Electricity Board in Morocco**

With 10 000 employees and 3.5 million customers, the National Electricity Board is a public establishment of an industrial and commercial nature, created in 1963, with activities focused on the production, transportation and distribution of electricity. After the government itself, it is the largest investor in the country with planned investment of MAD 11.6 billion in 2008 (compared with MAD 36.07 billion from the government's general budget and a total of MAD 66.6 billion* by all state-owned enterprises and public establishments). It is subject to supervision by the Court of Accounts, the IGF, the Directorate of State-Owned Enterprises and Public Establishments and Parliament (through specific parliamentary committees).

Given the sums at stake, the power sector is particularly vulnerable to corruption. In order to minimise risks of corruption that could tarnish its reputation, the National Electricity Board has taken a proactive stance to strengthen the integrity of its procedures. It established an ethics committee in 2007 that includes the CGEM and staff representatives. The remit of this Committee is to propose binding ethical rules and procedures for both staff and other stakeholders, including suppliers.

Its first task was to develop a code of ethics which would encourage staff to comply with the Act on the status of personnel. The consultation process for preparing the code was based on a representative sample that included not only managers but also operational staff (around 40% of representatives were from management, *versus* 60% from workers on the ground). Adherence to the code was made voluntary, as a means of encouraging all staff to sign on willingly. The next task will be to evaluate conflict-of-interest risks within the firm.

The National Electricity Board is also playing a driving role in the use of new technologies to strengthen transparency and accountability in procurement. Thus, it was publicising invitations to tender at its Internet site even before the 2007 Decree made this mandatory. It also maintains a database not only for storing information on calls for tender but, more generally, to keep records of decisions taken in the procurement process, and thereby make staff accountable. Information on suppliers is centralised and classified to facilitate evaluations on the basis of objective parameters such as price and timeliness of delivery.

The next phase should be to examine National Electricity Board's current operating regulations to harmonise them with the provisions of the 2007 Decree and have them validated by its Board of Directors.

* Statistics published by the Directorate of State-Owned Enterprises and Privatisation.

To ensure that complaints are treated fairly, plaintiffs should be given easier access to the Review Board by eliminating a number of existing filters and the Board itself should be given more powers and more resources in both financial and human terms.

A shift from control of compliance to performance-based controls of public spending

The aim of the reform is to relax *ex ante* control based on procedural compliance in favour of *ex post* control which would improve efficiency by emphasising control of the outcome and tangibility of the service supplied. Despite the numerous and cumbersome control efforts of such prestigious institutions as the General Treasury (*Trésorerie Générale*), the Inspectorate General of Finance (*l'Inspection Générale des Finances*) and the Court of Accounts Office (*la Cour des comptes*), these controls have proved unable to produce sufficient material evidence for judges to investigate cases of corruption in public procurement.

Tightening up *ex post* controls requires a change of mindset and therefore calls for a structural reorganisation and the professionalisation and support of the staff concerned. Training has a key role to play in this enhancement of professional skills in order to keep actors abreast of reforms, familiarise them with the new procedures to follow and also help them to prevent any risks of corruption.

3. Policy recommendations: How to improve the system

The analysis of procurement in Morocco identified a number of possible adjustments for enhancing the integrity of the system. To assist the Moroccan government in its efforts to reform public procurement, five priority lines have been identified through an analysis of the system:

- strengthen professional skills in public procurements in order to give authorising officials sufficient management capacity as part of the process of relaxing *ex ante* controls;
- increase the powers of the Public Procurement Review Board;
- continue with the assignment of responsibilities and auditing process;
- ensure the harmonised interpretation and implementation of the 2007 Decree; and
- introduce specific measures to prevent corruption in public procurement.

Professionalise public procurement

The reform now underway to simplify *ex ante* controls contributes to speeding up procurement procedures and avoiding excessive red tape in verifying their compliance with regulations. The plan is to transfer *ex ante* control gradually to the most capable authorising officials. While this should be feasible in the case of ministries that have a long tradition of procurement such as the Ministry of Equipment, the transfer may be more difficult for other line ministries that do not have the same skills profile. The issue is still more complicated for local governments, where there is even less available capacity.

In this context, the professionalism could be enforced by developing a common body of knowledge and skills. One possibility would be to create a professional category of public procurement specialists, whose function would be devoted entirely to planning, contracting and executing purchases, and who would assist the authorising officials in a context where the authorising officials themselves are responsible for internal controls. This function should have its own status and recognition within the hierarchy of civil service posts. In addition, specific procurement training could be organised so that procurement specialists can keep their skills up to date in line with the latest regulatory and technological developments, especially those relating to the electronic procurement portal. Over the longer term, a system for certifying purchases could be developed, with the support of international partners.

These measures would allow procurement to be recognised as a profession in its own right and ensure that contracting authorities at both the central and local level have the contract management capacity needed, which cannot but facilitate the move towards *ex post* control.

Strengthen the independence of the Public Procurement Review Board

The possibility of invoking the Public Procurement Review Board for the friendly settlement of disputes represents a step towards instituting an effective right of appeal for tenderers (Article 95 of the 2007 Decree). In fact, there is a widespread climate of mistrust among firms *vis-à-vis* the government, and firms are reluctant to file complaints. Yet the Public Procurement Review Board's mandate is very narrow, for appeals to it are submitted indirectly through the General Secretary of Government, and its opinion has merely advisory force. This means that the government is both judge and party, for it is the line minister who has the final say in the dispute. Although its creation dates back to 1936, the committee's human and financial resources are grossly inadequate for the proper handling of complaints. Finally, the right of challenge only relates to the award of the contract. This right therefore does not apply to the choice of procurement procedure or to the criteria for the selection of candidates, to a decision by the Review Board to reject all tenders, or to a decision by the competent authority to cancel the call for tenders.

A speedy mechanism for dealing with complaints is needed to ensure that tenderers are treated fairly, and there are a number of ways in which this can be achieved:

- The 2007 Decree should be amended to remove a number of filters on access to the Review Board, notably by allowing it to be consulted directly.
- Consideration might be given to speeding up the appeals procedure by making more systematic use of the right to refer cases to the Administrative Judge, which would allow appeals to be judged within a reasonable period of time.

If the aim is to put in place a proper appeals mechanism, consideration might be given to guaranteeing the independence of the Review Board by:

- Enhancing its statutes. Its opinions could be made binding so that they cannot be contested by the administrative and judicial tribunals. Furthermore, the exceptions mentioned in the 2007 Decree under which the procedure cannot be disputed could be removed to allow the procedure to fully fulfil its role as an appeals mechanism.
- Increasing its budgetary and human resources which are too limited and which do not allow it to successfully meet its remit.

Furthermore, other considerations must be taken into account to ensure the independence of the appeals mechanism. To avoid any undue influences, notably at a political level, certain guarantees for integrity could be introduced, for example the appointment of its members could be based on

precise professional and ethical criteria (*e.g.* no conflicts of interest, a reputation of integrity and neutrality).

Pursue the initiative to reinforce accountability and control

There has been significant progress in recent years in terms of provisions making the authorising officials accountable before the budget discipline court (Act 61-99 promulgated by Dahir 1-02-25 of 3 April 2002) and overseeing them (mandatory audit for contracts exceeding MAD 5 million since 1998). Another move in the right direction is the ambitious reform to ease *ex ante* control, which can lead to excessive formalities. In addition, the control is under reform to become more performance based. Yet despite these efforts, it was indicated during our interviews that ministers and senior officials are not systematically held responsible for their decisions and are rarely taken to task for violating the rules.

This can be attributed to the fact that when the authorising official is a minister, they cannot be held legally liable even if they has issued a requisition order (Article 52 of Act 62-99, on the Code of Financial Jurisdictions, 13 June 2002). More generally, there is no real control over the appropriateness of expenditure, and this leaves the authorising official broad powers of discretion when it comes to defining needs. With respect to *ex post* control, it was indicated in the interviews that the audit requirement for major contracts is not systematically enforced.

The move to accountability and *ex post* control of the authorising officials should be pursued. Several steps could be considered. The Code of Financial Jurisdictions could be amended to make authorising officials more accountable. The role of the IGF in the pre-tendering phase could also be expanded so that it can ensure the proposed procurement is consistent with the nature and scope of needs, which would help to verify the appropriateness of the expenditure. Finally, steps should be taken to ensure not only that large contracts are audited, but that audits are conducted more systematically for contracts worth less than MAD 5 million. One possibility would be to set audit priorities for the IGF in light of the risks inherent in the contract (for example the amount, the type of procedure used, etc.), without any minimum threshold for such audits.

Ensure harmonised interpretation and implementation of the 2007 Decree

The 2007 Decree constitutes a detailed and modern framework for regulating public procurement at the level of both central and local government. Its principles are consistent with those apply internationally, such as the WTO Agreement on Public Procurement, especially when it comes

to transparency, promoting competition, and preventing corruption. The private sector's involvement in preparing the 2007 Decree has enhanced its relevance, for it broadly reflects the expectations of stakeholders. It establishes clear rules governing procurement. It covers the entire procurement cycle, from the definition of needs to management of the contract, although it is focused primarily on the tendering phase. However, the Decree solely applies to state-owned enterprises and public establishments which do not have their own specific regulations.

The main challenge is to ensure that the decree is taken into consideration and actually implemented:

- Measures to publicise the decree have been initiated and should be stepped up. Training is underway within government departments and agencies, at both the central and local levels. This effort should be extended to firms, to familiarise them in particular with the new electronic portal and encourage them to use it.
- Similarly, more explanatory notes, manuals and standardised documents focusing on works, goods and services should be developed to ensure a common interpretation and implementation of the 2007 Decree. These explanatory notes would be particularly important for pre- and post-tendering phases.
- To ensure implementation of the Decree, consideration might be given to organising, within a year's time, a review of the application of its provisions by the administrations concerned and to make public the results of this review.

Moreover, it is essential to harmonise the provisions of the 2007 Decree with the regulations applicable to public establishments and state-owned enterprises, in order to make procurement regulation more consistent. The role of the General Secretary of Government could be useful here, in fostering intergovernmental co-ordination to facilitate harmonisation of texts. Moreover, adequate capacity must be provided at the local level to permit implementation of the Decree.

Introduce specific measures to fight corruption in procurement

The 2007 Decree introduces for the first time provisions targeted specifically at combating corruption in public procurement, by tenderers and officials alike. However, there are no detailed, government-wide ethical standards defining private interests and situations that might compromise officials' impartiality. More generally, government officials do not have a thorough understanding of the phenomenon of corruption and its causes, particularly when it comes to procurement.

It would be useful for the Central Corruption Prevention Office to take into consideration the specific measures for preventing corruption in public procurement. A first step would be to compile a "risk map" for the different departments and agencies to identify the positions of officials which are vulnerable, those procurement activities where risks arise, and the particular projects at risk due to the value and complexity of the procurement. To achieve this, the various administrations will have to co-operate with the Office and provide the required information. On this basis, the strategy and the means for combating corruption in procurement could be properly adapted. For example, training sessions could be organised to inform procurement officials and the controllers about the risks of corruption and measures for preventing and detecting it.

If ethical standards are to be thoroughly instilled in procurement activities, it is essential to develop regulations on conflicts of interest that will clearly define private interests or situations that could compromise an official's independence. In addition, officials involved in procurement could be made aware of ethical issues, with the adoption of a professional code that would help them manage potential conflict-of-interest situations (for example the receipt of gifts and other advantages) in their relations with suppliers.

Notes

1. The figure of 88.8% by open tendering in 2007 does not include purchase orders. The remaining contracts were awarded by restricted open tendering tendering (6%) or negotiated (5.2%). *Source: Statistiques de la trésorerie générale du royaume du Maroc.*
2. A Dahir is a decree issued by the King of Morocco.
3. Improving the probity of public life in Morocco is a government priority. An Action Plan against Corruption was framed in August 2005.
4. A detailed description of the methodology is given in the document "Terms of Reference for the Pilot Project on the Integrity of Public Procurement in Morocco – Joint Learning Study".

ANNEX A

OECD Recommendation on Enhancing Integrity in Public Procurement

THE COUNCIL,

Having regard to articles 1, 2a), 3 and 5b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on 21 November 1997, the Revised Recommendation of the Council on Combating Bribery in International Business Transactions adopted on 23 May 1997 and the related Recommendation on Anti-corruption Proposals for Bilateral Aid Procurement endorsed by the Development Assistance Committee on 7 May 1996;

Noting that legislation in a number of member countries also reflects other international legal instruments on public procurement and anti-corruption developed within the framework of the United Nations, the World Trade Organisation or the European Union;

Recognising that public procurement is a key economic activity of governments that is particularly vulnerable to mismanagement, fraud and corruption;

Recognising that efforts to enhance good governance and integrity in public procurement contribute to an efficient and effective management of public resources and therefore of tax payer's money;

Noting that international efforts to support public procurement reforms have in the past mainly focused on the promotion of competitive tendering with a view to ensuring a level playing field in the selection of suppliers;

Recognising that member countries share a common interest in preventing risks to integrity throughout the entire public procurement cycle, starting from needs assessment until contract management and payment;

On the proposal of the Public Governance Committee:

I. RECOMMENDS:

(1) That member countries take appropriate steps to develop and implement an adequate policy framework for enhancing integrity throughout the entire public procurement cycle, from needs assessment to contract management and payment;

(2) That, in developing policies for enhancing integrity in public procurement, member countries take into account the Principles which are contained in the Annex to this Recommendation of which it forms an integral part;

(3) That member countries also disseminate the Principles to the private sector, which plays a key role in the delivery of goods and services for the public service.

II. INVITES the Secretary General to disseminate the Principles to non-member economies and to encourage them to take the Principles into account in the promotion of public governance, aid effectiveness, the fight against international bribery and competition.

III. INSTRUCTS the Public Governance Committee to report to the Council on progress made in implementing this Recommendation within three years of its adoption and regularly thereafter, in consultation with other relevant Committees.

Appendix
Principles for Enhancing Integrity in Public Procurement

I. Objective and scope

The Recommendation provides policy makers with Principles for enhancing integrity throughout the entire public procurement cycle, taking into account international laws, as well as national laws and organisational structures of member countries.

The Recommendation is primarily directed at policy makers in governments at the national level but also offers general guidance for sub-national government and state-owned enterprises.

II. Definitions

Public procurement cycle

In the context of the present Recommendation, the public procurement cycle is defined as a sequence of related activities, from needs assessment, to the award stage, up until the contract management and final payment.

Integrity

The Recommendation aims to address a variety of risks to integrity in the public procurement cycle. Integrity can be defined as the use of funds, resources, assets, and authority, according to the intended official purposes and in line with public interest. A negative' approach to define integrity is also useful to determine an effective strategy for preventing integrity violations' in the field of public procurement. Integrity violations include:

- corruption including bribery, "kickbacks", nepotism, cronyism and clientelism;
- fraud and theft of resources, for example through product substitution in the delivery which results in lower quality materials;
- conflict of interest in the public service and in post-public employment;
- collusion;
- abuse and manipulation of information;
- discriminatory treatment in the public procurement process; and
- the waste and abuse of organisational resources.

III. Principles

The following ten Principles are based on applying good governance elements to enhance integrity in public procurement. These include elements of transparency, good management, prevention of misconduct, as well as accountability and control. An important aspect of integrity in public procurement is an overarching obligation to treat potential suppliers and contractors on an equitable basis.

A. Transparency

1. Member countries should provide an adequate degree of transparency in the entire public procurement cycle in order to promote fair and equitable treatment for potential suppliers

Governments should provide potential suppliers and contractors with clear and consistent information so that the public procurement process is well understood and applied as equitably as possible. Governments should promote transparency for potential suppliers and other relevant stakeholders, such as oversight institutions, not only regarding the formation of contracts but in the entire public procurement cycle. Governments should adapt the degree of transparency according to the recipient of information and the stage of the cycle. In particular, governments should protect confidential information to ensure a level playing field for potential suppliers and avoid collusion. They should also ensure that public procurement rules require a

degree of transparency that enhances corruption control while not creating red tape' to ensure the effectiveness of the system.

2. Member countries should maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering

To ensure sound competitive processes, governments should provide clear rules, and possibly guidance, on the choice of the procurement method and on exceptions to competitive tendering. Although the procurement method could be adapted to the type of procurement concerned, governments should, in all cases, maximise transparency in competitive tendering. Governments should consider setting up procedures to mitigate possible risks to integrity through enhanced transparency, guidance and control, in particular for exceptions to competitive tendering such as extreme urgency or national security.

B. Good management

3. Member countries should ensure that public funds are used in public procurement according to the purposes intended

Procurement planning and related expenditures are key to reflecting a long-term and strategic view of government needs. Governments should link public procurement with public financial management systems to foster transparency and accountability as well as to improve value for money. Oversight institutions such as internal control and internal audit bodies, supreme audit institutions or parliamentary committees should monitor the management of public funds to verify that needs are adequately estimated and public funds are used according to the purposes intended.

4. Member countries should ensure that procurement officials meet high professional standards of knowledge, skills and integrity

Recognising officials who work in the area of public procurement as a profession is critical to enhancing resistance to mismanagement, waste and corruption. Governments should invest in public procurement accordingly and provide adequate incentives to attract highly qualified officials. They should also update officials' knowledge and skills on a regular basis to reflect regulatory, management and technological evolutions. Public officials should be aware of integrity standards and be able to identify potential conflict between their private interests and public duties that could influence public decision making.

C. Prevention of misconduct, compliance and monitoring

5. Member countries should put mechanisms in place to prevent risks to integrity in public procurement

Governments should provide institutional or procedural frameworks that help protect officials in public procurement against undue influence from politicians or higher level officials. Governments should ensure that the selection and appointment of officials involved in public procurement are based on values and principles, in particular integrity and merit. In addition, they should identify risks to integrity for job positions, activities, or projects that are potentially vulnerable. Governments should prevent these risks through preventative mechanisms that foster a culture of integrity in the public service such as integrity training, asset declarations, as well as the disclosure and management of conflict of interest.

6. Member countries should encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management

Governments should set clear integrity standards and ensure compliance in the entire procurement cycle, particularly in contract management. Governments should record feedback on experience with individual suppliers to help public officials in making decisions in the future. Potential suppliers should also be encouraged to take voluntary steps to reinforce integrity in their relationship with the government. Governments should maintain a dialogue with suppliers' organisations to keep up-to-date with market evolutions, reduce information asymmetry and improve value for money, in particular for high-value procurements.

7. Member countries should provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly

Governments should set up mechanisms to track decisions and enable the identification of irregularities and potential corruption in public procurement. Officials in charge of control should be aware of the techniques and actors involved in corruption to facilitate the detection of misconduct in public procurement. In order to facilitate this, governments should also consider establishing procedures for reporting misconduct and for protecting officials from reprisal. Governments should not only define sanctions by law but also provide the means for them to be applied in case of breach in an effective, proportional and timely manner.

D. Accountability and control

8. Member countries should establish a clear chain of responsibility together with effective control mechanisms

Governments should establish a clear chain of responsibility by defining the authority for approval, based on an appropriate segregation of duties, as well as the obligations for internal reporting. In addition, the regularity and thoroughness of controls should be proportionate to the risks involved. Internal and external controls should complement each other and be carefully co-ordinated to avoid gaps or loopholes and ensure that the information produced by controls is as complete and useful as possible.

9. Member countries should handle complaints from potential suppliers in a fair and timely manner

Governments should ensure that potential suppliers have effective and timely access to review systems of procurement decisions and that these complaints are promptly resolved. To ensure an impartial review, a body with enforcement capacity that is independent of the respective procuring entities should rule on procurement decisions and provide adequate remedies. Governments should also consider establishing alternative dispute settlement mechanisms to reduce the time for solving complaints. Governments should analyse the use of review systems to identify patterns where individual firms could be using reviews to unduly interrupt or influence tenders. This analysis of review systems should also help identify opportunities for management improvement in key areas of public procurement.

10. Member countries should empower civil society organisations, media and the wider public to scrutinise public procurement

Governments should disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption.

ANNEX B

The Multi-disciplinary Approach of the OECD on Procurement

Following the Global Forum on Governance in 2004, the Public Governance Committee (PGC) and the Working Group on Bribery in International Business Transactions, and the Development Assistance Committee (DAC), have jointly carried forward the multi-disciplinary work on preventing corruption in public procurement:

- The Public Governance Committee mapped out good practices to enhance integrity, in particular through transparency (*e.g.* e-procurement), professionalism, corruption prevention, as well as accountability and control measures. Drawing on the experience of procurement specialists, as well as audit, competition and anti-corruption specialists, the OECD report *Integrity in Public Procurement: Good Practice from A to Z* provides a comparative overview of practices to enhance integrity in the entire procurement cycle, from needs assessment to contract management and payment.
- The Working Group on Bribery in International Business Transactions, the body responsible for monitoring the implementation of the OECD Convention on Bribery of Foreign Public Officials in International Business Transactions, developed a typology on bribery in public procurement. Based on contributions from law enforcement and procurement specialists, the report *Bribery in Public Procurement: Methods, Actors and Counter-Measures* describes how bribery is committed through the various stages of government purchasing; how it is related to other crimes, such as fraud and money laundering; and how to detect such crimes and apply sanctions accordingly.
- The Development Assistance Committee has been working with developing countries to strengthen procurement systems through the Working Party on Aid Effectiveness. It has also been working with its members to enhance their collective efforts to address corruption through the DAC Network on Governance.

- The Competition Committee has addressed competition issues arising in the context of public procurement. Recently it has developed a checklist to help public procurement officials detect bid-rigging during procurement tenders and limit the risks of collusion by careful design of the procurement process.

The Principles take into account the following legal instruments, policy instruments and tools in relation to public procurement and anti-corruption:

- The 1997 *OECD Convention on Bribery of Foreign Public Officials in International Business Transactions* and the revised *Recommendation on Combating Bribery in International Business Transactions*. The revised Recommendation states that:

i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement.[1]

ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that member's national laws and, to the extent a member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.

iii) In accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.

In commentary 24 to Article 3, an explicit reference is made to the "temporary or permanent disqualification from participation in public procurement".[2]

Over the last decade, the 37 Parties to the OECD Anti-Bribery Convention have made commendable progress in detecting, investigating and prosecuting foreign bribery – levelling the playing field for international business. Thanks especially to the rigorous peer review monitoring mechanism, governments have passed anti-bribery laws and created special investigation and prosecution units. Businesses have started to change the way they trade and invest worldwide, in the face of increased public scrutiny. The Shared Commitment to Fight Against Foreign Bribery, adopted at the 2007 Rome Ministerial Conference, provides a clear mandate for future work. Among others commitments, Parties pledge to maintain the robust monitoring mechanism – and to remain at the forefront of the global fight against foreign bribery by ensuring relevant and effective anti-bribery standards. The Working Group on Bribery is conducting a review of the OECD anti-bribery instruments, which might impact these instruments' procurement provisions and their subsequent enforcement.

- The 1996 Development Assistance Committee (DAC) *Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement*. The DAC recommends

that Members introduce or require anti-corruption provisions governing bilateral aid-funded procurement. The anti-corruption provision of the Recommendation was integrated in the 1997 revised Recommendation on combating bribery in international business transactions. However, the Recommendation did not apply to procurement carried out by developing countries themselves. Therefore developing countries, bilateral and multilateral donors have in the past years worked together through a Round Table process. As a result, the Working Party on Aid Effectiveness has developed a benchmarking methodology that developing countries and donors can use to assess the quality and effectiveness of national procurement systems through the DAC Joint Venture on Procurement.[3] In addition, the DAC Network on Governance has identified an agenda for collective donor action and *Principles for Donor Action in Anti-Corruption*[4] to ensure coherent support to country-led anti-corruption efforts.

Instruments and tools in relation to corporate governance and competition have also been considered, in particular the 1998 *Recommendation of the Council on Effective Action Against Hard Core Cartels*, the 2000 *Guidelines for Multinational Enterprises and the Risk Awareness Tool for Multinational Enterprises in Weak Governance*.

Notes

1. On 1 August 2004, the WTO General Council adopted a decision, which addressed, *inter alia*, the handling of the issue of transparency in government procurement, as well as the issues of the relationship between trade and investment and the interaction between trade and competition. The Council agreed that "those issues will not form part of the Doha Work Programme and therefore no work towards negotiations […] will take place within the WTO during the Doha Round". Since this decision, the Working Group on Transparency in Government Procurement has been inactive.
2. Article 3 of the Convention states that criminal sanctions shall be imposed on natural persons. While countries were convinced that sanctioning legal persons for foreign bribery was particularly important when negotiating the terms of the Convention, they did not stipulate that sanctions be of criminal nature. Consequently, Article 2 asks countries to introduce the "responsibility of legal persons" while Article 3(2) states that non-criminal sanctions against a corporation are also acceptable, provided that they include sanctions that are "effective, proportionate and dissuasive". See also *Fighting Corruption and Promoting Integrity in Public Procurement*, OECD, 2005.
3. For further information about the benchmarking and assessment methodology, please refer to: *www.oecd.org/document/40/0,3343,en_2649_19101395_37130152_1_1_1_1,00.html*.
4. See the Policy Paper and Principles on Anti-Corruption, Setting an Agenda for Collective Action, OECD, 2007, as well as the following web link: *www.oecd.org/dac/governance/corruption*.

ANNEX C

The Consultation on the Principles and Checklist with Stakeholders

An extensive consultation was carried out in 2008 on the Principles and Checklist. The consultation with representatives from OECD bodies working on related issues helped reflect the multi-disciplinary approach of the OECD. The Principles reflect the richness of the multi-disciplinary approach of the OECD that analyses public procurement from various perspectives: good governance, anti-bribery, development assistance, competition and international trade.

Furthermore, a consultation was carried out with representatives from government from non-member economies, private sector, civil society, bilateral donor agencies and international organisations – such as the United Nations, the World Trade Organisation or the European Union. The consultation with different stakeholders, in particular international and regional organisations working on public procurement issues, was an essential step to verify that the Principles provide guidance at the policy level that is in line with existing international legal instruments and usefully complements them. In addition to the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, these instruments include, notably:

- the *United Nations Convention against Corruption* (Chapter II on Preventative measures, in particular article 9 on Public procurement and management of public finances); (see Note)
- the *United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Services, Construction and Services*;
- the *World Trade Organisation Agreement on Government Procurement* (GPA);
- the legislative package of the *Directives of the European Parliament and of the Council on Procurement*; and

- the *International Labour Organisation's Labour Clauses (Public Contracts) Convention*.

In addition, other international and regional organisations such as the multilateral development banks, as well as bilateral aid agencies, were consulted to build on their experience in procurement reform work at the country level. Their experience was also particularly useful as they have developed related guidelines, even if these guidelines are tailored to the special conditions applicable under their financing. These include guidelines for anti-corruption and fiduciary risk assessment, such as the Public Expenditure and Financial Accountability (PEFA) Program.

Note

Article 9 of the United Nations Convention Against Corruption states that:

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision making, that are effective, *inter alia*, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, *inter alia*:

a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

c) 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;

d) 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 pursuant to this paragraph are not followed; and

e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, *inter alia*:

a) Procedures for the adoption of the national budget;

b) Timely reporting on revenue and expenditure;

c) A system of accounting and auditing standards and related oversight;

d) Effective and efficient systems of risk management and internal control; and

e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.

3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, 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.

Glossary

Audit Trail	A chronological record of procurement activities enabling the reconstruction, review and examination of the sequence of activities at each stage of the public procurement process.
Debarment	Exclusion or ineligibility of a contractor from taking part in the process of competing for government or multilateral agency contracts for a definite or indefinite period of time, if, after enquiry or examination, the contractor is adjudged to have been involved in corruption to secure past or current projects with a government agency.
Direct Social Control	The involvement of external actors – for example end-users, representatives from civil society or the wider public – in scrutinising the integrity of the public procurement process.
Integrity Pact	An agreement between a government or government department with all tenderers for a public sector contract that neither side will pay, offer, demand, or accept bribes, or collude with competitors to obtain the contract or while carrying it out. In case of breach, the contract terms and conditions include the possibility of cancellation of contract, forfeiture of bond, liquidated damages and debarment.[1]
Limited/negotiated Tendering	Limited/negotiated tendering means a procurement method where the entity contacts supplier(s) individually.
Mismanagement	Mismanagement could conceivably cover a range of actions from a simple mistake in performing an administrative task to a deliberate transgression of relevant laws and related policies.[2]
Open Tendering	Open tendering means a procurement method where all interested suppliers may submit a tender.
Public Procurement Cycle	The procurement cycle encompasses a sequence of related activities, from needs assessment, to the award stage, up until the contract management and final payment.

Restricted/selective Tendering Restricted/selective tendering means a procurement method where a limited number of suppliers are invited by the procuring entity to submit a tender.

Reverse Auction A traditional auction is where there is a single seller and many potential buyers tendering for the item being sold. A reverse auction, used for e-purchasing and generally using the internet (an e-auction), involves, on the contrary, one buyer and many sellers. The general idea is that the buyer specifies what it wants to purchase (and often its price ceiling), and then invites suppliers to prepare a tender. Reverse auction lends itself well to the procurement or purchase of items that are in large supply and for which price savings can be gained through increased competition.

Risk-based Approach This approach identifies potential weaknesses that individually or in aggregate could have an impact on the integrity of procurement-related activities, and controls are then aligned to these risks.

Transparency Transparency in the context of procurement refers to access to information on:

- laws and regulations, judicial decisions and/or administrative rulings, standard contract clauses for public procurement; and
- the actual means and processes by which specific procurements are defined, awarded and managed.

Notes

1. See also the website of Transparency International: *www.transparency.org/global_priorities/public_contracting/integrity_pacts*.
2. This definition has been extracted from the 1985 Canadian Financial Administration Act (*laws.justice.gc.ca/en/F-11/index.html*).

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OECD Principles for Integrity in Public Procurement

Many governments have heavily invested in reforming public procurement systems, both to ensure a level playing field for potential suppliers and to increase overall value for money. Yet although government contracts are increasingly open to competition, about 400 billion dollars in taxpayers' money are still lost annually to fraud and corruption in procurement. What can countries do better?

The *OECD Principles for Integrity in Public Procurement* are a ground-breaking instrument that promotes good governance in the entire procurement cycle, from needs assessment to contract management. Based on acknowledged good practices in OECD and non-member countries, they represent a significant step forward. They provide guidance for the implementation of international legal instruments developed within the framework of the OECD, as well as other organisations such as the United Nations, the World Trade Organisation and the European Union.

In addition to the Principles, this exhaustive publication includes a Checklist for implementing the framework throughout the entire public procurement cycle. It also gives a comprehensive map of risks that can help auditors prevent as well as detect fraud and corruption. Finally, it features a useful case study on Morocco, where a pilot application of the Principles was carried out.

"*The Checklist will help governments and agencies to develop more transparent, efficient procurement systems*", Nicolas Raigorodsky, Under-secretary of Transparency Policies, Anticorruption Office, Argentina

"*Public procurement is one of the most important public governance issues. Action is needed to ensure integrity by reducing bribery and corruption*", Business and Industry Advisory Committee to the OECD

"*The general thrust and content of the document is commendable. Much of it tracks very closely to the United Nations Convention Against Corruption and the United Nations Commission on International Trade Law Model Law*", Stuart Gilman, Head of the UN Global Programme Against Corruption and the Anticorruption Unit, United Nations Office on Drugs and Crime

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Integrity in Public Procurement

GOOD PRACTICE FROM A TO Z

OECD PUBLISHING

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GOOD PRACTICE FROM A TO Z

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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The OECD is a unique forum where the governments of 30 democracies work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

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Also available in French under the title:
L'intégrité dans les marchés publics
LES BONNES PRATIQUES DE A À Z

Foreword

Public procurement is the government activity most vulnerable to corruption. Lack of transparency and accountability were recognised as a major threat to integrity in public procurement at the 2004 OECD Global Forum on Governance: Fighting Corruption and Promoting Integrity in Public Procurement.

To verify this hypothesis, the OECD Public Governance Committee has launched a survey primarily targeted at procurement practitioners in charge of designing, supervising and managing procurement processes in central governments. Auditors, members of competition authorities and anti-corruption specialists have also been involved. On the basis of the information collected, good practices were identified by government officials, representatives from civil society and private sector at the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement in November 2006.

This project maps out good practices, that is, successful measures for enhancing integrity in public procurement. It is a complementary part of multidisciplinary efforts in the OECD to improve public procurement systems, in particular:

- Assessments of public procurement systems in developing countries by the Aid Effectiveness and Donor Practices Working Party of the Development Assistance Committee[1];
- Analysis of bribery in public procurement by the Working Group on Bribery in International Business Transactions;
- Studies of the central procurement structure and capacity as well as review and remedies systems of the European Union Member States by

1. For further information, see the following webpage: http://www.oecd.org/document/40/0,2340,en_2649_19101395_37130152_1_1_1_1,00.html.

the Support for Improvement in Governance and Management Programme (SIGMA)[2].

The publication was prepared by Elodie Beth in collaboration with János Bertók of the OECD Public Governance and Territorial Development Directorate, Innovation and Integrity Division, under the leadership of Christian Vergez. The author wishes to thank the nominated experts on integrity in public procurement for their invaluable contributions, and in particular the chair of this expert group, Robert Burton, Deputy Administrator of the Office of Federal Procurement Policy in the Executive Office of the President of the United States. Special thanks go to Anikó Hrubi for her preparatory work in the identification of good practices and Marie Murphy for her assistance in finalising the publication.

2. SIGMA is a joint initiative of the OECD and the European Union, principally financed by the EU.

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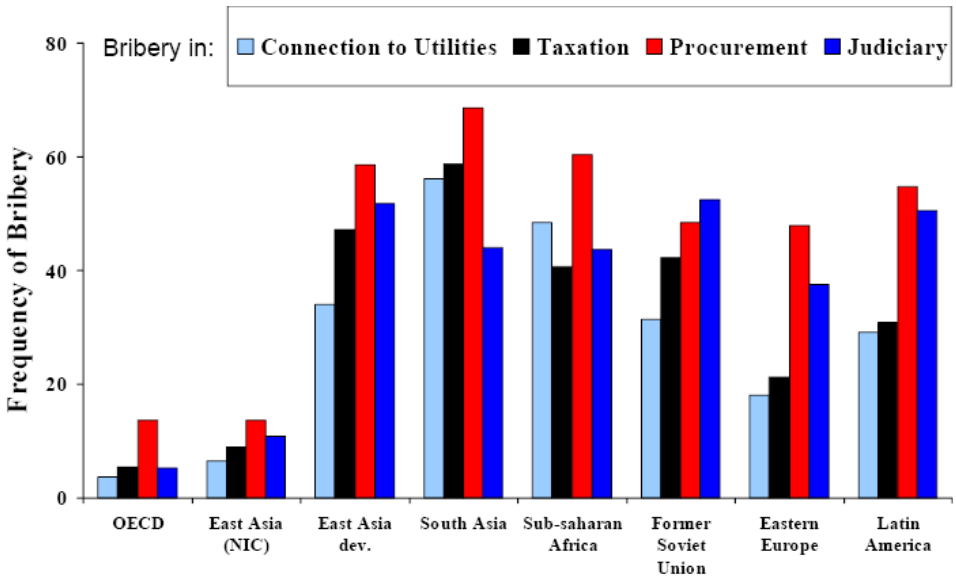
The most vulnerable government activity

Public procurement has been identified as the government activity most vulnerable to corruption. As a major interface between the public and the private sectors, public procurement provides multiple opportunities for both public and private actors to divert public funds for private gain. For example, bribery by international firms in OECD countries is more pervasive in public procurement than in utilities, taxation, judiciary and state capture, according to the 2005 Executive Opinion Survey of the World Economic Forum (see also Annex A).

Frequency of bribery in procurement



Source: Kaufmann, World Bank (2006), based on Executive Opinion Survey 2005 of the World Economic Forum covering 117 countries. Question posed to the firm was: In your industry, how commonly firms make undocumented extra payments or bribes connected with permits / utilities / taxation / awarding of public contracts / judiciary?

Public procurement is also a major economic activity of the government where corruption has a potential high impact on tax payers' money. In the European Union, public procurement equalled approximately EUR 1.5 trillion in 2002[3]. In OECD countries, existing statistics suggest that public procurement accounts for 15 percent[4] of Gross Domestic Product. The financial interests at stake, the volume of transactions on a global level and the closer interaction between the public and private sectors make it particularly vulnerable to corruption.

Balancing transparency and accountability with other aims of public procurement

Corruption thrives on secrecy. Transparency and accountability have been recognised as key conditions for promoting integrity and preventing corruption in public procurement. However, they must be balanced with other good governance imperatives, such as ensuring an efficient management of public resources – "administrative efficiency" – or providing guarantees for fair competition. In order to ensure overall value for money, the challenge for decision makers is to define an appropriate degree of transparency and accountability to reduce risks to integrity in public procurement while pursuing other aims of public procurement.

Beyond the "tip of the iceberg": Addressing the whole procurement cycle

The bidding process has been the traditional focus of international efforts. However, this is only the "tip of the iceberg", the most well-regulated and transparent phase of the procurement process. At the 2004 OECD Forum[5] countries called for specific attention to grey areas that are less subject to transparency requirements and therefore potentially vulnerable to corruption. Grey areas include in particular:

- The **pre-bidding** and **post-bidding** phases, from needs assessment to contract management and payment;

3. This includes the purchase of goods, services and public works by governments and public utilities. For further details, please refer to *A report on the functioning of public procurement markets in the EU*, European Commission, February 2004.

4. The ratio indicates the total government expenditure, including compensation for employees and defence-related expenditure. For further detail, see *The Size of Government Procurement Markets,* OECD, 2002.

5. OECD Global Forum on Governance: Fighting Corruption and Promoting Integrity in Public Procurement.

- **Exceptions to competitive procedures**, that is to say special circumstances such as extreme urgency and low-value contracts.

DEFINING AN ADEQUATE FRAMEWORK FOR INTEGRITY IN PUBLIC PROCUREMENT

Providing concrete solutions, based on practice

If international efforts put forward common goals guiding public procurement reforms, that is, efficient, non-corrupt, and transparent procurement, little information is available on means and, in particular, on concrete solutions that countries can adopt to improve their public procurement systems.

In order to define an adequate framework for promoting integrity in procurement, the OECD has surveyed countries' experiences on effective practices in the full public procurement cycle. The publication maps out good practices for integrity in procurement "from A to Z". It addresses not only the bidding process but also grey areas that have been neglected by international reform efforts. It also takes a global view of procurement by including elements of good practice in OECD countries, as well as in Brazil, Chile, Dubai, India, Pakistan, Romania, Slovenia and South Africa. Identified good practices are measures that have been successful in promoting integrity in procurement in a given context.

Transparency, accountability and professionalism

The findings of the survey among procurement practitioners in central governments confirmed that transparency and accountability are key for enhancing integrity throughout the whole procurement cycle, including in needs assessment and contract management. It also revealed that public procurement is regarded increasingly as a **strategic profession** that plays a central role in preventing mismanagement and minimising the potential of corruption **in the use of public funds**.

Challenge 1: What level of transparency?

A key challenge across countries has been to define an adequate level of transparency to ensure fair and equal treatment of providers and integrity in public procurement:

- Transparency in public procurement bears an immediate cost both for government and bidders. However, it is a key element to support

fundamental principles of the public procurement system, especially competition and integrity. Governments need to find an **adequate balance** between the objectives of ensuring transparency, providing equal opportunities for bidders, and other concerns, in particular efficiency. The drive for transparency must therefore be tempered by making transparent what sufficiently enables corruption control. If the level of transparency is adequately defined, the benefits will outweigh the cost, especially when comparing the initial cost of transparency with the potential negative consequences of corruption on the use of public funds related to procurement and possibly on public trust.

- In "**grey areas**" in the public procurement process, countries may use various approaches and solutions to ensure integrity, ranging from minimum transparency requirements to additional control mechanisms. Exceptions to competitive procedures represent a "grey area", that is, vulnerable to mismanagement and potentially corruption because of limited competition. However, it is important to highlight that limited competition does not necessarily require less transparency. For example, countries may use specific measures (e.g. reporting requirements, advance contract award notice, risk management techniques, etc.) to enhance transparency and integrity while counterbalancing the lack of competitiveness in the procedures. Similarly, some countries indicated that the phases before and after the bidding are regarded rather as internal management procedures and therefore not subject to the same transparency requirements as the bidding process. This makes it all the more important to have effective accountability and control mechanisms in daily management to keep public officials accountable.

- If information is not disclosed in a consistent or timely manner (e.g. disclosure of information on other bids in the award in a context of limited competition), it might be counter-productive by increasing the opportunity of collusion between bidders who can identify their competitors early in the process and contact them. While countries are progressively disclosing more information on public procurement procedures and opportunities in accordance with Freedom of Information Acts, they are also selecting **what information cannot be disclosed**, at what stage of the process and to whom – bidders, other stakeholders and the public at large.

Challenge 2: How to turn public procurement into a strategic profession

If transparency is an integral part of good governance in procurement, it is a necessary but not a sufficient condition for integrity in procurement. Building professionalism among procurement officials with a common set of professional and ethical standards is equally important. Survey results highlighted that public procurement is a significant factor for successfully managing public resources and should therefore be considered as a strategic profession rather than simply an administrative function:

- Driven by considerations of value for money, governments have put increasing efforts into rationalising and increasing efficiency of procurement. There has been recognition that procurement officials need to be equipped with **adequate tools** for improving planning and management and that their decisions need to be well informed. For example, countries have heavily invested in new information and communication technologies (e.g. through databases on goods' prices) to support procurement officials in their daily work and decisions. With emphasis being put on efficiency, some governments have faced difficult choices, with the reduction or stabilisation of the number of procurement officials while the volume of transactions has increased over the years.

- As most countries have adopted a more decentralised approach, enhancing **professionalism** in procurement has become all the more important. Efforts have been put into providing procurement officials with adequate skills, experience and qualification for preventing risks to integrity in public procurement. Procurement officials, who are increasingly required to play a role of "contract manager" in addition to their traditional duties, have begun to gain new skills, that is, not only specialised knowledge related to public procurement, but also project management and risk management skills.

- In a devolved management environment, procurement officials also need **ethical guidance** clarifying restrictions and prohibitions to prevent conflict-of-interest situations and, more generally, corruption. At the organisational level an emerging challenge is to ensure the separation of duties between officials to avoid conflict-of-interest situations while avoiding that these "firewalls" result in a lack of co-ordination between management, budget and procurement officials.

Challenge 3: Accountability to whom?

When defining priorities, policy makers need to decide what stakeholders public procurement primarily serves – end-users, government, the private sector, the media, or the public at large. Because of the important financial interests at stake and their potential impact on tax payers and citizens, public procurement is increasingly regarded as a core element of **accountability of the government to the public** on how public funds are managed.

- Governments have reinforced their control and accountability mechanisms on public procurement in recent years. A key challenge is to define a clear chain of approval and responsibility in the public procurement process in a context of devolved procurement. Furthermore, some countries have indicated the difficulty of co-ordinating internal controls and external audits in procurement. There has been growing recognition that internal controls and external audits should be based on a more **risk-based approach** in order to help prevent and detect corruption in procurement, based on the type of procurement (e.g. specificity, complexity, value and sensitivity) and the vulnerable points in the procurement process.

- Recourse systems for challenging government decisions have become a central mechanism for bidders and other stakeholders to verify the fairness and integrity of the public procurement process, both in the public and private sectors. Several countries have established **alternative resolution systems** to judicial decisions dedicated to procurement in order to promote an effective and timely resolution of bid protests and avoid the cost of litigation. In addition to bidders, procurement officials and other stakeholders have been involved in the control of public procurement through the establishment of administrative complaint systems. Whistleblowing has only been used in a few countries despite its potential for raising concerns about public officials' misconduct, including in public procurement.

- Although countries have various accountability and control mechanisms, they have increasingly involved bidders, other stakeholders and the wider public in monitoring the public procurement process through increased access to information and active participation. Some countries have also introduced **direct social control** mechanisms by involving stakeholders – not only private sector representatives but also end-users, civil society, the media or the public at large – in scrutinising the integrity of the public procurement process.

TAKING A PROSPECTIVE VIEW OF PUBLIC PROCUREMENT: EMERGING TRENDS

From a process-based towards a knowledge-based organisation

Procurement officials' role is shifting nowadays from a simple transactional role ("buy transaction") to a management role embracing the entire procurement process, from needs assessment to contract management and payment. In many countries, the procurement process has been delegated to departments and agencies while the central procurement authority has centralised more strategic functions such as the management of new technologies as well as the dissemination of knowledge and good practice. This could indicate an emerging trend to evolve from a process-based to a **knowledge-based procurement organisation**. Being less involved in the daily management, the organisation focuses on knowledge sharing among departments and provides an enabling environment for achieving value for money.

Survey results have confirmed that one of the most pervasive change factors for procurement is the use of **new information and communication technologies**. They have influenced policies and practices and revolutionised how goods and services are purchased. They have also become a central instrument for promoting transparency in procurement and keeping procurement officials and contractors accountable. In particular they have provided easy and real-time access to information, new ways for interaction between bidders and government officials, and facilitated the monitoring and tracking of information on procurement.

A convergence of integrity instruments for the public and private sectors

As public procurement officials are increasingly working closely with private sector actors to develop and deliver the solutions that promote value for money, they need adequate guidance. Enhancing professionalism requires not only management procedures but also a clear set of values and ethical standards clarifying how to achieve this objective. Countries expressed the need to develop a **model code of conduct** for procurement officials defining clear restrictions and prohibitions, as well as giving recommendations on how to handle their interaction with the private sector[6].

6. There was consensus on that issue at the 2006 OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement.

In light of increasing public expectations and potential reputation risks for individual companies and professions, **private actors** are also starting to take positive steps in this regard. They have developed integrity standards and instruments, for example with the adoption of quality management and integrity norms, codes of conduct or the certification and audit by a third independent party of their integrity systems. This raises the question of how governments could encourage these initiatives and under what conditions. When selecting a supplier, should the government include criteria linked to corporate social responsibility, and if so, how to ensure that these efforts are founded and that the criteria do not artificially reduce competition? With the convergence of integrity instruments used by public and private actors, partnerships between governments and potential suppliers could be further encouraged.

Exploring the conditions for public procurement to be a lever for wider economic, social and environmental change

Public procurement is increasingly recognised as an instrument of government policy and a lever for wider economic, social and environmental change. There is a debate in multilateral institutions such as the European Union and the World Trade Organisation on the extent to which international regulations allow for a wider view of public procurement than a business process. If countries are concerned about how **economic, social and environmental criteria** may be used in public procurement without harming the integrity of the process, few have tackled the issue. A challenge is to define how to possibly include economic, social or environmental considerations in the process while ensuring that government decisions are fair and transparent.

As public procurement has become increasingly global, it is turning into a global concern. Procurement decisions illustrate the challenges of achieving **sustainability** in a global economy. In particular, one of the difficulties for governments is to monitor the implementation of the contract by contractors and subcontractors that are often outsourced and ensure that labour and environmental standards are respected. It is the ultimate responsibility of governments to set and enforce clear public standards for both the main contractor and subcontractors, defining the parties' responsibilities for integrity.

POSSIBLE NEXT STEPS FOR THE OECD

Building on a better understanding of successful strategies and practices for enhancing integrity in public procurement, there is a new impetus for developing a non-binding policy instrument at the international level. At the OECD Symposium and Global Forum on Integrity in Public Procurement in November 2006, country experts called for a **Checklist** for enhancing integrity at all stages of public procurement, from needs assessment to contract management and payment. The Checklist could list the key building blocks, that is, policies and tools for promoting integrity, transparency and accountability in the public procurement process. In order to ensure that this policy instrument fits into different regional contexts, a series of regional dialogues will be organised to test the Checklist. This will involve all major stakeholders, in particular representatives from government, the private sector, civil society organisations and international organisations.

INTRODUCTION

Public procurement is increasingly recognised as a central instrument to ensure efficient and corruption-free management of public resources. In this context, the role of procurement officials has changed dramatically in recent years to cope with the demand for integrity in public procurement. Countries have devoted efforts to ensure that:

- Public procurement procedures are transparent and promote fair and equal treatment;
- Public resources linked to public procurement are used in accordance with intended purposes;
- Procurement officials' behaviour and professionalism are in line with the public purposes of their organisation;
- Systems are in place to challenge public procurement decisions, ensure accountability and promote public scrutiny.

The approach in this publication is to analyse public procurement from a good governance perspective, identifying the conditions under which elements of good governance – in particular transparency and accountability – contribute to integrity and corruption prevention in public procurement (see Survey Methodology in Annex B).

Considering that there is not a single "one size fits all" solution, this publication provides a comparative overview of solutions used by public organisations for ensuring integrity and corruption resistance at all stages of public procurement, from needs assessment to contract management. It also highlights elements of good practice to illustrate the range of policy options available to policy makers and procurement officials for improving public procurement systems.

In order to help central governments modernise existing procurement policy and practice, four issues are reviewed:

- **Risks to integrity at each stage of the public procurement process.** The publication starts with an inventory of risks to integrity that have been identified in countries at all stages of the public procurement process, that is, not only in the bidding but also in the pre and post-bidding phases.
- **Promoting transparency: potentials and limitations**. The second Part reviews the potentials and limitations of transparency in promoting a level playing field for bidders. It also maps out alternative solutions to competitive procedures used in countries to ensure integrity in public procurement.
- **Enhancing professionalism as a key element to prevent risks to integrity in public procurement.** The third Part highlights efforts to equip procurement officials with adequate skills and instruments to increase professionalism and value for money, as well as a clear set of ethical standards clarifying how to achieve these objectives.
- **Ensuring accountability and control in public procurement.** The fourth Part reviews existing and emerging mechanisms used for ensuring accountability and control in public procurement.

I. RISKS TO INTEGRITY AT EACH STAGE OF THE PUBLIC PROCUREMENT PROCESS

Based on the results of the survey questionnaire, this Part provides an inventory of the risks to integrity that have been identified in countries. It is important to recognise that risks may stem from a simple mistake in performing an administrative task to a deliberate transgression of relevant laws and related policies.

The inventory highlights that there are **critical risks to integrity at all stages** of the public procurement process, from the needs assessment through the bidding to contract management and payment. The following tables indicate the particular risks[7] for each stage of the public procurement process.

PRE-BIDDING: STARTING FROM NEEDS ASSESSMENT

In the pre-bidding, the most common risks include:

- The lack of adequate needs assessment, planning and budgeting of public procurement;
- Requirements that are not adequately or objectively defined;
- An inadequate or irregular choice of the procedure; and
- A timeframe for the preparation of the bid that is insufficient or not consistently applied across bidders.

7. These risks or concerns were mentioned by countries in the response to the OECD Questionnaire on Integrity in Procurement, as well as in discussions at the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement in November 2006.

Table I.1. Risks in pre-bidding

Pre-bidding	Risks identified
- Needs assessment, planning and budgeting	- The lack of adequate needs assessment, deficient business cases, poor procurement planning (e.g. in the Netherlands, New Zealand, Spain, Turkey); - Failure to budget realistically (e.g. in the United Kingdom), deficiency in the budget (e.g. in Spain); - Procurements not aligned with the overall investment decision-making process in departments (e.g. in Canada); - Interference of high-level officials (e.g. in the Czech Republic, Poland, the Slovak Republic) in the decision to procure; - Informal agreement on contract (e.g. in Brazil).
- Definition of requirements	- Technical specifications: a) Tailored for one company (e.g. in Belgium[8], Canada, Poland, Spain and the United Kingdom); b) Too vague or not based on performance requirements (in countries such as Chile and Germany). - Selection and award criteria: a) Not clearly and objectively defined (in countries such as Poland and Slovenia); b) Not established and announced in advance of the closing of the bid (for instance in New Zealand); c) Unqualified companies being licensed, for example through the provision of fraudulent tests or quality assurance certificates (for instance in the United Kingdom).
- Choice of procedure	- Lack of procurement strategy for the use of non-competitive procedures based on the value and complexity of the procurement which creates administrative costs (for instance in Canada); - Abuse of non-competitive procedures on the basis of legal exceptions (e.g. in Belgium, Finland, Netherlands and Slovenia) through: a) Contract splitting on the basis of low monetary value contracts; b) Abuse of extreme urgency; c) Abuse of other exceptions based on a technicality or exclusive rights, etc; d) Untested continuation of existing contracts.
- Time frame for preparation of bid	- A time frame that is not consistently applied for all bidders, for example, information disclosed earlier for a specific bidder (in countries such as Belgium and Norway); - A time frame that is not sufficient for ensuring a level playing field (for instance in New Zealand).

Sources: - Country responses to the OECD Questionnaire.
- Discussions at the OECD Symposium, Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement, November 2006.

8. For further information on the risks identified in Belgium and the responses developed, see Box IV.5.

In the needs assessment phase, risks have been recognised[9] as being particularly high, due to the potential **influence of external actors** such as politicians or consultants on officials' decisions. In the 2006 *Handbook on Curbing Corruption in Public Procurement*, Transparency International identified examples of the most usual manifestations of corruption in the needs assessment:

- The investment or purchase is unnecessary. Demand is induced so that a particular company can make a deal but the purchase is of little or no value to society.
- Instead of systematic leak detection or grid loss reduction (both of which offer little reward), new capacity is installed (which offers bribe potential).
- The investment is economically unjustified or environmentally damaging.
- Goods or services that are needed are overestimated to favour a particular provider.
- Old political favours or kickbacks are paid by including a "tagged" contract in the budget (budget for a contract with a "certain" pre-arranged contractor).
- Conflicts of interest are left unmanaged and decision makers decide on the need for contracts that have an impact on their former employees ("revolving doors").

This shows that procurement processes provide opportunities for political corruption[10] in the needs assessment. This may encompass a variety of situations, including the use of procurement as a public policy tool to pay back political support or ensure future support (e.g. political campaign financing, rewarding supporters, etc.) or in some cases directly finance politicians' own private benefits. If public procurement is used for supporting national goals (e.g. local industry, employment of targeted groups, etc.) without the necessary transparency in the procurement process, this may also possibly lead to corruption.

9. This was highlighted in the discussions at the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement, November 2006.

10. *Global Corruption Report, Special Focus: Political Corruption*, Transparency International, 2004.

BIDDING

In the bidding phase, countries indicated the following risks:

- Inconsistent access to information for bidders in the invitation to bid;
- Lack of competition or in some cases collusive bidding resulting in inadequate prices;
- Conflict-of-interest situations that lead to bias and corruption in the evaluation and in the approval process;
- Lack of access to records on the procedure in the award that discourages unsuccessful bidders to challenge a procurement decision.

Table I.2. Risks in bidding

Bidding	Risks identified
- Invitation to bid	- Information on the procurement opportunity not provided in a consistent manner; - Absence of public notice for the invitation to bid (e.g. in Finland); - Sensitive or non-public information disclosed (e.g. in Belgium, Mexico, the United Kingdom, the United States); - Lack of competition or in some cases collusive bidding that leads to inadequate prices or even illegal price fixing (e.g. in Austria, the United Kingdom).
- Award	- Conflict of interest and corruption (e.g. in Canada, Germany, New Zealand, Norway, the United Kingdom) in: a) The evaluation process (e.g. familiarity with bidders over the years, personal interests such as gifts or additional/secondary employment, no effective implementation of the "four-eyes" principle, etc.); b) The approval process: no effective separation of financial, contractual and project authorities in delegation of authority structure; - Lack of access to records on the procedure.

Sources: - Country responses to the OECD Questionnaire.
- Discussions at the OECD Symposium, Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement, November 2006.

The bid evaluation has been considered a particularly vulnerable step[11]. A key concern is the lack of transparency when using economic, social and environmental criteria to evaluate bidders (e.g. favouring bidders from

11. This was highlighted in the discussions at the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement and the back-to-back Global Forum, November 2006.

economically disadvantaged areas, using environmental-friendly materials, etc.). For countries that allow the use of these criteria, regulations do necessarily clarify how they may be used together with other evaluation criteria without harming the integrity of the public procurement process. Even when the evaluation criteria are defined in a transparent and precise manner, they usually offer discretion to evaluators. If bidders are to trust and respect the outcome, they need to know how discretion was exercised and how criteria were applied.

POST BIDDING: TAKING IN CONTRACT MANAGEMENT AND PAYMENT

In the post-bidding phase, the most frequent risks to the integrity of the public procurement process include:

- The insufficient monitoring of the contractor;
- The non-transparent choice or lack of accountability of subcontractors and partners;
- Lack of supervision of public officials;
- The deficient separation of financial duties, especially for the payment.

Table I.3. Risks in post bidding

Post bidding	Risks identified
- Contract management	- Failure to monitor performance of contractor (e.g. in Ireland, Norway, New Zealand, Mexico, Slovenia, Spain), in particular lack of supervision over the quality and timing of the process that results in: a) Substantial change in contract conditions to allow more time and higher prices for the bidder; b) Product substitution or sub-standard work or service not meeting contract specifications; c) Theft of new assets before delivery to end-user or before being recorded in the asset register; - Subcontractors and partners are chosen in a non-transparent way, or not kept accountable.
- Order and payment	- Deficient separation of duties and/or lack of supervision of public officials (e.g. in Belgium, Italy, the United Kingdom) leading to: a) False accounting and cost misallocation or cost migration between contracts; b) Late payments of invoices, postponement of payments to have prices reviewed so as to increase the economic value of the contract; c) False or duplicate invoicing for goods and services not supplied and for interim payments in advance of entitlement.

Sources: - Country responses to the OECD Questionnaire.
- Discussions at the OECD Symposium, Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement, November 2006.

Several countries emphasised that the phases before and after the bidding are not regulated by procurement laws but rather by civil and contract law. Therefore they are often less subject to transparency and accountability requirements, which entail risks to integrity in public procurement.

Regarding the specific risk of bribery in public procurement, information can be found in *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, OECD, 2007[12].

To address risks to integrity, the next Parts review the following issues:

- **The lack of transparency in procurement** – This may take various forms such as the provision of inconsistent or incomplete information to bidders, insufficient transparency in the use of non-competitive procedures, or procurement regulations and procedures that are unclear for bidders.
- **Insufficient professionalism of officials** – This may translate into poor planning, budgeting and risk management for procurement, leading to unnecessary delays and cost overruns for projects. In other words, public officials are not necessarily well prepared to keep up with professional standards. Furthermore, officials may not necessarily be aware that their acts are unethical or may bias the process which can lead to conflict-of-interest situations and sometimes corruption.
- **Inadequate accountability and control mechanisms** – Unclear accountability chains for officials, lack of co-ordination between different control mechanisms or insufficient supervision over contractors' performance might lead to mismanagement and even

12. The report describes how bribery is committed through the various stages of government purchasing; how bribery in public procurement is related to other crimes, such as fraud and money laundering; and how to prevent and sanction such crimes. The typical motivations and conduct of the various actors engaging in corruption are also highlighted.

corruption, especially in "grey areas" where there are fewer requirements for transparency.

The publication looks at approaches and solutions for promoting integrity in the full procurement cycle, from needs assessment, planning and budgeting, through the bidding to contract management and final payment.

II. PROMOTING TRANSPARENCY: POTENTIALS AND LIMITATIONS

Attracting a sufficient number of bidders in public procurement through processes that are open and fair is a key concern. To ensure a level playing field for bidders, all countries recognise the need to provide:

- Transparent and readily accessible information on general laws, regulations, judicial decisions, administrative rulings, procedures and policies on public procurement; and
- Equal opportunities for participation of bidders through a competitive procedure, and the provision of consistent information to all bidders on the procurement opportunity, in particular on the method for bidding, specifications, as well as selection and award criteria.

Transparency could be considered a public good[13] that bears an immediate cost for both government and bidders. A balance must be found between transparency and its contribution to corruption control with other considerations such as efficiency. In practice countries have adapted the level of transparency and openness of the procurement procedure according to a number of factors, including the sensitivity of the information and the **specificity and value** of the public procurement.

BALANCING THE NEED FOR TRANSPARENCY WITH OTHER CONSIDERATIONS

The sensitivity of the information

There are some restrictions on the information governments make available to protect:

- **Commercially-sensitive** information for bidders (e.g. content of competitive bids such as commercial secrets, individual prices, etc.); and

13. This concept was introduced by Steven Schooner, Keynote Speaker at the 2006 OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement.

- **Security-sensitive** information for the State (e.g. defence, national security) that could harm interests of the bidders or of the State.

For example, if the names of bidders are disclosed before the submission of the bids, this could encourage firms to co-ordinate their bids on procurement, leading to collusive price-fixing behaviour. Firms may agree to submit common bids, thus eliminating price competition or alternatively agree on which firm will be the lowest bidder and rotate in such a way that each firm wins an agreed upon number or value of contracts. The example below highlights the prevention measures that Japan has put in place in recent years to prevent bid rigging in procurement.

Box II.1. Bid rigging in public procurement in Japan: Prevention measures and recommendations

Bid rigging in the procurement process, when favoured bidders have the possibility to adjust their bids after receiving information about rival bids, is one of the most serious breaches of the Antimonopoly Act. Accordingly, the Japan Fair Trade Commission has taken proactive and strict measures against bid rigging.

The following table highlights the numbers of the Japan Fair Trade Commission's legal actions in recent years against antitrust violations as a whole and against bid rigging.

Fiscal Year	2001	2002	2003	2004	2005
Number of Legal Actions against Anti-trust	38	37	25	35	19
Of which Bid Rigging	33	30	14	22	13
Number of Entrepreneurs Object of Legal Actions against Anti-trust	928	805	405	472	492
Of which Bid Rigging	908	762	376	449	473
Amount of Surcharge (billion yen) against Anti-trust	2.2	4.33	3.87	11.15	18.87
Of which Bid Rigging	1.72	3.22	3.83	3.45	18.8
Number of Entrepreneurs Object of Surcharge against Anti-trust	248	561	468	219	399
Of which Bid Rigging	240	546	467	194	392

In addition, the recent amendments of the Antimonopoly Act – came into effect in January 2006 – introduced a leniency programme to give companies an incentive to voluntarily refrain from collusive bidding. It also introduced compulsory measures for criminal investigations and increased the surcharge rate to make the provision prohibiting bid rigging more effective.

Moreover, for the purpose of preventing procurement officials from getting involved in bid rigging, the Act on Elimination and Prevention of Involvement in Bid Rigging came into force in January 2003. This Act provides that the head of procurement institutions shall take action to

eliminate involvement if requested by the Japan Fair Trade Commission. The recent amendment enacted in December 2006 introduced criminal penalties against officials involved in bid rigging.

In order to promote competition and prevent cartels in public procurement, the Japan Fair Trade Commission made the following recommendations:

- For cases that should be subject to competition, open bidding should be the appropriate form.
- To prevent bid rigging, the names of designated bidders should be announced after the submission of bids, because the prior announcement of their names would enable those planning bid rigging to obtain information about candidate bidders, thereby making it easier for them to conduct bid rigging.
- It would also allow those planning bid rigging to obtain important information and would raise a contract price if the estimated price by a procurement institution is announced before the submission of bids. In view of this, the estimated price should only be announced after the submission of bids.

Sources: - Japan, response to the OECD Questionnaire.
- *Roundtable on Competition in Bidding Markets: Note by Japan,* discussion document, September 2006.

The specificity and value of the procurement

A balance must be found between the need for transparency and other considerations such as efficiency depending on the type of contract at stake. Therefore, the information made available and the means for its dissemination vary proportionally to the size of the contract and the specificity of the object to be procured. Box II.2 highlights an example of application of the proportionality principle in publicising procurement opportunities in France and how the discretionary power of official for low-value contracts has been balanced with stronger accountability mechanisms.

Box II.2. Applying the principle of proportionality in publicising procurement opportunities in France

The legal principle of proportionality requires administrative actions be proportionate in a reliable and predictable way with the objectives pursued by the law.

In procurement, the proportionality principle requires that information be made public according to the size of contracts. The Code of Public Procurement Contracts, which came into effect on 1 January 2006, stipulates the principle of proportionality for publicising bidding opportunities in France, namely:

- Public procurement procedures above the threshold defined by the European Directives must be published in the Official Journal of the European Union (OJEU), as well as in the procurement publications part of the official gazette of the French Republic (*Bulletin officiel des annonces des marchés publics*, BOAMP).
- Public bids above EUR 90 000 but under the European threshold are to be published in the BOAMP, and can also be published in specialised journals.
- The publication of bids below the value of EUR 90 000 must be adapted to the size and importance of the contract. Finding the most adequate solution for publishing is the responsibility of the procurement officer who has discretionary power to select the most adequate solution amongst available options, including the official gazette, regional or national bulletins, specialised journals or press. To balance this increased discretionary power of procurement officers, control has also been strengthened to detect mismanagement or abuse and transfer of such cases to court.
- Contracts below EUR 4 000 are exempt from mandatory publication.

Source: France, response to the OECD Questionnaire.

For **major procurement projects**, governments may use additional requirements such as increased transparency, guidance or controls. For instance, in Poland, for contracts above a certain amount, an *ex-ante* control of the award of public contracts is carried out by the Public Procurement Office.

Box II.3. *Ex-ante* control of the award of major public contracts in Poland

With the 2004 Public Procurement Law, the *ex-ante* control of the award became mandatory for public contracts of high value in Poland. The mechanism is used for contracts above EUR 20 million for public works and EUR 10 million for public supplies and services.

The aim of this preventive mechanism is to avoid improper spending of public money and reveal possible infringements before the conclusion of contracts, such as:

- Negligent preparation of contract award procedures;
- Incorrect evaluation of submitted bids or requests to participate in award procedure;
- Definition of the terms of participation in the award procedure in a way obstructing fair competition;
- Failure of demand to submit documents necessary to evaluate whether an economic operator satisfied the conditions for participation in the award procedure;
- Failure to exclude economic operators from a procedure in a situation when the premises for exclusion existed;
- Failure to reject a bidder in a situation when the premises for rejection existed.

Awareness-raising and training activities were also carried out to reinforce the professionalism of procurement officials.

In case of major infringement of public procurement that influenced the results of the procedure or the selection of the bidder, the Public Procurement Office may recommend the re-evaluation of the bidders, or the cancellation of the whole procedure. When infringements of the Public Procurement Law are neither substantial nor had influence on the result of the procedure, the recommendations may concern future proceedings in the scope of confirmed infringements.

As a result of these reforms, the statistics below indicate the decline of the number of infringements:

Results of ex-ante controls carried out by the Public Procurement Office (in %)

	May 2004 – Jan. 2005	*Jan. – July 2006*
No infringements found	14	23
Recommendation to cancel procedure	18	3
Recommendation to re-evaluate bid	5	2
Minor infringements	63	72
Total	100	100

The findings of the *ex-ante* controls are published in periodic reports every six months and are widely distributed (e.g. on the website of the Public Procurement Office). The information included in those reports have a preventive effect as they draw the attention of awarding entities to the scale, type and weight of infringements found and, as a result, enable to avoid similar errors in future procedures.

Sources: - Case study provided by Poland for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.
- Report on *Functioning of the Public Procurement System in 2005*, Public Procurement Office, June 2006.

BEFORE, DURING AND AFTER THE BIDDING: WHAT LEVEL OF TRANSPARENCY FOR EACH STAGE?

Another key factor for defining the level of information is **the stage** of the public procurement process. Contrary to the bidding process that is strictly regulated, the phases before and after the bidding are less subject to transparency and accountability requirements in a majority of countries.

Pre-bidding

In the pre-bidding, in **a third of countries** potential bidders and other stakeholders, in particular end-users have an opportunity to be associated in the drafting of specifications for the object to be procured. Governments consult stakeholders on the specifications of procurement items prior to the bid notice in order to engage in a dialogue with the private sector and encourage innovation, especially for complex contracts (e.g. technical issues, difficulty in estimating prices, etc.). This may take the form of an invitation to companies to submit suggestions on line, surveys among bidders or a market study.

A concern is to ensure that the process for integrating their views is **not biased** to avoid specifications being targeted at one company. Countries indicated the necessity to have a sufficiently large number of participants to represent the views of the industry, as well as clear criteria to select them to avoid potential conflict-of-interest situations. For instance, in Belgium, a pre-information notice may be used to invite all interested bidders to participate in the preparation of the market study and then the results of this consultation are reviewed in light of the initial market overview prepared by the procuring authority. In Germany, precautionary measures include a formal commitment by stakeholders not to commit misconduct and corruption, its exclusion from follow-up contracts and its potential liability for prosecution in case of breach.

More generally, it is increasingly recognised that the public sector needs to take a more systematic and **strategic approach** to managing major government markets and providing industry with clearer view of public sector demand in order to improve competition and long-term capacity. An emerging practice is to organise seminars together with bidders early in the process to increase the exchange of information between the public sector and companies and provide the opportunity for the industry to discuss possible solutions (e.g. in Belgium, Finland, Germany, Ireland and the United Kingdom).

Bidding

In the bidding process, three quarters of countries use **new information and communication technologies** (ICTs) in order to release information on procurement opportunities in an open and competitive manner. At the European level, one of the ambitious targets of the Action Plan is that by 2010 all public administrations across Europe will have the capacity to carry out a hundred percent of their procurement electronically, where legally permissible, thus creating a fairer and more transparent market for all companies. The example of Portugal below illustrates how countries are progressively moving the different stages of procurement activities on line, including contract management and payment, in order to enhance transparency and efficiency.

Box II.4. Implementing an online platform covering all stages of procurement in Portugal

The Portuguese e-Procurement Programme was launched in June 2003 as a priority target of the National Action Plan for the Information Society. This system, implemented by the Knowledge Society Agency (UMIC), was set up with the main objectives of creating a centralised and high-quality technological platform that promotes efficiency and competition through increased transparency and savings in the whole public procurement process.

The National e-Procurement Portal (http://www.compras.gov.pt) started as a portal only providing information, but now it also offers the possibility of downloading the whole bid documentation and specifications free of charge. Also, the portal automatically releases public bid announcements, allows public or restricted procedures, receives suppliers' queries and manages all communication and information exchange on line. The next steps include the implementation of a Contract Management Tool that allows consulting and monitoring of contracts concluded as well as enables e-invoicing. The Information Management System will also help collect, store and systemise information and statistics on the procurement process.

In order to aggregate at a central level the needs of public bodies, an Electronic Aggregation Tool was developed to promote standardisation of goods and services as well as to facilitate planning, management and control. In the near future, further tools will be implemented, such as the National Register of Suppliers, which is a central suppliers' repository, and the Central Electronic Catalogue with information on products and services from the registered State suppliers.

In addition to increased transparency, the acquired knowledge and proactive management orientation, the system has also produced significant cost and time savings as well as structural rationalisation. As a result, total savings reached EUR 7.8 million for a total negotiation of EUR 39 million since September 2003. Eight ministries have already adopted new procedures, 796 public bodies and 1389 people were involved in the project.

Successful implementation of the project requires an adapted human resource management approach in order to motivate and mobilise the stakeholders. It also necessitates further standardisation of processes on the one hand, and product and service codification and standardisation on the other hand.

Sources: - Portugal, response to the OECD Questionnaire.
- The Portuguese e-Procurement Programme, 2006.

In order to ensure a level playing field in the bidding process, a majority of countries have not only ensured the wide dissemination of the bid notice but also developed specific measures to ensure that bidders:

- **Receive clear documentation on the procurement opportunity** to ensure an accurate understanding by bidders. A vast majority of countries have devoted significant efforts in recent years to develop model documents (e.g. through template bid documentation, standard sets of clauses and conditions, standard procurement guidelines, etc.). In Hungary, a legality control before the publication of procurement notices has been established (see Box II.5);

- **Receive information early about evaluation criteria**, i.e. how bids will be evaluated in the process. In Pakistan, Letters of Invitation are often used for ensuring that the short listing of consultants is based on clear and objective evaluation criteria (see Box II.6). The criteria and relative weightings, if appropriate, must be published in a timely manner so that bidders are aware of them when preparing their bid, for instance in Mexico and Norway. In Mexico, criteria are included in the bidding conditions and may be revised by a Bidding Conditions Revising Sub-Committee as well as be subject to public scrutiny before the publication of the notice. In the United Kingdom, the software for bid evaluation requires that criteria are established early in the process and also records them to ensure the possibility of auditing them;

- **Receive information at the same time** when bid requirements change. This is done in a written form through online notification or additional information published on e-procurement websites (e.g. in Belgium, Canada, Ireland, Mexico and Norway). In addition, it may be published in an official gazette or posted by suppliers in query mailboxes, for instance in the United Kingdom;

- May ask for further **clarification** or information, keeping in mind that information on questions and answers should be consistently disseminated to all bidders. Countries usually organise information sessions and may provide a contact point for information (e.g. in Belgium, Canada, Germany and Mexico) that sends back information to all bidders. In Mexico an online module enables bidder to observe clarification meetings;

- Have **sufficient time to prepare bids.** For example, additional information must be delivered - at least twelve days in the Czech Republic - before the time limit for receiving bids.

Box II.5. *Ex-ante* legality control of procurement notices in Hungary

It is the task of the Public Procurement Council to monitor the public procurement processes in Hungary. The Council is an autonomous public body reporting directly to Parliament every year on public procurement. It contributes to the development of public procurement policy, and its recommendations also assist in preparing and amending legislation.

In addition to available *ex-post* control and remedy possibilities, a specific filter mechanism was established to check compliance of procurement notices with national legislation and to detect and prevent any unlawful element before the bidding process starts. The Public Procurement Council requires a legality control, by the Editorial Board, before the publication of all procurement notices. In case of non-compliance with the law, the Public Procurement Council calls upon the bidder to complete or modify the notice before submitting it for publication.

According to the statistics available to the year 2005, out of 25 000 documents, the Council had to call on nearly 75%, requesting that the procurement notices be adjusted before their publication. Once the Public Procurement Council has required precisions and modifications from public authorities, they have generally accepted to make changes in line with the legal requirements. If not, the President and the Members of the Public Procurement Council may initiate an ex officio proceeding of the Arbitration Board. This *ex-ante* filter mechanism has therefore helped prevent a high number of *ex-post* remedies.

In addition to *ex-ante* legal control, since 2004 the Public Procurement Act also requires the contracting authorities to publish a notice on the amendment and execution of the contract in the Public Procurement Bulletin. The provisions of the Public Procurement Act set out strict conditions for amending the contract. The provisions narrowed this possibility to such events that were not foreseeable and would jeopardise the legitimate interests of a party in case of executing the contract in its original form.

Source: Hungary, response to the OECD Questionnaire.

Box II.6. Definition of objective criteria for evaluation in Pakistan

In the last seven years Pakistan made various efforts to promote good governance and accountability in its government contracting system. In co-operation with Transparency International (TI) Pakistan, the government implemented **practical tools for increasing transparency,** particularly the Integrity Pact that was first applied for the project of K–III Greater Karachi Water Supply Scheme in 2001. This project consisted of two successive phases assisted and monitored by TI to help implement the Integrity Pact: the selection of consultants for the design and supervision; and the selection of contractors.

In the first phase of the project, the IP for contracts related to the K–III was signed by all consultants and contractors participating in the bidding. For the selection of the consultants TI Pakistan assisted in the transparent short listing of consultants based on **clear** and **objective evaluation criteria included in the "Letter of Invitation"**. The selection was based on the two-envelope system, that is, two separate envelopes; one for the technical and one for the financial proposals. Opening the envelopes with the financial proposals is preceded by the verification and approval of the technical proposal. This system ensures that the evaluation not only takes into account the price but also the quality of each bid. The contract was finally awarded to the proposal with the highest technical requirements and the possible best price for this technical level.

The second phase of the project, that is, the bidding process for the contractors was concluded in September 2003, and the overall cost attained nearly PKR 4 485 million (Pakistan rupee). TI Pakistan estimated the net savings at PKR 837 million.

Sources: - Case study provided by Pakistan for the OECD Global Forum on Governance: Sharing Lessons on Promoting Integrity in Procurement, November 2006.
- *Curbing Corruption in Public Procurement*, Transparency International, December 2006.

Countries have recognised the importance of **communicating award results** in a transparent manner. The objective is to create a relationship of trust with the bidder that the process has been conducted in a fair manner and improve value for money for future procurements by providing feedback and advice to bidders on how to improve their bids.

All countries provide at the minimum the name of the successful bidder and the reasons for the rejection of the offer to the unsuccessful bidder. However, the level of information provided varies significantly depending on the country. For instance in the United Kingdom, the Ministry of Defence has decided to publish on line information on contract award that it cannot reasonably expect to protect under the Freedom of Information Act. This information includes the contractor's name, nature of goods and services, award criteria, rationale for contract awards, headline price of winning bid, and the identities of unsuccessful bidders. However, no information should be released on the competitor's bid. On the contrary, in Finland, bidders may ask for the winning bid document after **confidential information** has been removed by the successful bidder (e.g. business secrets).

The provision of information is done in **three quarters of countries** through the publication of the contract award as well as a debriefing on request. Several European countries have a double publication at the national level and in the Official Journal of the European Union. More than half of countries use new information and communication technologies to communicate award results.

The debriefing is usually made in writing. Very few countries mentioned the procedure used for approving the debriefing reports. In Norway, all reports must be approved by the procurement division and normally also by a specific board. In a few countries there is a possibility to request an **oral debriefing** that is usually carried out after the award (e.g. in Canada, Ireland, the United Kingdom and the United States). However, in the United States the debriefing can also be requested before the award so that bidders who have been excluded in the pre-qualification receive information early in the process. Some countries have developed detailed guidance for procurement officers to ensure that they do not release commercial in-confidence information (e.g. business secrets) that could contribute to the collusion of bidders, and that they have necessary experience or sensitivity to carry out the interview with the bidder successfully. The example of the United Kingdom below illustrates the potential benefits of debriefing for both the procuring authority and the bidders (see Box II.7).

Box II.7. Debriefing in the United Kingdom

If regulations require departments to debrief candidates in contracts exceeding European thresholds in the United Kingdom, the Office of Government Commerce (OGC) also strongly recommends debriefing in contracts below thresholds.

Debriefing candidates not selected for a bid list and unsuccessful bidders is incumbent on the contracting agency or public organisation. Debriefing provides a valuable opportunity for both parties to gain benefit from the process, and thus it is considered a useful learning tool for the parties.

Debriefing is also useful **for the buyer** department or agency because it may:

- Identify ways of improving processes in the future;
- Suggest ways of improving communications;
- Make sure that good practice and existing guidance are updated to reflect any relevant issue that have been highlighted;
- Encourage better bids from those suppliers in future;
- Get closer to how that segment of the market is thinking (enhancing the intelligent customer role);
- Help establish a reputation as a fair, open and ethical buyer with whom suppliers will want to do business in the future.

Debriefing also has **potential benefits for the supplier,** as it:

- Helps companies to rethink their approach in order to make future bids more successful;
- Offers targeted guidance to new or smaller companies to improve their chances of doing business in the public sector;
- Provides reassurance about the process and their contribution or role (if not the actual result);
- Provides a better understanding of what differentiates public sector procurement from private procurement.

Debriefing discussions – either face-to-face, over the telephone or by videoconference – are held within maximum 15 days after the contract is awarded. The sessions are chaired by senior procurement personnel who have been involved in the procurement.

The topics for discussions during the debriefing depend mainly on the nature of the procurement. However, the session follows a predefined structure. First, after introductions, the procurement selection and evaluation process is explained with openness. The second stage concentrates on the strengths and weaknesses of the supplier's bid to build a better understanding. After the discussion, the suppliers are asked to describe their views on the process and raise any further concerns or questions. More importantly, at all stages it remains forbidden to reveal information about other submissions. Following the debriefing, a note of the meeting is made for the record.

The most important result of an effective debriefing is that it reduces the likelihood of legal challenge because it proves to suppliers that the process has been carried out correctly and according to rules of procurement and probity. Although the causality between the introduction of detailed debriefing and legal reviews cannot be proven, there has been a sharp decrease in the last decade in the number of reviews (from approximately 3 000 in 1995 to 1 200 in 2005).

Nevertheless, debriefing contains risks and costs if it is not properly conducted. In particular debriefing should never be delegated to employees who do not have the necessary experience or sensitivity to carry out the interview successfully. Inaccurate debriefing led to complaints resulting in the European Commission beginning infraction proceedings against the United Kingdom and legal proceedings against the contracting authorities themselves in the High Court.

Sources: - United Kingdom, response to the OECD Questionnaire.
- *Supplier Debriefing*, OGC Publications.
- *Debriefing Unsuccessful Suppliers*, Environment Agency, United Kingdom.

To provide bidders with sufficient time to challenge the decision before the contract starts, most countries have a **standstill period** between the date of notifying bidders of their contract award decision and the date they may enter into the contract. This standstill period varies significantly in practice, for example 5 days in Portugal, 10 days in Korea, and 21 days in Finland. At the European level, the Commission has proposed an amendment to the Remedies Directive to include a mandatory standstill period of 10 calendar days. The introduction of a standstill period at the European level has been highly debated. If it does promote the fairness of the procedure by providing

a dedicated time for challenging the decision, it also has the potential of influencing decision makers towards systematically using competitive procedures to avoid their decision being challenged. This illustrates the difficulty in procurement to balance concerns of fair and equal treatment with efficiency concerns.

Post-bidding

The post-bidding phase is regarded as an **internal management process** between the administration and the supplier that is subject to less strict requirements for transparency. It is not covered by procurement laws and regulations but rather by contract law. Very few countries, such as Denmark and Sweden indicated that the contract should be open to the extent that it does not reveal secret information that could harm the interests of the contractor or the State.

In a vast majority of countries, the contract management is only known by the contracting agency and the contractor. As mentioned earlier, a core challenge is to ensure that the project is being carried out in accordance with specifications, in particular in terms of quality and quantity of materials used, timely provision of all components. Another common issue in the post-bidding process is whether the payment is carried out in a timely manner.

Therefore, it is all the more essential to strengthen **guidance and accountability** mechanisms for procurement officials and contractors to prevent risks to integrity in the post-bidding phase. Countries have introduced various measures, such as:

- **Adequate planning**. Having an adequate plan for public procurement can help the agency to analyse its need and select the best procurement option to prevent mismanagement and even corruption in procurement. The bid notice may include details on the way the contract is to be managed as well as the plan and method for payment, for instance in Canada, Ireland and the United Kingdom;
- **Risk management techniques**. An internal risk matrix for the administration helps ensure the involvement of specialist contract staff for high-risk contracts, for instance in Australia, New Zealand and the United Kingdom. In Canada, risk assessment and risk management plans are provided as part of the bidder's solution;
- **Restrictions and controls over change in the terms of the contract**. The procurement authority needs to justify variations, e.g. in Italy, Korea, Mexico and the United Kingdom. This may be subject to an internal or external review including a third party (e.g. involvement of

an unsuccessful bidder in the monitoring in the case of changes to the contract). Furthermore, the delegation of authority for approving technical or financial variations may also be done only up to a certain threshold, which requires that additional change orders beyond this threshold be approved by higher authorities;

- **Accurate and timely supervision** by managers, control agencies, with regular reporting on the progress of the project, for instance in Belgium. An emerging practice in countries such as Spain is for the government to use companies specialised in monitoring;
- **New technologies to monitor** the progress of the contract and the payment, which are widely used in Mexico and Korea. In Portugal, a contract management tool will allow the change and validation of commercial aspects and the control of compliance to contract terms by suppliers. Box II.8 illustrates the experience of the Central Vigilance Commission in India, which has made risk management tools an integral part of the e-bidding and e-payment processes with the support of new technologies (e.g. automatic reports, exception alerts, etc.);
- **Shared** accountability. Countries often use models for risk sharing between the contracting authority and the contractor, such as performance bonds. For example, the government receives a substantial sum in the event of default in the execution of the contract in Japan. On the other hand, if invoices are not paid within the term established in the contracts, the government agency agrees to pay interest, which may be a cause of liability for the procurement officer in charge, such as in Mexico;
- **Public scrutiny**. A key condition of public scrutiny is the access of stakeholders and the public to records. In Norway archived contracts and all related documents are available to the press. This is all the more important if there have been changes to the contract, for instance all amendments are recorded in writing in the United Kingdom. In very few countries, public scrutiny is ensured through the involvement of stakeholders in the post-bidding phase (see Box II.9 on the experience of Korea in using new technologies to involve third parties).

Box II.8. Increasing transparency in vulnerable areas through new technologies in India

The Central Vigilance Commission is an independent central body in the Indian administration which was set up by the Government in 1964 with the objective of advising and guiding Central Government agencies in planning, executing, reviewing and reforming their anti-corruption efforts.

Following numerous complaints about the mishandling of administrative processes that may lead to corruption in the administration (e.g. delays and arbitrariness; non-adherence to the 'first-come-first-served' principle, etc.), the Commission decided that all organisations that deliver services or are at the interface with the general public or with private businesses, must increase the transparency and accountability of their activities through the use of new information technologies.

As far as the public procurement process is concerned, the Commission identified the following areas where information technology can promote efficiency as well as curb corruption through increased transparency:

- E-bidding, in particular with the mandatory publication of procurement opportunities and documentation on line;
- E-payment, which helps reduce transaction costs as well as curb corrupt acts that may accompany handing over cheques to contractors and suppliers.

With the support of new technologies risk management tools are made an integral part of the main processes. For example, the accounting software can be built in such a way that the computer system generates 'exception reports' and gives alerts wherever there are significant deviations from certain benchmarks and norms, and it can also make comparisons of expenditures on procurement items.

The extensive use of the website can be used both as a tool for communication with stakeholders and for curbing corruption through increased transparency in processes that are vulnerable, not only in public procurement but also in customs and in the collection of income tax.

Sources: - Case study provided by India for the OECD Forum on Governance: Sharing Lessons on Promoting Integrity in Procurement, November 2006.
- Circular N°40/11/06: Improving vigilance administration by leveraging technology, Central Vigilance Commission, Government of India, 2006.

Box II.9. Involving third parties to monitor on line the contract management in Korea

The nationwide integrated Korea Online E-Procurement System (KONEPS) enables online processing of all procurement from purchase request to payment. Through the digitalised system, customer organisations and companies are involved in scrutinising the way public funds are managed in the procurement process. The System covers all stages of the procurement process, from the pre-bidding to contract management and payment. For example, the Public Procurement Service releases specifications of procurement items on the KONEPS prior to the bid notice in order to encourage interested suppliers to submit suggestions.

The Korean experience illustrates how new technologies can support the involvement of a third party - an insurance company - that provides a guarantee for the contract between the administration and the bidder. The successful bidder and the contracting agency establish an e-contract through KONEPS, and in the process, a surety insurance company, as a third party, shares part of that information regarding the contract. In practice, the contracting official receives both the contract documents provided by the contractor and the written guarantee for the contract provided by the surety insurance company, and replies to the guarantee. The contracting officer drafts the final version of the contract after clarification and sends it to the contractor and the end-user organisations.

Another feature of the information system is that it helps monitor the payment and prevent risks to integrity during payment. The contractor submits a payment request and receives payment upon receipt, which is sent by an inspector from an end-user organisation. Since the e-payment is connected to the Finance Settlement, the end-user organisation, the contractor and the bank share information in the flow of payment. Payment is automatically completed on line within two working hours upon payment request to avoid overdue payment.

Source: South Korea, response to the OECD Questionnaire.

EXCEPTIONS TO COMPETITIVE PROCEDURES: HOW TO ENSURE INTEGRITY?

If open procedures are favoured in all countries, procurement laws and regulations define alternative procedures – restrictive/selective as well as negotiated/limited procedures that can be used under strict conditions. The method favoured is often based on the **type** of product or service and its **overall value**. At the European level a procedure, competitive dialogue, can also be used for complex contracts where the open or restricted procedure is not appropriate, but there are no grounds for using the negotiated procedure.

Types of exceptions

To ensure a level playing field, procurement laws and regulations define **a strict list of exceptions** to competitive procedures that are based on the following circumstances:

- Specific nature of the contract to be procured which results in a lack of genuine competition in the market (e.g. technical or artistic reasons, proprietary rights, etc.);
- Low value of the contract: the national thresholds under which direct purchasing is allowed vary across countries (e.g. equivalent to EUR 17 500[14] in Canada, EUR 6 000 in Poland, EUR 5 000 in Portugal);
- Commodity (e.g. goods that are traded at the same price);
- Exceptional circumstances such as extreme urgency. As a principle, factors giving rise to extreme urgency must be unforeseeable and outside of the control of the contracting authority;
- Confidentiality of the procurement to protect State interests, such as national security and other public interests.

Limited competition does not necessarily requires less transparency

A key challenge is to ensure equal and fair treatment for bidders, even when using procedures that are less subject to competition. Experience shows that limited competition does not necessarily require less transparency. In these circumstances, **alternative measures** have been used in countries for reinforcing the fairness and integrity of the procurement process, in particular:

- The **strict definition of criteria for using non-competitive procedures** and their application under verified conditions (e.g. impossibility to have follow on contracting for contracts of low value to avoid splitting of contracts);
- The **publication of an advance contract award notice** in order to provide an opportunity for potential bidders to participate in the procedure in cases where there is not absolute certainty that only one firm has the ability to perform the contract (in Canada, see Box II.10);

14. Calculated as an equivalent to CAD 25 000 in January 2007.

- The **opening of bids in an official manner**, involving several persons, especially for negotiated/direct procedures, supported by double signatures, for instance in Belgium;
- **Specific guidance** to procurement officials for ensuring the fairness of the procedure through directives and internal policies, in countries such as the Czech Republic and Ireland;
- **Additional controls to verify** the justification of the legal derogation in the approval phase by specific internal control agencies or departments (e.g. in Belgium, Canada, Ireland and the Netherlands). On the other hand, there may be a committee bringing together officials involved in procurement and representatives from internal control agencies for instance in Mexico;
- **Specific reporting requirements** for using exceptions to competitive procedures (e.g. in Australia, Belgium, Luxembourg, Mexico, Portugal, the Slovak Republic and the United States);
- The **verification of the justification** for using direct procedures by the Supreme Audit office, in countries such as Germany, Ireland, Norway and Portugal;
- **Minimum transparency requirements**. This can lead to the publication of the contract award notice to ensure sufficient publicity, for instance, in New Zealand and Korea. Other transparency requirements may include a written record on the justifications of derogation from competitive procedures for possible review, in countries such as Australia, Ireland and New Zealand. In a few countries, publicity rules apply for all procedures, only the means for communication vary, for instance in the Netherlands and Sweden (see Box II.11).

Box II.10. Ensuring a level playing field: The Advance Contract Award Notices in Canada

The Advance Contract Award Notice (ACAN) is an electronic bidding methodology that is normally used when there is a possibility that only one supplier can perform the work defined in the bid documentation. In circumstances where detailed market knowledge confirms this as fact then the contract should be awarded on a non-competitive basis with transparency achieved through a contract award notice.

The objectives of the Advance Contract Award Notice process are to:

- Provide a procurement process that is efficient and cost effective;
- Provide potential suppliers with the opportunity to demonstrate, by way of a statement of capabilities, that they are capable of satisfying the requirements set out in the ACAN; and
- Respect the principles of government contracting by enhancing access and transparency.

An Advance Contract Award Notice contrasts with non-competitive contracts in a number of ways. Notices provide all suppliers with an opportunity to signal their interest in bidding, through a statement of capabilities. They are posted for a minimum of 15 calendar days on the Internet on the government's electronic bidding service. The system operates 24 hours a day, 7 days a week. Notices open the process to additional electronic or traditional processes if a supplier's statement of capabilities is valid.

The Advance Contract Award Notices may be used when there is a justifiable reason not to call for bids, provided that the notice clearly explains the nature of the work to be done, the name of the proposed contractor, the estimated cost, why bids are not being called, and sufficient time (15 days) is allowed for potential challengers to come forward. If there is a valid challenge to the proposed contract award, it must not be ignored.

Sources: - Canada, response to the OECD Questionnaire.
- Guide for Managers – Best Practices for Using Advance Award Notices, http://www.tbs-sct.gc.ca

Box II.11. Ensuring transparency below the European Union threshold in Sweden

In Sweden, public procurement is regulated by the Public Procurement Act (LOU), which is based on the Directives of the European Commission. After 1992, when the Swedish Government implemented the Public Procurement Act, the share of openly advertised public procurement in the GDP[15] increased significantly at the European Union level (from 0.12% in 1993 to 3.4% in 2004). It is one of the highest among EU member states.

The Government took one step further in July 2001 by making the publication of notices below the European Union threshold mandatory in Sweden. Before this date, there were no laws regarding advertisement, only rules that the public bodies had to invite at least three bidders in an open procurement process.

The Swedish procurement procedures below European thresholds are very similar to the ones above the thresholds. Having one set of rules above and below the threshold helps promote transparency and equal treatment for bidders. In accordance with the Public Procurement Act, all three options that could be used for procurement procedures below the threshold ensure a minimum of publicity in procurement, namely:

- The simplified procurement procedure, the most commonly used procedure below the threshold, requires that notices be published through an electronic database readily accessible for all potential bidders.
- In a selective procurement procedure (the equivalent of the selective procedure in the case of procurements over the European threshold values), the notices must also be published through an electronic database accessible to all.
- Even in case of direct procurement procedures, the notice must be openly accessible to all stakeholders on the public procurement website.

Information on stages of the public procurement process from the pre-bidding, through the selection and award, to the debriefing of award results and contract management and payment are openly accessible on the procurement website.

Sources: - Sweden, response to the OECD Questionnaire.
- A Brief Description of LOU by the National Board for Public Procurement.
- Eurostat*:* http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1996,39140985&_dad=portal&_schema=PORTAL&screen=detailref&product=STRIND_ECOREF&language=en&root=STRIND_ECOREF/ecoref/er040.

15. Openly advertised public procurement refers to the value of public procurement that is openly advertised as a percentage of GDP. The nominator is the value of public procurement, which is openly advertised: for each of the sectors - work, supplies and services - the number of calls for competition published is multiplied by an average based, in general, on all the prices provided in the contract award notices published in the Official Journal during the relevant year. The denominator is the GDP.

Specific efforts for procurement projects at-risk

Some countries have made particular efforts to ensure the integrity of the process when using non-competitive procedures that are considered particularly at risk, especially low-value contracts, emergency procurement and defence procurement.

Low-value contracts

In the case of **low-value contracts**, a balance must be found between the need for transparency and other considerations, in particular efficiency. For example, at the European level, there are no mandatory rules for public contracts with respect to specific services ("IIB services") and for contracts with a low monetary value. However, following a notice of the European Commission in this respect (2006/C179/02) and a recent opinion of the Advocate General in the case Commission v. Ireland (C-507/03 and 532/03), some countries in the European Union have initiated efforts to address this issue. For instance, in the Netherlands, since 2006, contracting authorities publicly announce a request for competition regarding low-value contracts to ensure transparency while they have the flexibility to determine the medium through which contracts will be publicly announced. In the Czech Republic, a central register was created in 2006 for publishing above and below-the-threshold contracts in the form of a notice in the Information System on Public Contracts (see Box II.12).

Box II.12. Central register for publishing contracts in the Czech Republic

With the accession to the European Union (EU) in May 2004, the Czech Republic committed to enhancing transparency in public procurement.

Accordingly, the Act on Public Contracts which came into force on 1 July 2006 makes the publication of public contracts below EU thresholds mandatory both at national and EU levels. The contracting authority is obliged to publish contracts above and below the threshold in the form of a notice in the Information System on Public Contracts. This central register - a sub-system of the Information System on Public Contracts - was created and launched with the Act on 1 July 2006, and replaced the former publication system (the Central Address).

The data on public procurement is collected in the Information System on Public Contracts run by the Ministry for Regional Development. On the basis of this data it is possible to compare the proportion of above-the-threshold contracts or small size contracts or to verify whether negotiated procedures without publication are not excessively used or whether the contracting entities fulfil their duties concerning publication of contract notices. These findings can help prevent and detect irregularities in the system.

In accordance with the "National Plan for the Introduction of Electronic Public Procurement over the Period 2006-2010", the notification will be entirely in electronic form by 2010.

Sources: - The Czech Republic, response to the OECD Questionnaire.
- Case study provided by the Czech Republic for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

Emergency procurement

As for **emergency procurements**, derogations from competitive procedures offer the needed flexibility for procurement officials to order on-the-spot goods and services to face emergencies. However, there is growing awareness that emergency procurements hold important risks for mismanagement and possibly corruption resulting from the amount of funds that are transferred in a short period of time, the lack of a co-ordinated response from government agencies and the possible disorganisation of accounting systems. The example below illustrates the inherent difficulties in preventing fraud and corruption in emergency contracting and the lessons learned from the Hurricanes Katrina and Rita in the United States.

Box II.13. Emergency contracting in the United States: Improving transparency and accountability

The Federal Government's response to Hurricanes Katrina and Rita in August and September 2005 resulted in increased oversight of its contracting practices. The devastation of the Gulf Region and the unparalleled response and recovery efforts created significant challenges for public procurement officials.

During the emergency, communication among agencies was limited, authorities of the various response organisations were unclear, and contracting oversight was not commensurate with the risk inherent in the disaster. These factors adversely affected contracting transparency and raised questions regarding the scope of the contracts awarded and the work being done. The federal government saw the need to improve emergency communication plans, preparedness, and oversight and institutionalise improved emergency response capabilities.

Public procurement experts created an Emergency Response and Recovery Team to address issues that arose during Hurricane Katrina. The Team developed an Internet-based resource that includes checklists, existing contracts, samples, emergency field guides, training, best practices, and other resources.

The team surveyed personnel who were deployed to the Gulf Region and identified numerous lessons learned regarding transparency and accountability (see: http://www.acc.dau.mil/emergency response). Lessons learned are being shared government-wide and provided in training to improve emergency contracting in the future. Some of the lessons learned are listed below:

- Agencies should consider the creation of a risk mitigation board to control the increased risks during an emergency. Such boards allow for increased communication, clear policy direction, and effective resource utilisation. The board is most effective when integrated into the agency's management structure and when composed of key agency stakeholders, including contracting officers, procurement policy analysts, small business representatives, representatives from the Office of the Chief Financial Officer, representatives from the Inspector General's office, and technical experts, such as programme managers.
- Agencies should develop stewardship plans to review the results from an appropriate sampling of their emergency acquisitions. Reviews should give increased attention to

transactions that are conducted using emergency acquisition flexibilities, These transactions comprise increased thresholds sole-source transactions of a high-dollar value, and other risky acquisitions, including those involving complex technical requirements or marketplace solutions.

– Agencies should consider limiting the value and length of a contract to address only the most immediate emergency and should pursue firm-fixed price contracts whenever practicable.

Although significant efforts were made, the 2006 report of the Government Accountability Office (GAO) called for further efforts to reinforce more effective controls to prevent and detect fraud in emergency contracting. According to the GAO report, tens of millions of dollars have continued to be lost through improper and/or fraudulent payments following the hurricanes Katrina and Rita. Payments include rental assistance paid to individuals who had already been provided with free housing, duplicate payments to individuals who claimed damages to the same property from both hurricanes Katrina and Rita as well as financial support for foreign students, temporary workers and other individuals who were not eligible.

Sources - Case study provided by the United States for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.
- *Hurricanes Katrina and Rita Disaster Relief – Continued Findings of Fraud, Waste and Abuse,* United States Government Accountability Office, 2006 (http://www.gao.gov/new.items/d07252t.pdf).

Defence procurement

Some countries have also initiated specific efforts to improve integrity in the area of **defence procurement**, which often requires the use of non competitive procedures to keep national security interests confidential. For instance, in Korea, the Defence Acquisition Programme Administration, based on the 2005 Law on Defence Acquisition, ensures that external experts are engaged in the decision-making process of major projects through a specific Committee aimed at strengthening transparency and monitoring of the procurement system. In Poland, the Ministry of Defence has co-operated with a civil society organisation to address risks in defence procurement (see Box II.14).

Box II.14. Partnering with civil society organisations to address risks in defence procurement in Poland

In 2004 Transparency International (TI) launched a project to reduce corruption and build integrity in defence and security institutions. As defence is a particularly sensitive sector, governments are aware of the potential costs of corruption in defence and are therefore willing to take preventive anti-corruption measures.

This project is based on several pillars. First of all, to build awareness and co-operation with key groups –exporting and importing governments, defence ministries, suppliers and international institutions such as the North Atlantic Treaty Organisation (NATO) – then build practical experience, and apply this in practical work with reform-minded governments. A crucial point is the political will and support of arms exporting governments. The support of NATO is also very important, considering its influence in many countries and its capacity to promote leadership training and education.

In Poland, anti-corruption efforts have focused primarily on more effective detection of criminal activity and subsequent punishment with the creation of a special secret service, the Central Anti-corruption Bureau. As a result of co-operation with TI United Kingdom, the Defence Ministry of Poland has also taken the following steps:

- Appointment of a Director to set up an anti-corruption policy;
- Efforts to eliminate conflicts of interests among members of bidding commissions;
- Limitations to the use of single-source procedures and promotion of competition;
- Prosecutions at high level (e.g. First General charged in a corruption case);
- Introduction of elements of Defence Integrity Pacts in bids for VIP aircraft and transport helicopters;
- Use of electronic auctions (30 in 2006, 400 planned for 2007) in the Defence Ministry.

Transparency International is assisting anti-corruption projects for defence procurement in other countries including Colombia, India, Latvia, Poland and South Korea.

Source: M. Pyman and M. Wnuk, *Reducing Corruption, Building Integrity in Defence and Security Institutions*, XIIth International Anti-Corruption Conference, November 2006. (http://www.transparency.org/content/download/12840/127158/file/12thIACC_Pyman-presentation.pdf).

III. ENHANCING PROFESSIONALISM TO PREVENT RISKS TO INTEGRITY IN PUBLIC PROCUREMENT

Public procurement is increasingly recognised as a profession that plays a significant role in the successful management of public resources. In the last decade reform efforts have often occurred in **cycles**, as public procurement has gone through substantial changes in terms of priorities, needs and capacity. In many cases these reforms been driven by *ad hoc* scandals.

As countries have become more aware of the importance of procurement as an area vulnerable to mismanagement and potentially corruption, they have recently initiated efforts to integrate procurement in a more **strategic view of government actions**.

This has also led some countries to recognise procurement as a **strategic profession** rather than simply an administrative function. This requires specific guidelines as well as restrictions and prohibitions to:

- Ensure that public funds are used for the purposes intended;
- Enable public officials to adapt in a changing environment;
- Minimise the potential for corruption.

USING PUBLIC FUNDS ACCORDING TO THE PURPOSES INTENDED

Public officials need to be equipped with **instruments,** as well as a range of procurement, project and risk management **skills** to properly plan and manage procurement processes, in accordance with the budget.

Planning

As part of an effort to adopt a long term and strategic view of their procurement needs and management, **more than a third of countries** have used annual procurement planning. Procurement authorities are required to

review their purchasing processes, and identify improvement goals, targets and milestones that closely link with their business plans, outputs and government objectives. Annual procurement plans may also be publicised so as to inform providers of forthcoming procurement opportunities (e.g. in Australia, Chile, Mexico, Poland). These plans usually contain a short strategic procurement outlook for the agency supported by details of any planned procurement, in particular the subject matter and the estimated date of the publication of the bid notice.

In addition, project-specific procurement plans can also be prepared for specific purchases of goods and services that are considered high value, strategic or complex in countries such as Australia, Finland and New Zealand. The purpose of project-specific plans is then to assist the agency to analyse its need and select the best procurement option for large-scale procurements that are particularly vulnerable to mismanagement (e.g. overrun costs, failure to complete work on time, defective product, etc.) and potentially corruption. The government of Australia has identified a Checklist of probity issues that can be used in the construction of a probity plan (see Annex C for details).

In order to ensure that public funds are used according to the purposes intended, annual procurement planning might encompass various aspects linked to the attainment of **government or department objectives**, in particular:

- **Financial and human resources requirements** for attaining objectives, initiatives and planned results - over a period of one year in Belgium and three years in Canada. For instance, in Belgium, it is necessary to justify not only the object but also the amount, and prove that the amount is based on a realistic price assessment.

- **Departmental or individual performance** to provide accounts of results achieved in the most recent fiscal year against performance expectations, for instance in Canada and Chile. Balanced scorecards are a tool used in countries such as Belgium and Korea that translate the strategy into action and provide feedback on a regular basis to improve strategic performance and results. To provide the right incentives for procurement officials and encourage them to improve value for money, individual performance appraisals should be carried out at different points of the contract, especially for multi-year contracts, and take into account criteria that are not only linked to timeliness but also quality.

- Some countries, have extended accountability from using expenditures for the "purposes intended" to **outcomes achieved with those expenditures**, for instance in Canada (see Box III.2). This approach can

help verify, for example, that transparency policies in procurement are defined in line with the government strategy and support it in practice. A specific process is used to justify the use of public procurement procedures and verify whether the aggregation of the benefits and costs - including overhead costs - of a procedure contribute to the overall value for money.

Budgeting

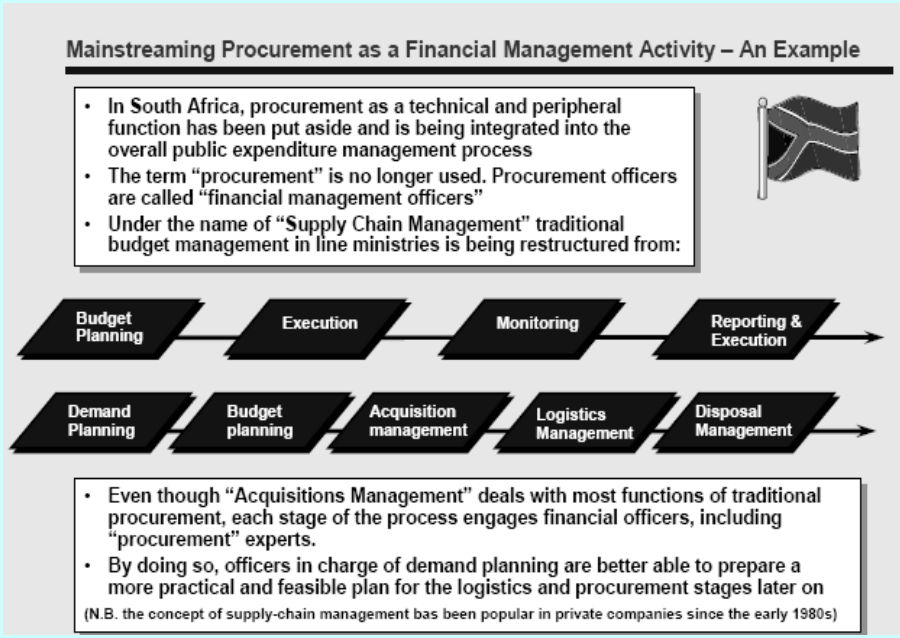
Appropriately budgeting procurement is a key element of transparency and accountability in the way public funds are managed. The budget is the **single most important policy document** of governments, whereby policy objectives are reconciled and implemented in concrete terms.

Budget transparency can be defined as the full disclosure of all relevant fiscal information in a timely and systematic manner. Countries have indicated that **financial commitments** need to be approved before starting the procurement. For instance, in Luxembourg, the first step is the control of the commitment and the order to pay all expenses, the verification of the availability of credits, the correctness of the budgetary commitment, the regularity of proofs and the correct execution of internal controls. Public agencies are also required to justify expense and show that they fit into the objectives of the budget allocated.

A growing concern is to ensure that **public procurement is an integral part of the public financial management**. Transparency and therefore visibility in management and financial performance begins with the budget process. It must be reflected throughout key management processes and practices to support investment decisions, asset management, procurement, and in the final results be reflected in sound corporate reporting. Transparency is an essential condition of integrity in the management of the entire life-cycle from expenditure planning to final results. Box III.1 illustrates the efforts in South Africa to establish strong integration across the budget cycle in order to make the entire public financial management system accountable for achieving results.

Box III.1. Integrating procurement in financial management in South Africa

A higher degree of integration of procurement and financial management has been achieved in South Africa since the change of regimes in 1994. Within this overall approach, procurement has been recast as a process of supply chain management – involving decisions to acquire assets, maintain assets, and sell off unnecessary assets. The scheme below represents the different elements of the South African system for managing public procurement.



As a consequence of this redesign, procurement is no longer treated as a purely technical process, and procurement specialists now work alongside other leading officials and participate in decision making on how agencies manage their assets and spend their resources. The designation of "procurement specialist" may have lapsed as a result, but the changes have served to highlight the importance of having professionals with wide-ranging skills in the planning and execution of procurement.

Source: *Harmonising Donor Practices for Effective Aid Delivery: Strengthening Procurement Capacities in Developing Countries*, OECD, 2005.

Similarly, strengthening **accountability for public expenditures** has been an important part of reform efforts in the last decade. This may take various forms:

- Providing the opportunity and the resources to **Parliament** to examine fiscal reports on public procurement;

- Making reports **publicly available**, for example, on the Internet;
- **Promoting an understanding** of the budget process by civil society organisations and the wider public[16].

Furthermore, some countries have put efforts into reinforcing internal **responsibility mechanisms**, in particular through a statement of responsibility by the senior official responsible, more stringent performance reporting in departments and improved systems of internal financial control. For instance, in Canada, the current reform has not only reinforced planning and budgeting reporting requirements but also created an integrated model linking appropriation, budgeting, investment, procurement and contract management processes, validated by a robust audit process (see Box III.2).

Box III.2. Promoting integrity in public procurement: Budgeting and financial management reforms in Canada

Canada's long-established Financial Administration Act requires that funds be used for the purposes intended as approved by Parliament. It is also the basis for ensuring an **appropriate segregation** whereby budget procurement, project and payment verification activities are conducted by individuals from separate functions and **distinct reporting relationships**.

Current reform efforts are underway to **extend accountability** from using expenditures for the "purposes intended" to "**outcomes achieved**" with those expenditures. In particular the Management Reporting and Results Structure Policy establishes more structured and detailed appropriations documents and performance reporting both in departments and to Parliament. An Assets and Acquired Services Policy Framework also requires since November 2006 that procurement activities be clearly aligned with expected results of key programme activities and demonstrate how they contribute to expected outcomes.

The 2006 Federal Accountability Act also seeks to reinforce citizens' confidence in procurement through:

- An overarching **statement of procurement principles** that commits the government to promoting fairness, openness, and transparency in the bidding process;
- The inclusion of **integrity provisions in contracts**;
- The creation of a **dedicated Procurement Auditor** to review procurement practices across government, handle complaints from potential suppliers, review complaints from contract management, manage an alternative dispute resolution process for contracts and submit an annual report to Parliament.

In addition to establishing the planning and budgeting reporting requirements, the new frameworks and supporting policies recognise the importance of:

- An **enabling environment** for contributing to realising outcomes that promotes governance and effective processes (e.g. management reporting, management capacity);

16. For further details, see the *OECD Best Practices for Budget Transparency*, OECD, May 2001.

- Having an **integrated model** linking appropriation, budgeting, investment, procurement and contract management processes, validated by a robust audit process. This is a significant departure from long-established practice of silo functions with limited financial management and performance information and a transactional approach to audit;
- **Building capacity** through training at all levels of management as well as greater reliance on professionally accredited or certified communities of practice and external recruitment.

Sources: - Canada, response to the OECD Questionnaire.
- Case study provided by Canada for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

New technologies may also be a tool for facilitating the integration of different processes linked to the procurement process. Box III.3 illustrates how Dubai has brought together in a mixed online system the budget, purchasing and payment processes, which helps reduce the duplication of procurement functions and promote a more unified flow of information within the administration.

Box III.3. Integrating processes on line for budget, purchasing and payment in Dubai

Dubai has established regulations to enable the development of an integrated e-procurement system, *Tejari*. *Tejari* is a government-initiated, profit-driven online marketplace that enables all phases of the negotiation to take place on line. In addition, government departments use an Enterprise Resource Planning system that can be used for making purchases requests since it is linked to the accounting and invoicing system. These systems are used together in an integrated manner. All government departments use a shared internal information system collecting all information together. Tejari consists of several purchase processes and functions:

- *e-Bidding: Tejari* collects and evaluates bids;
- *e-Cataloguing*: It gives the possibility of uploading and searching;
- *e-Ordering* for orders and invoices;
- *e-Auctioning*, including e-Marketplace, negotiation, reverse auctions;
- *Tejari Link:* This market-making facility supports small and medium-size businesses, where a company can log on to a national directory and view contracts, promotions and messages, as well as establish showrooms;
- *Tejari Expert:* This consulting service helps streamline the procurement process for large organisations.

In 2006 Tejari has more than 4 000 suppliers, and the vast majority are from the private sector. As the Government is the largest buyer in the region, 60% of the procurement spending comes from the government sector. Since the launch of e-procurement in 2000, the value of business through this system represents over two billion USD, and over 100 000 items in the catalogue are available.

With the introduction of Tejari, Dubai has benefited in particular from the reduced duplication of procurement functions and offices, and a more unified and user-friendly procurement system that brings together budget, purchasing and payment processes on line. Obstacles that still need to be overcome include the lack of adequate skills in the government and the need to ensure a wider participation by suppliers. Efforts have been initiated in that direction with awareness raising activities as well as training for both public sector employees and suppliers.

Online purchases were made in two important sectors in the public administration, the Armed Forces and the Ministry of Health. The government estimated resulting average savings of 40% on equipment and 14% on hardware compared to traditional purchasing modalities.

Sources: - Presentation of Dubai at the OECD High Level Seminar on E-procurement. Good Governance for Development in Arab Countries Initiative, Naples, January 2006.
- E-procurement in the United Arab Emirates, in *E-procurement for Good Governance and Development in Italy, North Africa and the Middle East*, Centre for Administrative Innovation in the Euro-Mediterranean Region.

Another related challenge is the difficulty of **defining a budget consistent with the expected costs of a solution** ensuring value for money. To develop a sound cost estimate for procurement based on a good

understanding of the market and solutions available, countries have used solutions, in particular:

- Making reference to established market prices – e.g. in the United Kingdom with commercial catalogues – or calculating the cost based on detailed market research, for instance in Turkey;
- Engaging with a representative group of suppliers to that market early in the process, in countries such as Belgium, the Netherlands and Turkey;
- Another common practice is to use knowledge of prior procurements of a similar nature, for example through a database or data mining.

A CHANGING ENVIRONMENT: ENABLING PROCUREMENT OFFICIALS TO ADAPT

From procurement officer to "contract manager"

Public procurement systems in countries have moved increasingly from a situation where procurement officers are expected to comply with rules to a context where they are given more flexibility to achieve the wider goal value for money. As countries have developed flexible regulatory frameworks and simplified procedures, a trend is to develop uniform documentation to ensure consistent implementation of rules. In order to raise awareness about evolving procurement standards, procurement officials have been involved – directly and/or through professional associations – in the **drafting or revision of procurement laws, regulations and guidelines**. More than a third of countries have consulted officials involved in the procurement process. Some countries such as Finland have even sought public comment to reflect the views of other actors, in particular of business and non-governmental organisations. This has contributed to building a mutual understanding among officials of expected standards and to facilitating their implementation.

Furthermore, most governments have provided increasing responsibility for procurement, daily management being passed to individual public sector entities, while overall oversight and co-ordination of public procurement activities has been concentrated in the central public procurement body. A report from SIGMA on *Central Procurement Structures and Capacity in Member States of the European Union* highlights the difference in the

central public procurement structure[17] between the group of recently acceded member states to the European Union that are centrally-driven and other countries in Europe. For countries in the process of building up their public procurement systems, the establishment of a strong focal point for public procurement at high central level, which is given a fairly wide scope of functions and responsibilities, has been seen as a vital measure. In other EU member states, the establishment of central procurement structures is the result of a peripherally-driven approach, where the pressure for strengthening certain, but not all functions at the central level could be regarded as an effect of changes in the external environment. These changes stem from different factors, such as the demand for more efficient government (e.g. through framework agreements, co-ordinated purchasing), technological changes (e.g. e-procurement), and external commitments (e.g. membership in the EU and the WTO).

More centralised procurement can contribute to efficiency in public procurement by improving management information through aggregation of demand, lowering prices through reduced production costs and transaction costs and enhancing the efficiency of the supply chain. It may also reinforce the **integrity and neutrality** of the public procurement system since:

- The central public procurement body often has a "firewall" position that avoids direct contact between the contractors and end-users;
- Promoting integrity and auditing actual practices is easier in a single entity than hundreds of government entities, and contributes to more uniform and professional working methods;
- Transparency and openness are often a key factor for the credibility of the public procurement body to achieve good results for end-users of the contract, in particular government agencies, in their negotiations with bidders.

For instance, in Finland, there is a central procurement unit that establishes framework agreements for procurements, which contributes to more efficient and transparent purchasing (see Box III.4).

17. The table in Annex D provides a comparative analysis of central procurement structures, capacity and their respective functions in the European Union. For further reference, see *Central Procurement Structures and Capacity in Member States of the European Union,* SIGMA Paper No 40, 2007.

Box III.4. Framework agreements: More centralised, efficient and accountable purchasing in Finland

Hansel Ltd is the central procurement unit of the State of Finland that aggregates the procurement needs from ministries and ministerial offices, as well as from state agencies and publicly-owned enterprises. Through competitive bidding it establishes framework agreements for procurement of products and services.

In June 2006, the Ministry of Finance reformed Hansel Ltd to promote more centralised procurement for goods, services and information technology systems that are widely used in government. As a result, some phases of the procurement process such as the bid notice and the contracting are done in the central procurement body, which produces framework agreements used by public authorities. The use of centralised purchasing is considered as:

- A more efficient and cost saving way to perform public procurement in areas involving large volumes or standardised products and services.

- An opportunity to advance the competence of its personnel as well as its internal communication to improve integrity and performance in government purchases.

- An easier way to keep accountable a limited number of procurement officials in their interaction with the private sector, while they make the link between multiple government agencies and private sector actors.

When using framework agreements, there are a number of advantages and costs to weigh up. In certain cases they may prevent entry of new players and reduce participation from small and medium companies, and possibly discourage innovation.

Sources: - Finland, response to the OECD Questionnaire.
- http://www.hansel.fi.

In a context of increased devolved management of the procurement process, officials who have never managed a contract are now required to do so in addition to their usual duties. This calls for adequate guidance for procurement officials to enhance management effectiveness in public procurement. Procurement officials also deal with a profoundly changed procurement process by the use of new technologies where basic tasks such as placing orders with suppliers have become largely automated. Therefore, the role of the procurement official now encompasses **new responsibilities** such as strategic sourcing and auctioneering, as well as negotiation management. There is growing recognition that organisations need to provide managers with the opportunity to acquire the necessary skills - such as negotiation, project and risk management skills - and personal attributes to adapt to this changing environment.

A particular concern in some countries is the lack of qualified staff to monitor the contract management phase. The commercial pressure to "buy" at the best value for money may lead to a resource shift away from the

contract management and to an **irresponsible delegation of governance to the private sector.** The risk lies in the contractor defining the level of quality for the contract rather than the public authority. This question is all the more difficult in a context of global procurement. Governments have difficulties monitoring contractors and subcontractors that are often outsourced and ensuring that integrity, labour and environmental standards are respected.

In order to provide staff with **up-to-date skills, experience and qualifications** for preventing mismanagement and potentially corruption, countries are starting to use:

- Certification requirements. For instance, in the United States, they have been harmonised in the Federal Government since 2005;
- Specific training linked to new technologies or to specific situations, such as emergency contracting, which hold important risks of mismanagement and potentially corruption.

Providing adequate skills

Procurement officials have to deal with a substantial amount of work - the number of procurements has significantly increased in recent years while the number of officials has often been stable or sometimes reduced. The issue of capacity, that is, the ability of people, organisations and society as a whole to successfully manage their affairs, is critical both in OECD countries and in developing countries. Although efforts in recent years have often focused on limiting the procurement workforce, countries are starting to invest **in human capital** to improve efficiency in procurement and potentially reduce the temptation for corruption.

Some countries have initiated efforts to **attract well-skilled professionals**, for example through **adequate incentives** in countries such as Chile and the United Kingdom. A key incentive is the provision of **salaries and bonuses** for procurement officials that are competitive with those in the private sector. In countries where salaries are particularly low, inadequate compensation may also increase the temptation for corruption. The example of Chile (see Box III.5) illustrates how performance indicators can be developed within a management improvement programme and linked to rewards at individual and organisational levels in order to enhance professionalism in procurement.

Box III.5. Establishing performance indicators in procurement in Chile

The Public Management Improvement Programme *(Program de Mejoramiento de Gestión)* is a national programme – run by the Directorate of Budgets of the Ministry of Finance – in order to achieve measurable improvement in key aspects of public management. In particular, the programme focuses on the following: human resources, customer assistance, planning and implementation, internal audit, financial management and quality of service. Public procurement is identified as an important issue in the programme, and the procurement goals are included in financial management.

The public procurement component of the management improvement programme specifies key performance indicators and establishes rewards at individual and organisational levels. In order to give recognition to the procurement function through adequate salaries and therefore improve capacity, the programme has included agency and employees' incentives linked to performance. Thus salary increases are tied to achievement of PMG goals. **Performance indicators,** among others, include:

- The rate of acquisitions made as an emergency purchase process;
- The amount of the acquisition's budget executed via public bids; and
- The difference between annual plan and actual acquisitions made during the year.

The agency responsible for fixing goals and evaluating improvement results in the field of procurement is the Directorate of Public Procurement Contracting (DCCP). By the end of 2003 some 131 agencies had included procurement in their PMG plans and nearly all of them had achieved a higher quality level in the procurement function. These results can be partly explained by the efforts devoted to training for employees, in which about 7 900 individuals were included until 2004, and by investments in information services.

Sources: - Chile, response to the OECD Questionnaire.
- Country Procurement Assessment Report of the World Bank on the Republic of Chile, 2004.

In the case of **e-procurement**, the enabling environment is key for successful implementation of the platform in government, in particular by:

- Providing adequate incentives for officials, for example, commitment from the political level, sufficient wages, etc.;
- While minimising the barriers for using the system, for example, through stable legal environment, training for officials and progressive implementation of the system.

Box III.6 below illustrates the current efforts carried out in Romania to implement a national single portal for the transmission of public procurement notices.

Box III.6. Incentives and results: Involving stakeholders in e-procurement in Romania

E-procurement in Romania started as a pilot project in March 2002, initially including 159 public authorities and 7 product categories. At present, the system assists 1000 public authorities, more than 3 000 supplier companies and 80 categories of goods. The extended version of the e-Licitatie (Extended Electronic System for Public Acquisitions – SEAP) is in compliance with the European Directives. Since 1 January 2007, http://www.e-licitatie.ro has been the national single portal for the transmission of public procurement notices to the EU Official Journal.

To ensure successful implementation and functioning of the e-procurement system, specific attention has been paid to involving all stakeholders and providing them with adequate incentives. Key components of the enabling environment include:

- Strong political commitment;
- Gradual implementation;
- Mandatory use of electronic means for specific procedures;
- Low tariffs;
- SME-user friendliness;
- Massive advertising campaigns;
- Constant training.

The deployment costs of the overall system exceeded EUR 4 million, while the total value of public acquisitions affected by the system is EUR 1 billion. Implementation revealed some deficiencies in the system, such as the lack of long-term procurement strategy, the lack of secure digital infrastructures and inefficient processes of knowledge sharing at national and international levels.

One of the most serious problems remains the low wages for public procurement officials. The Inspectorate is currently implementing a special incentive system for them, in which part of the money savings due to the e-Procurement system will be redistributed among officials.

Sources: - Presentation of Romania at the OECD Forum on Governance: Sharing Lessons on Promoting Integrity in Procurement, November 2006.
- E-Government Good Practice Framework, http://www.egov-goodpractice.eu.

Attracting professionals with adequate skills and in particular **commercial know-how,** for example, skills for negotiation, is a core challenge across countries. This makes it all the more important to the **cross-fertilise government and private sector talent**. Career movement between government and industry is critical to efficiency and to the evolution of procurement regimes. A key condition is that public service regulations and policies define the right balance between encouraging exchanges between the public and private sectors and preventing conflict-of-interest situations. For instance, in Brazil, the 2006 bill on conflict of interest expanded the "quarantine time" in which public officials are not allowed to work for the private sector from four months to one year and reinforced civil and administrative sanctions in case of non compliance (e.g. a fine up to 100 times the civil servant wage plus debt recovery, loss of

political rights, etc.). At the same time officials may obtain financial compensation under certain conditions to encourage movement between the public and private sectors (see also page 71, Preventing conflict of interest and corruption). Further efforts include making **job descriptions** in the public service more attractive, possibly by describing the positions as "contract managers" rather than simple administrative employees ("paper-pushers") to reflect the recent evolution in the tasks and responsibilities of procurement officials.

Furthermore, **retaining talent** is just as critical, for example by providing procurement officials with opportunities for growth and gaining new skills through training, coaching programmes or even lateral rotation. More generally, an environment that provides clear paths for career development and promotion for procurement officials is a key factor. Box III.7 highlights the prominent efforts of the Office of Government Commerce in the United Kingdom to provide guidance, disseminate good practice, as well as define possible career paths in senior management for procurement officials.

Box III.7. Centre for sharing expertise: the Office of Government Commerce in the United Kingdom

The Office of Government Commerce (OGC) is an independent office of the Treasury in the United Kingdom, created in April 2000. It helps departments achieve efficiency and promote value for money in their procurement activities. It supports initiatives that encourage better supplier relation, sustainable procurement, the benefits of using smaller suppliers and the potential of e-procurement, as well as promotes capacity building and professionalism.

OGC develops and publishes recommendations, guidance and best practices that cover a wide range of management practices, including programme and project management, procurement and service management. Best practices are available both on line (http://www.ogc.gov.uk), and in published form.

In addition to Gateway Reviews (see Box IV.3), the OGC introduced the following key initiatives to reinforce professionalism:

- *The Successful Delivery Toolkit* – an online guide which brings together procurement policy, tools and good practice for procurement, project and risk management;
- *The Successful Delivery Skills Programme and Project Management Specialism* – a scheme providing a career route into senior management through specialisation into professional delivery and project management; and
- The promotion of *Centres of Excellence* – within departments to support specific programmes and projects by providing oversight and advice, and working to enhance skills and capacities.

Following a review in 2004, OGC put more efforts into tailoring its engagement with departments to better meet individual requirements.

Source: *The impact of the Office of Government Commerce's initiative on the delivery of major IT-enabled projects*, Report ordered by The House of Commons, 2005.

Helping officials make informed decisions

There has also been an effort to equip procurement personnel with a number of tools and practices to help them make informed decisions regarding acquisition operations. In recent years several governments have developed internal information systems to support officials in making informed decisions about procurements. A key challenge for governments is to select procurement information that is accurate, objective and relevant for decision making, while not making it burdensome for procurement officials and bidders.

To help officials make informed decisions about procurements, internal information systems may provide data on:

- **Bidders/contractors**, in particular their potential or actual performance and integrity (e.g. technical capability of bidders, list of parties excluded, past performance, etc.), which is particularly useful in the process of selection, for instance in Ireland, Italy, Korea and the United States;
- **Former procurement contracts**, in particular on the types of goods and services and their individual prices. This helps define the needs in a realistic manner and facilitates the evaluation of procurements (e.g. in Belgium, Portugal, Turkey, the United Kingdom and the United States);
- **The execution of the contract**, in particular to monitor the progress and actual performance of the contractor, for instance in Korea and Mexico.

In a few countries, this information is also filtered and integrated at the government-wide level in a statistical report analysing **trends and patterns** in procurement, which is available to policy makers and the public at large. This may even be used at the supranational level. For instance, in Poland, the data entered in the Public Procurement Office database is processed in a national statistical report for the European Union. Box III.8 illustrates how the United States has used a variety of databases to support decisions of procurement officials by providing information on the performance of suppliers, and the details of products or services to be purchased.

Box III.8. The use of information systems to support decisions on procurement in the United States

"Acquisition Central" (http://www.acquisition.gov) seeks to provide a single-point-of-entry for government procurement in the United States on regulations, systems, resources, opportunities, and training. One of its features is to provide a link to the numerous databases that help collect, structure and communicate information about public procurement. The following information systems, among others, contribute to unifying and streamlining the federal acquisition process:

- The **Central Contractor Registration** (CCR) is the Federal Government's primary vendor database that collects, validates, stores, and disseminates vendor data in support of agency acquisition missions. Both current and potential vendors are required to register in the CCR to be eligible for federal contracts. Once vendors are registered, their data will be shared with other federal electronic business systems that promote the paperless communication and co-operation between systems (see http://www.ccr.gov).
- The **Excluded Parties Lists System** (EPLS) is a web-based system that identifies parties excluded from receiving federal contracts, certain subcontracts, and certain types of federal financial and non-financial assistance and benefits. The EPLS is updated to reflect government-wide administrative and statutory exclusions, and also includes suspected terrorists and individuals barred from entering the United States. The user is able to search, view, and download current and archived exclusions (see http://www.epls.gov).
- The **Past Performance Information Retrieval System** (PPIRS) is a web-based, government-wide application that provides timely and pertinent information on a contractor's past performance to the federal acquisition community for making source selection decisions. PPIRS provides a query capability for authorised users to retrieve report card information detailing a contractor's past performance. Federal regulations require that report cards be completed annually by customers during the life of the contract. The PPIRS consists of several sub-systems and databases (e.g. Contractor Performance System, Past Performance Data Base, Construction Contractor Appraisal Support System, etc. (see http://www.ppirs.gov).
- The **Federal Procurement Data System** (FPDS) facilitates decision making of procurement officers by raising their knowledge and awareness on annual trends in government purchasing. The FPDS collects information from purchasing agencies concerning their number and value of bids awarded, the dates and conditions of the contracts, the contracting partners and methods, the form of payment, etc. The system structures and forwards the information to the President, the Congress, the Government Accountability Office, executive agencies and the general public, in order to measure and assess the impact of federal procurement on the nation's economy, the extent to which awards are made to businesses in the various socio-economic categories, the impact of full and open competition on the acquisition process, and other procurement policy purposes (see https://www.fpds.gov).

Although these databases have been useful in supporting decisions on public procurement, there is growing awareness that they may become burdensome if the information included is not appropriately selected and officials not sufficiently trained to use it. Furthermore, some concerns have been raised regarding the confidentiality and accessibility of the data for contractors.

Source: United States, response to the OECD Questionnaire.

Furthermore, some countries have also encouraged the exchange of information between government officials through the creation of **networks and centres of expertise in the administration** to identify and disseminate good practice. In the United Kingdom, the centres of excellence in the various ministries provide a detailed and constantly updated advice documentation regime, regular process quality assurance in conjunction with auditors and networking with departments and the Office of Government Commerce. In the Netherlands, a professional and innovative public procurement network for contracting authorities *PIANOo* was established in the Ministry of Economic Affairs to provide exchange of know-how and training among contracting authorities. Other ways to increase the exchange of information in the administration include the creation of multi-disciplinary committees involving representatives of various parts of the administration to review and discuss specific issues of concern related to procurement, for instance in Norway.

There has been a clear trend in countries (e.g. in France, Ireland, the Netherlands, New Zealand, Norway and the United Kingdom) to invest in the development of **good practice guidance** for procurement officials. This trend is illustrated with the examples of the Irish Government Contracts Committee, whose role has evolved towards a general guidance role on issues of concern for public procurement, and the recent creation of the Government Procurement Development Group in New Zealand to enhance professionalism in procurement (see Box III.9 and Box III.10).

Box III.9. From approval to guidance: An evolving role for the Irish Government Contracts Committee

Initially created to provide external approval for contract awards above EUR 25 000 that are not using competitive procedures in exceptional circumstances, the role of the Government Contracts Committee (GCC) has evolved since January 2003 towards a more general guidance role on issues of concern for public procurement.

The GCC is a committee of procurement officers from central government departments and agencies, which have a significant procurement function or have responsibility for key procurement sectors. The GCC therefore concentrates on advising on procurement issues of general concern to the State sector. It also has a role in developing, together with the National Public Procurement Policy Unit in the Department of Finance, good practice guidance for supplies, services and construction procurement. Departments benefit from guidance material to enable them to comply with fair and transparent public procurement rules and to secure value for money. The national public procurement website also plays an important role in disseminating guidance and relevant procurement information.

With the suppression of the approval by the GCC, internal control over non-competitive procedures was therefore strengthened to ensure the integrity and efficiency of those contracts being awarded under exceptional circumstances, such as extreme urgency, or when only one product or producer meets the contract requirements. A review should be completed within the department concerned, preferably by the Internal Audit Unit or by a senior official who is not part of the

procurement process. The reporting procedures were also revised with the completion of an annual report signed off by the Accounting Officer for these contracts, which should be forwarded to the Comptroller and Auditor's General Office, with a copy to the National Public Procurement Policy Unit of the Department of Finance. Each department should also maintain a central up-to-date register of such exceptional purchases and contracts.

*Source*s: - Ireland, response to the OECD Questionnaire.
- Circular 40/02: Public Procurement Guidelines - revision of existing procedures for approval of certain contracts in the Central Government Sector, 2003.

Box III.10. Enhancing professionalism: The Government Procurement Development Group in New Zealand

In July 2006 a Government Procurement Development Group (GPDG) was established in the Ministry of Economic Development (MED) in New Zealand. The mission statement is "to drive the best possible procurement outcomes for government, the taxpayer and business in New Zealand.

An important focus of its work programme is to spread and improve knowledge of procurement good practice by:

- **Raising the profile of procurement** – contributing to more widespread awareness of the benefits of good procurement practice; recognition by Chief Executives and Board level management of the value of and need for good practice within their agencies; increased demand for procurement professionals; and increased investment in staff training and education; and
- **Acting as a catalyst for learning and knowledge sharing** – contributing to increased training and education opportunities for agencies and industry; more active knowledge sharing (between agencies; the public and private sectors; and GPDG and its MED colleagues and overseas counterparts); and increased peer pressure.

The GPDG maintains an interactive electronic "Community of Practice" workspace as a vehicle for good practice promotion, advice and information sharing between public sector procurement practitioners. It also organises a regular programme of seminars, workshops, conferences and training courses on all aspects of the public sector procurement process.

Recognising the value of international benchmarking of procurement good practice and professional standards, the GPDG developed links with the Australian chapter of the Chartered Institute of Purchasing and Supply (CIPSA), and is collaborating with CIPSA on programmes to further develop procurement professionalism in New Zealand.

Source: New Zealand, response to the OECD Questionnaire.

Another emerging practice in countries such as Australia and Canada is the use of **applied procurement research** to help senior officials and policy makers take major procurement decisions. Contemporary procurement research is beginning to reveal increasing complexity within the supply environment, as procurement activities are related to many academic disciplines. This complexity is also the result of limited co-ordination of procurement knowledge between government agencies, such as between procurement, competition and audit, as well as with the private sector.

PREVENTING CONFLICT OF INTEREST AND CORRUPTION

In a devolved management context, enhancing professionalism requires not only management procedures but also a clear set of values and ethical standards clarifying how to achieve these objectives. Specific ethical guidance has been developed in several countries defining clear restrictions and prohibitions for procurement officials in order to avoid **conflict-of-interest** situations and prevent corruption both at individual and organisational levels.

Organisational measures

At the organisational level, there are requirements that are used across countries for ensuring the **separation of duties and authorisations**, in particular between:

- Entities: There is a separation between entities of the administration that require specific goods and services, and procuring entities, in countries such as Austria and Germany;
- Functions: Strategic planning, budget and performance programme, accounting and reporting, and internal control functions are clearly separated, for instance in Turkey;
- Stages of the procurement process: The approval of spending, the approval of key procurement milestones, the recommendations of awards and the payment should be conducted separately, for instance in the United States;
- Commercial and technical duties: The commercial and technical evaluations are conducted separately and information is brought together to independently inform the recommendation of award, for example in the United Kingdom;
- Financial duties: Ex-ante control in the financial services unit and the financial transaction process should be conducted separately. In particular, the duty of authorising officer and accounting officer cannot be combined in one person (e.g. in Ireland, Luxembourg and Turkey).

An emerging challenge is to ensure the separation of duties between officials to prevent conflict of interest and potentially corruption while avoiding that "**firewalls**" result in a lack of co-ordination between management, budget and procurement officials. In the United Kingdom, the Ministry of Defence has developed several preventative measures against fraud and corruption in procurement, including the effective separation of duties, rotation of duties, effective supervision, custodial controls over assets and records, prevention of accumulated backlogs of work, as well as systems built-in safeguards (see Box III.11).

Box III.11. Preventing fraud and corruption in defence procurement in the United Kingdom

From the early 1980s, the Ministry of Defence (MoD) in the United Kingdom adopted a commercial approach to procurement, aiming to increase competition for contracts. The Ministry identified various potential areas of risk for corruption or other types of fraud in the procurement system, including:

- Manipulating bids and collusive bidding (including cartels);
- Rigging specifications in favour of one supplier;
- Product substitution or sub-standard work or service not meeting contract specifications;
- Theft of new assets before delivery to the end-user and before being recorded in the asset register;
- Fraudulent (false or duplicate) invoicing for goods and services not supplied or for interim payments in advance of entitlement;
- Improper or unauthorised use of Government furnished equipment or information;
- False accounting and cost misallocation or cost migration between contracts;
- Goods ordered for personal use, including misuse of the Government Procurement Cards and e-procurement facilities;
- Provision of fraudulent test or quality assurance certificates;
- Corruption or attempted corruption of Crown Servants.

These areas of risk are made known to the MoD's acquisition staff through fraud awareness training. Moreover, the ministry informs Her Majesty's Treasury annually of all cases of suspected or proven frauds, including fraud perpetrated by, or suspected to have been perpetrated by, departmental staff or contractor or supplier frauds. The Annual Government Fraud Reports are available at: http://www.hm-treasury.gov.uk/.

Preventative steps against fraud and corruption in procurement fraud have been taken, including:

- Effective separation of duties preventing one or two individuals securing control over a whole system, particularly where computers multiply the volume of information available to one source;
- Rotation of duties, particularly in sensitive posts or those giving staff the opportunity for long term commercial connections, possibly in an environment of non-competitive procurement;
- Effective supervision, particularly where separation of duties is difficult to achieve or where staff work in remote locations. The delegation of authority should not be construed as a substitute for effective supervision;
- Effective custodial controls over assets and records that protect stores, cash, property, cheques, warrants, payable orders, confidential information and computer resource;
- Prevention of accumulated backlogs of work, guarding against short cuts to retrieve the situation or concealment of attempted fraud;
- Built-in safeguards against internal and external threats in the design of new systems.

Experience shows that the prime causes of fraud, theft and irregularity are the absence of proper control procedures. MoD relies on the vigilance of its acquisition staff to prevent corruption and has created a dedicated "hotline" for reporting fraud operated by the Defence Fraud Analysis Unit and the MoD Police. The Defence Fraud Analysis Unit uses the latest data mining and fraud detection techniques in a proactive response to fraud risk. Other detective techniques include reconciliation of accounts; physical verification of assets (e.g. stock checks, etc) and spot checks.

Source: United Kingdom's Ministry of Defence, response to the OECD Questionnaire.

In order to ensure that **interaction between officials and bidders** does not lead to bias and more generally corruption, measures have been set up to define clear restrictions for procurement officials in their interaction with bidders at different stages of the procurement, in particular during negotiations. In this regard, new information and communication technologies have increasingly played a role in ensuring that interactions are transparent and accountable. For example, e-auctions – a means of carrying out purchasing negotiations via the Internet – have been used in an increasing number of countries such as Brazil, Mexico and the United Kingdom. They are a real time event that occurs on line, allowing multiple suppliers in different geographic regions to place and modify bids simultaneously. Their main objectives are to:

- Reduce the overall cost of the procurement;
- Avoid direct contact between suppliers and with officials during negotiations, since processes take place electronically and in an anonymous manner; and
- Promote transparent negotiations, for example by providing citizens with the opportunity to monitor the procurement on line.

The first example below highlights the use of e-auctioning in the Federal Government of Brazil while the second example focuses on its application in a key government sector in the United Kingdom, the National Health Service (see Box III.12).

Box III.12. E-auctioning for transparent and cost-effective online negotiations in Brazil and the United Kingdom

Electronic auctioning has been increasingly used in recent years to identify the best price possible in an online competition, for instance in Brazil and the United Kingdom. This method is generally used for homogenous products, where the decision on purchasing is mostly based on the price factor.

E-auctioning in the Federal Government of Brazil

In Brazil, the electronic reverse bidding is regulated by the Law of July 2002. The complete procurement documentation is published on the Procurement Portal of the Federal Government – *Comprasnet* (http://www.comprasnet.gov.br), in the government's Official Gazette and is also broadly disseminated in newspapers, in 2004, BRL 8 billion (Brazil reals) was spent on consumer goods and services – contracted through reverse bidding, according to studies of the Ministry of Planning, Budget and Management of the Federal Government of Brazil. Considering that the total amount used in this area was BRL 15 billion, the share of reverse bidding accounts for over 50% of total spending.

Electronic reverse bidding reduced the cost of participation in competitions, as bidders are not physically required and only need to be connected to the Internet. One of the consequences is the higher number of suppliers. In the past four years there has been an increase of suppliers from 150 000 to 214 000, that is a 42% increase. Last year alone, 20 000 new companies became suppliers of the largest buyer in the country, the Federal Government. Electronic reverse bidding has also helped increase the transparency of negotiations. Contacts between suppliers and between the government and the administration have been avoided while citizens have monitored the procurement on line.

Applying e-auctions in the National Health Service in the United Kingdom

In 2005, the *OGCbuying.Solutions*, the Executive Agency of the UK Office of Government Commerce, used the key sector of national health as one of the pilots for e-auctions. It enabled specialists in the National Health Service (NHS) to source health framework agreements.

In 2006, the NHS Purchasing and Supply Agency completed an e-auction transaction of a GBP £1.2 billion worth of temporary agency staff cost. Following a five month bidding and evaluation process, 176 employment agencies were identified as being successful at the evaluation stage and were invited to participate in the e-auction. These suppliers were given the opportunity to participate and bid in a fully transparent environment, with multiple opportunities to revise their pricing, while gaining an insight into the current level of market pricing. 70,000 bids were placed during the event which ran over three days and resulted in significant savings for the NHS. The e-auction contributed to an additional 10.3 percent saving in addition to the savings provided under the Best and Final Offer in the initial bid.

Even if reverse e-auctions speed up the price-discovery process and improve market transparency, they require an important initial investment to set up the technological infrastructure and supporting legal environment.

Sources: - Brazil, response to the OECD Questionnaire.
- Case study provided by the United Kingdom for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

To avoid prolonged contact between government officials and bidders, some countries have encouraged the **rotation of officials** involved in procurement, rotation proved useful particularly in posts that are sensitive or involve long-term commercial connections where the number of suppliers is limited. Time limits may vary significantly depending on the post and the country, for example:

- Accounting-related officers in Korea are rotated every one to three years;
- Financial controllers every three to five years in Luxembourg;
- Commercial officials within a period of maximum five years in the United Kingdom;
- Procurement Commission members yearly in Brazil.

Another commonly used method for controlling risk internally is the application of the **four-eyes principle** which ensures the joint responsibility of several persons in the decision making - in particular through separation of various functions, double signatures, and cross-checking. For example, public bid committees are usually formed to balance the discretionary power of a single procurement official in the process. They may also benefit from the expertise from various specialisations, by involving accountants, economists, judges, etc. As the importance of the project increases, the number of officials involved may also increase. For instance, in Korea, for contracts of high value or difficult decisions, the responsibility is delegated to the Contract Review Committee, which consists of independent experts, including representatives from NGOs and academics. A key condition of the effectiveness of a committee is to define an appropriate organisation and composition, as well as clear obligations and restrictions for its members, in particular when involving experts from outside the government.

Defining ethical standards for public officials

At the individual level, core values provide guidance for the judgement of public servants on how to perform their tasks in daily operations. To put the values into effect, a vast majority of countries have legislated standards expected of officials across the whole public service, in civil service regulations or in specific conflict-of-interest regulations - most recent examples being the Slovak Republic and Spain. Two-thirds of countries have also put forward ethical standards in the form of a code of conduct or ethics for the public service. More than a third of countries have developed guides or guidelines as internal management instruments to help the implementation of ethical standards in the administration (see Table III.1).

Table III.1. Ethical standards for the public service - Rules and guidance

Laws and regulations	Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, Spain, Turkey, the United Kingdom, the United States
Code of conduct, code of ethics	Australia, Brazil, Canada, the Czech Republic, France, Germany, Greece, Ireland, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Norway, Poland, the Slovak Republic, Spain, Switzerland, Turkey, the United Kingdom
Guides, guidelines	Australia, Canada, Denmark, France, Germany, Ireland, Korea, the Netherlands, New Zealand, Norway, the United Kingdom, the United States

Sources: - Based on *Trust in Government: Ethics Measures in OECD Countries*, OECD, 2000.
- OECD surveys on conflict of interest in the public service in 2002 and 2006.

Defining specific standards for public procurement

A more detailed description of the **standards of conduct** expected for procurement officials, in particular specific restrictions and prohibitions, helps ensure that officials' private interests do not improperly influence the performance of their duties and responsibilities. Potential conflict-of-interest situations may be in relation to:

- Personal, family or business interest, outside activities in particular in relationship to contract (e.g. in Chile, Ireland, Mexico, the Netherlands, New Zealand, Poland and Spain);
- Gifts and hospitality – in countries such as Belgium, Ireland, and Japan;
- Involvement in the activities of a political party, for instance in Turkey;
- Disclosure of confidential information, in countries such as Belgium, Mexico and Turkey;
- Future employment, for instance in the Netherlands and the United States.

In Spain, in the last two years the government has taken several measures to modernise expected standards of behaviour in the administration and prevent conflict of interest for officials who are particularly vulnerable to conflict of interest due to their position – high-ranking officials as well as procurement officials working at the interface of the public and private sectors (see Box III.13).

Box III.13. Preventing conflict of interest in public procurement: Recent reforms in Spain

Spain has recently introduced several measures to avoid conflict of interest, promote good conduct and improve transparency in public contracting. These measures aim at preventing conflict of interest generally for public officials, and also more specifically for procurement officials.

In February 2005, the Council of Ministers approved the Code of Good Governance, binding to members of Government and high-ranking officials of the General State Administration, which was an important declaration of values to set direction for public action in the future.

Furthermore, the Law on Conflict of Interest for Members of Government and High-ranking Officials of the General State Administration was approved in April 2006. This Law introduces requirements in the legal regime for high-ranking positions to avoid situations that put impartiality at risk:

- Absolute incompatibility with other positions;
- Requirements for high-ranking officials to abstain from intervening in procedures - including public procurement - where the companies they (or their family) managed or represented in the two years prior to their appointment in public office are concerned; and
- The obligation to declare assets and income.

Following the recommendations of the report on Study and Diagnosis of Public Contracting in Spain in 2004, the government has similarly clarified and made more precise the scope and requirements of incompatibility rules in the procurement legislation. The Spanish government approved a Project of Law for Public Sector Contracts in July 2006, which was sent to Parliament. This Project of Law strengthens the current prohibitions for officials in charge of public procurement to intervene in procurement procedures when they have an interest in the bidding company. In addition, companies are excluded from bidding or contracting with the administration when high-ranking officials or members of government have investments in over 10% of their capital.

To ensure the application and enforcement of these regulations, mechanisms have been set up in order to identify and manage conflicts of interests. The Office of Conflict of Interest is in charge of the management of the Registry of Activities, Goods and Patrimony, and responsible for the custody, security and integrity of the data and documents filed. In addition, financial assets of members of Government and certain high-ranking officials will be managed in a "blind trust fund", unknown to or not operated by interested parties.

The law also reinforced the sanctioning regime. In the event of incompatibility special sanctions will be applied and proceedings started, publication of which will appear in the Official Bulletin of the State and a special communication given to the business contractor of a high-ranking official. Those that infringe the regulation, if still in office, will lose the right to receive a compensatory pension. High-ranking officials infringing the regulation will also be disqualified from a public position for a period of five to ten years.

These measures are crucial steps for modernising expected standards of behaviour in the Spanish Administration and preventing conflict of interest for officials who are particularly vulnerable due to their position. A key challenge will be to implement them effectively, and, in particular ensure the impartiality of the Office of Conflict of Interest.

Source: Case study provided by Spain for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

Specific standards for public procurement may be described in:

- Formal laws and regulations, in countries such as Mexico, New Zealand, and the United States;
- Specific ethics codes or codes of conduct for procurement officials, in countries such as Austria, Belgium and Canada; and
- Guidance materials, for instance in Australia and Ireland.

In Italy, a binding code of ethics has been adopted by *Consip (Concessionaria Servizi Informatici Pubblici)* a private company in charge of e-procurement. The code applies to personnel as well as suppliers and stakeholders (see Box III.14).

Box III.14. Adopting and implementing a Company Code of Ethics for public procurement in Italy

Consip is a company entrusted with information technology activities for Italy's Ministry of the Economy and Finance (MEF) and responsible for the e-procurement system. It has recognised that public procurement is highly exposed to conflict of interest and corruption, and has thus introduced a Code of Ethics.

This Code of Ethics sets standards for *Consip*'s personnel as well as anyone who co-operates with the company, including employees, consultants, suppliers, the Ministry of Economy and Finance and other stakeholders. It provides general standards of behaviour which must be respected in activities with *Consip*.

The Code of Ethics contains several provisions for standards of behaviour in the following areas:

- General rules on ethics and behaviour and in relations with suppliers and stakeholders;
- Conflict of interest;
- Gratuities;
- Interaction with the Public Administration, civil society, politics and the media;
- Confidentiality of information and documentation.

The Code has put in place internal controls to evaluate the compliance with the Code and verify periodically that corporate procedures, organisation and management of the company are in conformity with existing laws and regulations. To support compliance and application of the Code, the Office of Compliance was established with the following functions:

- Communication and interpretation of the Code;
- Verification of the effective application of the Code, and in case of violations, recommendations of appropriate measures to comply with existing laws and regulations;
- Information to the heads of departments in case of inappropriate behaviour in order to allow for the adoption of adequate measures.

Sources: - Company Code of Ethics, Consip, 2005: http://www.consip.it/sc/pdf/Code_of_ethics.pdf.
- P. Magrini, *Transparency in Public E-Procurement: The Italian Perspective*, OECD, 2005.

A key challenge across countries is to find solutions to ensure the **protection** of officials involved in procurement **from any pressure and influence**, including political influence, in order to ensure the impartiality of decision making and to promote a level playing field for procurement officers. Key conditions for protection from political influence include:

- Clear ethical standards for procurement officials;
- An adequate institutional framework, budgetary autonomy, human resource management based on merit (e.g. appointment, selection and career development); as well as
- Working independence for procurement officials, where procurement officials are solely responsible for decisions.

Box III.15 describes the reform undertaken in 2002 in Turkey to prevent pressure from interest groups and set higher ethical standards for procurement officials.

Box III.15. Setting clear ethical standards for procurement officials: The 2002 public procurement reform in Turkey

The Turkish public procurement system underwent a major reform in 2002 in order to address shortcomings identified such as:

- Most public agencies were not covered by the law, and had the right to issue their own regulations on procurement. This resulted in a dozen of regulations covering different public agencies.
- Publication of notices was not required for all procurement methods and even when it was obligatory, announcement periods were too short to inform interested economic operators.
- Selection and evaluation criteria were not objectively determined and pre-announced.
- Unsuccessful bidders were not informed about the decision of the contracting entity.

With the 2002 Public Procurement Law (PPL), the Public Procurement Authority (PPA) was established as an administratively and financially autonomous entity at the central governmental level to regulate and monitor public procurement. In order to prevent problems encountered previously, measures were introduced by the law to prevent pressures from interest groups and set higher ethical standards for officials, in particular:

- The Authority shall be independent in the fulfilment of its duties. No organ, office, entity or person can issue orders or instructions for the purpose of influencing the decisions of the Authority.
- The Authority is comprised of the Public Procurement Board, the Presidency and service units. Members of the Public Procurement Board are appointed by the Council of Ministers and must fulfil criteria, including higher education, more than 12 years of experience in public institutions, and knowledge and experience in the field of national and international public procurement procedures. Candidates shall

have no past or present relationship of membership or task with any political party. Members of the Board are nominated for a five-year term[18] and, once appointed, cannot be revoked before the expiry of their term.

- Board members shall take an oath in witness of the First Bureau of Assembly of the High Court of Appeal that they will fulfil their duties in an honest and impartial manner, that they will not violate and let others violate the provisions of the PPL Law and related legislation.
- Members of the Board, except for some legally-defined exceptions, cannot be involved in any official or private jobs, trade or freelance activities, and cannot be a shareholder or manager in any kind of partnerships based on commercial purposes.
- The Board members are obliged to submit a declaration of property, within one month following the date of commencement and expiry of office, and every year during their service period.
- When executing their duties, the Board members and the staff of the Authority cannot disclose any confidential information or document concerning the related officials or third parties to any entity except for those authorised by law for such disclosures, and cannot use them for the benefit of their own or third parties. This liability of confidentiality shall also continue after they leave their offices.

*Source*s: - Turkey, response to the OECD Questionnaire.
- Extracts from Public Procurement Law no: 4734 of Turkey, 2002.

Applying standards

The application of standards of conduct starts with recruitment. Some countries have indicated that they take into account ethical considerations in the recruitment process by:

- Issuing security clearance for positions representing a potential risk to national security or other important national interests, for instance in the United Kingdom;
- Verifying the background of officials before their appointment. In Mexico, public officials, including procurement officials, must show evidence that they have not been barred or disqualified to hold positions in the Federal Administration;
- Going through a public selection based on objective methods of assessment of their capacity and knowledge in the field and then being subject to a three years probationary period of training. In Brazil, this

18. Among the 10 members of the Board, two of them were initially designated by the Council of Ministers and selected among the candidates proposed by the Ministry of Finance and the Ministry of Public Works and Settlement. These two members - the Chairperson and the Secondary Chairperson of the Board - are on duty for seven years.

applies to at least two of three members of Procurement Commissions who are permanent members of the Public Administration;

- Evaluating candidates' capacity to handle ethical dilemmas. This may take the form of certification process that assesses competence and skills as well as preparedness to handle ethical risks.

A growing number of countries use **training** to build public officials competence and skills for handling complex procurement procedures and to raise awareness of possible risks to integrity. Training on procurement and integrity issues may be induction, prior to joining the office, to raise awareness of ethical issues and/or offered on an on-going basis to tackle emerging issues or address specific risks linked to a position. In the United Kingdom, all commercial officers within the Ministry of Defence are required to undertake training courses before being issued with a commercial licence by a senior officer. Training may also be done on a voluntary basis – in Norway, open training programmes are offered to public officials by important agencies, the private sector and the National Public Procurement Board – or mandatory such as in the United States. Box III.16 illustrates how integrity training, together with measures such as staff rotation and counselling for officials, contributes to embedding a culture of integrity in the Federal Procurement Agency in the German Ministry of Interior.

Box III.16. Integrity training in Germany

The Federal Procurement Agency is a government agency which manages purchasing for 26 different federal authorities, foundations and research institutions that fall under the responsibility of the Federal Ministry of the Interior. It is the second largest federal procurement agency after the Federal Office for Defence Technology and Procurement.

The Procurement Agency has taken several measures to promote integrity among its personnel, including the support and advice by a corruption prevention officer, the organisation of workshops and training dealing with corruption and the rotation of its employees.

Since 2001, it is mandatory for new staff members to participate in a corruption prevention workshop. With the help of a prosecutor from the district prosecution authority, they learn about the risks of getting involved in bribery and the briber's possible strategies. Another part of the training deals with how to behave when these situations occur, for example, by encouraging them to report it ("blow the whistle"). Workshops highlight the central role of employees whose ethical behaviour is an essential part of corruption prevention. In 2005 the target group of the workshops was enlarged to include not only induction training but also on-going training for the entire personnel. About ten workshops took place with 190 persons who gave a positive feedback concerning the content and the usefulness of this training. The involvement of the Agency's "Contact Person for the Prevention of Corruption" and the Head of the Department for Central Services in the workshops demonstrated to participants that corruption prevention is one of the priorities for the agency.

Another key corruption prevention measure is the staff rotation after a period of five to eight years in order to avoid prolonged contact with suppliers, as well as improve motivation and make the job more attractive. However, the rotation of members of staff still meets difficulties in the Agency. Due to a high level of specialisation, many officials cannot change their organisational unit, their knowledge being indispensable for the work of the unit.

Source: Case study provided by Germany for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

Some governments have developed procedures that enable procurement officials to identify and **disclose relevant private interests** that potentially conflict with their official duties. It may be restricted to financial interests (e.g. shareholdings, investments) or also include other interests such as relationships and additional/secondary employment. Such disclosure is usually required to be provided periodically, generally on commencement in office and thereafter at regular intervals, usually annually, and in writing. Some countries have made it mandatory for senior officials involved in procurement to disclose relevant private interests (e.g. in Korea, Spain, Turkey and the United Kingdom). For this tool to be effective, the reliability and effective mechanism for verifying the reliability and completeness of the information disclosed must be verified on a regular basis.

In recent years a few countries have introduced specific restrictions and prohibitions for procurement officials not only for the time of their tenure but also for employment after leaving their public office. In the United States specific **post-employment** prohibitions have been developed for officials involved in procurement and contract administration for contracts over USD 10 million (see Box III.17). However, a key challenge is to enforce post-public employment provisions as well as detect possible breaches. For instance, in Brazil, the Office of the Comptroller General conducted a significant investigation as part of "the Sabujo project"[19]. It found that, despite prohibitions, 313 officials were owners and 2 479 were shareholders of 1 928 companies that had contracts with the Central Government and that between 2004 and 2006 these companies sold over BRL 407 million[20] in goods and services to the government.

19 The "Sabujo Project" is a search and data matching system used by the Brazilian Office of the Comptroller General as a decision making system.

20. Approximately EUR 145 million in January 2007.

Box III.17. Post-employment prohibitions for procurement and contract administration in the United States

In addition to the generally applicable post-employment restrictions for federal employees in the executive branch, there are certain post-employment prohibitions in place for those involved in procurement functions and contract administration.

Former officials may not accept compensation from a contractor for one year as an employee, officer, director or consultant of the contractor if:

- They served as a procuring/contracting official, or a source selection authority at the time a contract exceeding USD 10 million was awarded, or a member of the source selection evaluation board, or chief of a financial or technical evaluation team; or
- They served as administrative contracting officer, or programme manager or deputy programme manager for a contract exceeding USD 10 million; or
- They personally made a decision to award a contract, subcontract, task order or delivery order over USD 10 million, establish overhead or other rates in excess of USD 10 million; approve issuance of contract payment(s) in excess of USD 10 million, or pay or settle a claim for more than USD 10 million.

Partnering with bidders to prevent conflict of interest and corruption

Most countries require bidders to **demonstrate** at least that they have adequate financial resources to perform the contract. In Poland, bidders are required to make a declaration that they fulfil the requirements to participate in the public procurement. The requirements include: having the necessary authorisations, appropriate knowledge experience, technical and human capacity to perform the contract; being in a financial and economic situation to ensure the performance of the contract; and not being subject to exclusion from the award procedure. In Ireland bidders go through a selection process that verifies the company's tax law compliance, as well as its professional standing, financial capacity and expertise.

Furthermore, some countries use specific anti-corruption criteria for ensuring that bidders have a **satisfactory record of integrity**. Criteria for pre-selecting bidders may include the compliance with anti-corruption laws, no involvement in the past in corrupt activities or the implementation of an ethics code ("white listing"). For instance, in the Netherlands, a declaration of integrity was recently introduced, which requires a declaration by the Ministry of Justice that no objections have been raised against the economic operator on the basis of an investigation concerning the conduct of the economic operator in the past.

There is increasing awareness that the information provided by the prospective bidder must be systematically verified and the bidder kept

accountable for its performance and integrity. Box III.18 illustrates the key components of a sound policy for promoting an efficient and corruption-free interface with bidders, based on the recommendations from the United Nation's Procurement Task force.

Box III.18. Managing the relationship with bidders: Recommendations of the United Nation's Procurement Task Force

Based on a review of internal procurement procedures, the United Nations' Procurement Task Force of the Office of Internal Oversight Services developed a number of recommendations to help prevent corruption in the relationship with bidders, including:

- **Registration**: To be a supplier for the United Nations (UN), registration is required and based upon identified factors, including proven expertise in providing the goods or services, financial stability and capacity to undertake the particular project. However, the declaration is not sufficient if it is not followed by a thorough verification of the information provided by the prospective bidder and its comparison with other sources of information to verify its capacity to participate in the procurement process.
- **The periodic review of vendor status***:* A periodical review of bidders' status helps track whether circumstances have changed after the registration.
- **Assistance to the Investigation Office**: The bidder should be obliged to co-operate or risk breaching the contract or to be suspended if it fails to co-operate (e.g. through the inclusion of a specific clause in the contract of the UN).
- **Performance bond***:* It is a common feature of procurement contracts to lodge or pledge a substantial sum in the event of default in the execution of the contract. In the event of fraud, corruption or significant irregularity on the part of the bidder the performance bond should be automatically forfeited to the UN.
- **Financial disclosure***:* Financial disclosure obligations imposed on officials dealing with procurement should promote a culture of openness in the organisation, supported by a regular verification of the reliability and completeness of the information.
- **Black listing***:* Systems to ensure that adverse findings in relation to a bidder in one mission or duty station should be automatically disseminated widely among United Nation's agencies.
- **Commercial responsibility**: The UN should join proceedings more systematically when the integrity of a supplier is challenged by competitors, in cases when the organisation is a victim of corrupt acts and could therefore obtain damages.

Source: Presentation of the United Nations Procurement Task Force at the OECD Forum on Governance: Sharing Lessons on Promoting Integrity in Procurement, November 2006.

An emerging practice is to **deny access** to bidders in the public procurement process when irregularities or corruption have been proven to promote the integrity of the procurement process and discourage bidders from engaging in illegal or corrupt activities. For example, in Spain since 2005 central, autonomous and local governments are allowed to stop

working with business contractors employing a former high-ranking official who has infringed incompatibility rules. The basis for denial of access in a procurement procedure may take different forms, such as:

- The exclusion of a company to participate in a specific procurement, for instance in Belgium, the permanent or temporary disqualification for a firm to participate in future public procurements;
- Deletion from the list of entrepreneurs in the Slovak Republic;
- Disqualification based on criminal activities in the past that are not necessarily linked to procurement.[21]

A key question is **how this information is made available and shared** across the administration. For instance in Germany the list of registers is shared between *Länder* to facilitate information sharing.

Furthermore, there is a growing trend among companies to take **steps for voluntary self-regulation**, specific instruments against corruption at:

- The sector level - sector agreements such as Business Principles for Countering Bribery in Engineering and Construction Industry; or
- Company level - company codes of ethics or other guidelines for integrity in public procurement.

Guidelines or codes aim at enhancing the reputation of an industry or organisation as well as decreasing the risk of corrupt activities by raising awareness about specific prohibitions and restrictions. Another instrument that has been increasingly used is the **dispute board**, set up at the outset of a project, with the intention that it operates actively throughout the whole period of the contract, not only to resolve disputes, but also to prevent them. In 1999, the International Federation of Consulting Engineers (FIDIC) amended standard forms of contract to incorporate dispute boards as a first step in the contractual framework for the resolution of disputes between the employer and the contractor. In 2004, the International Chamber of Commerce published a set of rules for the operation of dispute boards, together with standard clauses that may be adopted for large infrastructure contracts. A more recent initiative by the FIDIC has been the development of a Government Procurement Integrity System (see Box III.19).

21. For further information on debarment, see *Fighting Corruption and Promoting Integrity in Procurement,* OECD, 2005.

Box III.19. FIDIC's Government Procurement Integrity Management System

The International Federation of Consulting Engineers (FIDIC) is the leading organisation representing the international consulting engineering industry. Since 1995 it has raised the importance for the private sector to take positive steps against corruption. A key initiative has been to develop a practical tool, namely a comprehensive Business Integrity Management System (BIMS) for consulting firms, which includes integrity as part of the ISO 9001-2000 quality management. It has proved to be an efficient standards-based approach for integrity assurance in private-sector procurement. A 2005 FIDIC survey revealed that since the creation of the tool, over 70 small, medium and large firms in 12 developed and developing countries have adopted BIMS.

Pursuant to this effort on the supply side of corruption, FIDIC's Integrity Management Committee was mandated to apply its experience to help develop a complementary preventive integrity assurance system for the demand side of corruption, and created in 2006 the Government Procurement Integrity Management System (GPIMS).

The principles identified for the Government Procurement Integrity Management System are the followings:

- **Leadership** – for example the commitment of the Director General of the Procurement Agency is crucial to the success of the GPIMS;
- **Involvement of staff** – in particular through effective communication and co-ordination;
- **A process approach** – each process performed by the agency must be accomplished with integrity;
- **A system approach** – identifying potential areas of corruption in the interrelated processes;
- **A documented process** – documenting and auditing information.

The GPIMS includes a voluntary set of good practices adopted by a government procurement agency as well as a checklist to help identify vulnerabilities in the procurement system.

Sources: - Case study provided by FIDIC for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.
- Government Procurement Integrity Management System, Guidelines, 2006, available at: http://www1.fidic.org/resources/integrity/.

Some governments have also created **partnerships for integrity with business and non-governmental organisations**. For instance, a public-private partnership in Denmark, in conjunction with Transparency International and the UN Global Compact, led to the creation of a Business Anti-corruption Portal that provides small and medium-sized companies with the necessary knowledge and tools to invest in emerging markets, including detailed information on the integrity of procurement practices.

Governments often require integrity pledges, where bidders must testify the absence of conflict of interest and corruption. On the other hand, the

Integrity Pact[22] requires a mutual commitment by the principal and all bidders to refrain from and prevent all corrupt acts and submit to sanctions in case of violations. Bidders pledge to disclose all payments to agents or any other third parties in connection with the contract in question, responding to the concern that independent agents and other intermediaries are frequently used by exporting companies to obtain contracts. The Integrity Pact binds bidders and contractors to refuse to pay or accept bribes or to engage in anti-competitive transactions. If a bidder acts in breach of the rules during the selection process, this can result in that bidder's exclusion from the process. Any breach after winning a tender can result in the annulment of the contract. Other sanctions could include the forfeiture of the bid or performance bonds, liability for damages and debarment regarding future contract opportunities for a period of time reflecting the seriousness of the violation.

Ideally the Integrity Pact is monitored by an independent expert Monitor, who may be provided by civil society or commercially contracted. The Monitor would have access to all documents, meetings and parties and could raise concerns first with the principal and, if no correction is made, with the prosecution authorities. An Integrity Pact was used recently for the major international airport project in Berlin Brandenburg in Germany. Considering the amounts involved - a total investment of EUR 2 billion is anticipated between 2005 and 2010 - the use of the Integrity Pact helps send a clear signal in support of fair competition, corruption prevention and against illegal transactions.

22. The Integrity Pact was developed by Transparency International. For further details on the application of the Integrity Pact in Korea, see Box IV.17.

IV. ENSURING ACCOUNTABILITY AND CONTROL IN PUBLIC PROCUREMENT

Within the public sector, procurement is seen as increasingly important in delivering value to governments and ultimately to tax payers and society. Procurement officials are **in the public eye** because of the significant impact of procurement on the economy.

The cornerstone of a public procurement system operating with integrity is the availability of mechanisms and capacity for ensuring effective internal control and audit. Furthermore, mechanisms for lodging complaints and challenging administrative decisions contribute to ensuring the fairness of the process. In order to respond to citizens' demands for greater accountability in the management of public expenditures, some governments have also introduced direct social control mechanisms by closely involving stakeholders – not only the private sector but also end-users, civil society, the media or the public at large – in scrutinising integrity in procurement.

ACCURATE RECORDS: A PRE-CONDITION FOR ACCOUNTABILITY AND CONTROL

Accurate written records of the different stages of the procedure are essential to maintain transparency, provide an audit trail of procurement decisions for controls, serve as the official record in cases of administrative or judicial challenge and provide an opportunity for citizens to monitor the use of public funds. Agencies need procedures in place to ensure that procurement decisions are well documented, justifiable and substantiated in accordance with relevant laws and policies in order to promote accountability.

Written records may be kept in paper and/or electronic form. Some countries have used information systems to coercively support the documentation of all steps of the public procurement process and to allow real-time monitoring of officials' performance and integrity (see the example of the Federal Procurement Agency of the Ministry of the Interior in Germany in Box IV.1).

Box IV.1. Electronic workflow: Processing and tracking information on public procurement in Germany

The Federal Procurement Agency in the Ministry of the Interior has set up an electronic workflow that helps centralise all information related to the procurement system and provide a record of the different stages of the procurement procedure. Employees are assisted by an electronic workflow, which leads through the process and coercively supports the application of the four-eyes principle. Each decision is to be well founded and documented along the milestones of the procurement procedure. All files are stored in a document management system.

The Federal Procurement Agency has also recognised the importance of accurate records for maintaining transparency and providing an audit trail of procurement decisions. In addition, supervisors may access any document at anytime. In case of suspicion the contact person of prevention for corruption may also have access to documents for inspection. This access is not visible for the official concerned. The department for quality management randomly examines documents in the system, while the internal audits review transactions of the previous year. These inspections are not exclusively used to prevent corruption, but also to ensure lawful and economically advantageous public procurement.

Sources: - Germany, response to the OECD Questionnaire.
- *Das Beschaffungsamt*, *A procurement agency that does more,* Bonn, 2004.

Information systems often have the advantage of recording information per user, which keeps officials accountable for their actions and can help track irregularities in the process. Information systems have been used to record and analyse data on:

- The **financial aspects** of procurement, in particular accounting records, for instance in Brazil and Italy;
- **Characteristics of procurement** processes, such as the criteria used, the frequency and reasons for using exceptions to competitive procedures, in countries such as Germany, Mexico, Portugal and Turkey;
- The number of **administrative complaints and recourse mechanisms**, for instance in Poland, Mexico and Turkey;
- The number and types of **controls** carried out on procurement in Poland, irregularities detected and sanctions applied in Mexico.

Keeping records depends on the objective sought. The most frequent objective of records is to provide an **audit trail**. The maintenance of proper accounting records is an important element of internal control. Records can also contribute to the safeguarding of assets, including the prevention and detection of fraud. The type of records, level of documentation and retention time on procurement may be proportionate to the nature and risk of the procurement. In particular, records will vary depending on the timeframe,

the complexity and the sensitivity of the purchase, as well as the procedure used. For example, records will be stricter for exceptions to competitive procedures.

In most countries, appropriate records are not only kept by the procurement agency and/or internal control agencies but also made available to the public. The objective is then to provide bidders and other stakeholders with the necessary information for **challenging the fairness of the procedure**. Records might cover part of the procedure - for example the contract award in Turkey - or the whole procurement process. In Norway, a recent reform introduced the obligation of documenting all steps of the procurement process for contracts above the national threshold. The records might be restricted to bidders, or on the contrary open to other stakeholders - for instance, in Italy citizens and consumer associations that have a concrete interest.

In a few countries (e.g. Brazil, Chile, Poland, Sweden, and the United States), records on procurement are publicly available. In Sweden anybody who has an interest can have access to records, which enables **the media, law-enforcement agencies and the public at large to uncover cases** of mismanagement and potential corruption in public procurement. More importantly, freedom of information acts as a deterrent since the risk of detection of illicit or questionable practices increases. In Brazil, it is mandatory for federal public administration bodies to disseminate through Internet all the information relative to budgetary and financial execution, including public procurements. This provides an opportunity for citizens to monitor the use of public funds. Another example is the General Controller's Office in Mexico that makes public the data on all administrative sanctions applied since 2001 to federal public servants, as a result of disciplinary investigations (see Box IV.2).

Box IV.2. Publicising information on sanctions related to procurement in Mexico

The Ministry of Public Administration – through its Unit of Normativity of Procurement, Public Works, Services and Federal Patrimony – gathers and publishes information regarding bidders, intermediaries and contractors, as well as public officials who have been sanctioned for breaches of public procurement laws and regulations. This information is made available to the public in the Report of Activities of the Ministry of Public Administration.

During 2005, 1 153 **bidders, intermediaries and contractors** were sanctioned with disqualification, debarment from participating in procurements and fines. The list of sanctioned bidders, intermediaries and contractors can be consulted on the Ministry's website (http://www.funcionpublica.gob.mx/index1.html).

In regard to **public officials**, 3 592 administrative sanctions were applied against 2 618 public officials between January and August 2005. Among the sanctions imposed, 2% were warnings, 27% were admonishments, 20% were suspensions, 7% were dismissals, 24% were disqualifications and 20% were economic sanctions for a total amount of MXN 3733.7 million (Mexican pesos).

Among the causes that motivated the imposition of administrative sanctions, 1 931 were due to administrative negligence, 1 193 occurred due to violation of laws or norms that regulate the Federal Expense Budget, 235 derived from non-compliance with procurement procedures, 174 were due to abuse of authority and 59 resulted as a consequence of acts of bribery.

The primary sources for revealing such breaches were unsuccessful bidders and other external stakeholders. Of the administrative sanctions imposed, 1 612 originated from a complaint or citizen accusation, 1 480 were the result of audits practiced at the agencies or entities of the Federal Public Administration and 500 emerged from internal investigations.

Source: Mexico, response to the OECD Questionnaire.

The retention time for general records also varies significantly among countries. In Australia, records have to be retained for at least three years and may be kept longer depending on the circumstances while in Korea and Japan they are usually kept for five years and in Sweden for ten years.

INTERNAL CONTROL: A MANAGEMENT INSTRUMENT FOR IMPROVEMENT

Without an adequate internal control system, an environment is created in which assets are not protected against loss or misuse; good practices are not followed; goals and objectives may not be accomplished; and individuals are not deterred from engaging in dishonest, illegal, or unethical acts. It is particularly important to have **functioning internal controls in procurement, including financial control, internal audit and management control.**

It is the **responsibility of procurement authorities** to set up effective internal control systems that monitor the performance of procurement officials, assist compliance with laws and regulations and help ensure the reliability of internal and external reporting. This responsibility is even more important in a context of decentralised procurement. For instance, in Brazil, the Internal Control of the Federal Executive Branch is carried out by the General Controller's Office through the Federal Secretariat of Internal Control and decentralised units. Decentralised units play a fundamental role in implementing control efforts.

A clear chain of responsibility

An important condition of accountability is to clearly define the **delegated levels of authority** for approval of spending and sign off and approval of key stages. The level of authorities responsible for the approval process may vary according to:

- The value of the procurement, for which a chain of approval hierarchies should be in place. In Portugal, the procedure might have to go through the authorisation of the Ministerial Council in certain cases;
- The business needs of the organisation and the official's experience. In the United Kingdom, the maximum value that commercial officers are able to contractually commit is determined by their grade and the estimated budget required in their post.

Managers have a crucial role in ensuring proper supervision over procurement. Internal procedures in agencies often require senior-level review of key decision points in procurement. For example, in the United States, the definition of evaluation criteria, evaluations and contract award selections are usually subject to senior-level reviews. Furthermore, internal guidance through policies and guidelines can help define the level of responsibility and the obligations for reporting to different authorities - for instance in Mexico and the United Kingdom. In Mexico, the policies and guidelines must be published on the website of each government agency.

There might also be **additional controls**, for example by a team of people independent of the acquisition team such as the Gateway Reviews in the United Kingdom (see Box IV.3) or by the internal audit of the authority, for instance in Belgium and Finland. More formalised reviews are usually required for projects of high value. In Ireland, independent peer review is required for information and communication technologies' projects of over EUR 5 million in regard to business case and good project management, which also includes a post implementation review.

Box IV.3. Independent examination of acquisitions: The Gateway Review in the United Kingdom

A Gateway Review is an examination of an acquisition project carried out at key decision points by **a team of experienced people, who are independent of the acquisition team**. There are five types of Gateway Reviews designed by the Office of Government Commerce (OGC) during the lifecycle of a project:

- Up to and including contract award: Gateway Reviews one to three (business justification, procurement strategy, and investment decision);
- Post contract award: Gateway Reviews four to five (readiness for service, and benefits evaluation).

The review is conducted on a confidential basis for the person who takes personal responsibility for the successful outcome of the project (the Senior Responsible Owner). This approach promotes an open and honest exchange between the acquisition team and the review team. The Gateway reports are frankly written and deal with the strategic, business and personnel aspects of the project, including instances of good practice that may be transferable to other projects.

Acquisition programmes and procurement projects in central civil government may be subject to the OGC Gateway Process without any minimum financial limits. However, the financial value is one factor to consider when deciding on the level of risk faced by a project, and it is recognised within the Risk Potential Assessment (RPA), which must be completed for each procurement project. The composition of the review team reflects the assessed potential risk of the project, namely in case of:

- **High risk projects**, RPA Score 41 or more: The Gateway Review is undertaken by an independent Review Team Leader (RTL who is independent from the department that carried out the project) with an independent Operations Team;
- **Medium risk projects**, RPA Score 31-40: The Review Team Leader is still independent from the department but the team members are provided by the department (independent from the project);
- **Low risk programmes**, RPA Score less than 31: All the team and the leader are resourced from the sponsoring department but all are independent from the project.

Each review takes about three or four days. At the end of their investigations, the review team produces a report summarising their findings and recommendations, together with an assessment of the project's status as Red, Amber or Green.

- "Red" status means that remedial action must be taken immediately; but not necessarily stop the project.
- "Amber" status indicates that the project should go forward with recommendations for actions to be carried out.
- "Green" status shows that the project is on target to succeed but may benefit from the uptake of recommendations.

The Gateway Review Process provides assurance and support for Senior Responsible Owners in discharging their responsibilities to achieve their business aims by ensuring that the best available skills and experience are deployed on the projects; all stakeholders are covered by the project; and the project can progress to the next stage of development or implementation.

From 2001 to the end of 2004, OGC Gateway Teams conducted over 800 OGC Gateway Reviews covering over 500 projects. The feedback from Senior Responsible Owners has been very supportive.

Sources: - United Kingdom, response to the OECD Questionnaire.

In addition to strengthening controls, some countries have ensured **enforcement** through effective, proportional and timely sanctions. In the United States, there have been numerous investigations in the last five years by Inspectors General into individual procurements, which have resulted in criminal convictions, penalties and loss of employment for public officials and contractor employees. In Norway, a contracting authority that conducts direct illegal purchasing may be subject to an administrative fine of up to 15% of the contract value since January 2007.

EXTERNAL AUDIT: AN INDEPENDENT REVIEW

Countries have recognised the essential role of audit in **detecting and investigating** fraud and corruption in procurement as well as suggesting systemic improvements. If internal audit is used in some countries - such as Belgium, Finland, Switzerland and the United Kingdom - the vast majority of countries use external audits conducted mainly by supreme audit institutions with jurisdiction over the whole public service. For instance, in Finland and Switzerland, the State Audit Office carries out external financial audits and performance audits of procurement.

Possible **criteria for selecting public procurement cases for audit** include:

- Total value and complexity of the procurement;
- New acquisition rather than routine procurements;
- Order value per contractor and number of orders per contractor (whether specific contractors receive unusually often or unusually large orders); as well as
- General aspects – such as critical statements of external and internal supervision authorities (e.g. Ministry of Finance, internal auditors), handling in political committees, coverage in the media, complaints, legal proceedings or professional experience of auditors.

Performance audits help provide information on the actual benefits of procurements, which contributes to improving operations, facilitating decision making by parties with responsibility to initiate corrective action, and enhancing public accountability. In Austria, the Court of Audits plays a key role in conducting external audits and **making recommendations for the improvement of processes**, in particular for public procurement (see Box IV.4).

Box IV.4. Recommendations of the Austrian Court of Audit for improving procurement

The administration of public procurement and contracts is considered by the Austrian Court of Audit as a particularly vulnerable area to mismanagement and corruption. Procurement audits are among the most important and discussed reports of the Austrian Court of Audit. The recommendations of the Austrian Court of Audit for procurement audits cover all stages of the procurement process.

1. General procedure:

Organisation: Organisational units responsible for different procurement aspects (e.g. definition of needs, specification, awarding of a contract, financing) should be separated organisationally. Dependencies as well as parallel structures should be avoided.

Documentation: The documentation of procurement procedures should be in writing and covering all important aspects. Internal procurement regulations should be binding and notified to the employees concerned.

2. Planning and preparation of procurements:

Planning concept: Planning should be completed before conducting a specific procurement procedure and should be updated on time.

Financing: Procurement preparation should include a statement of the prospective total expenses of the project and a long-term planning. The required funds should be guaranteed on time.

Analysis of demand: Preparation of procurement should also include cost-benefit and make-or-buy considerations. Core duties should be performed by public authorities. External experts should only be consulted if special knowledge or specialised technologies are not available within the awarding authority or if they substantially increase the quality of a project and the probability of success.

Time frame: Procurement planning should contain realistic time targets.

3. Execution of procurement:

Completion of the preparations: Procurement procedures should only be initiated and conducted after all necessary prearrangements have been completed (e.g. purchase of property in connection with construction projects).

Choice of and justification for the procurement procedure. Special attention should be turned to the choice of procurement procedures as they are often reasoned or justified by unfounded circumstances (e.g. urgency, demand for special abilities or experiences).

Specifications: Specifications should be neutral, based upon completed planning and defined standardised products, if possible. Off-the-shelf products should be preferred. The relevant documentation should be complete, clear, understandable and calculable.

Bidding period: When defining the bidding period the complexity of the specific procurement should be taken into account.

Opening of bids: At the opening of bids all formal requirements must be fulfilled. This must be documented sufficiently.

4. Evaluation of bids:

Evaluation catalogue: The evaluation catalogue must be completed and approved before the opening of bids. The evaluation catalogue should concentrate, if possible, on a limited number of

key criteria. Award criteria, which must refer to the demanded product, should not be mixed with qualification or selection criteria, which must refer to the bidders.

Weighting of award criteria: If standardised products are purchased, the price component must be weighted sufficiently.

Comparative bids: The price adequacy of the offered or awarded products must be evaluated in any case, also when applying the negotiated procedure.

Supplementary amendments: After the opening of bids, price negotiations or supplementary amendments of the specifications or the weighting of the award criteria must be avoided (except for the negotiated procedure).

5. Conclusion of the contract:

Performance requirements: The specifications of the invitation for bids and the contract should correspond.

Model contracts: It has been recommended to develop model contracts.

6. Contract management and payment:

Supplementary amendments: Supplementary amendments and extensions of contracts should be avoided.

Acceptance: The management of contracts requires accurate and timely supervision. Defects must be rejected immediately in writing.

Payment: Payment should be made punctually; early payments should be avoided.

Logistics: Logistics has to include timely provision of all components that are necessary for the operation and maintenance of the procured goods (e.g. training, documentation, servicing, special tools, and spare parts).

Stock management: Over-stocking should be avoided.

Source: Austria, response to the OECD Questionnaire.

In order to keep the public informed, information on external audits is routinely published in two-thirds of countries. Procurement expenditures are also usually reported to Parliament. For instance, in Canada, reports on plans and priorities, which are individual expenditure plans for each department and agency, are reported to Parliament by the President of the Treasury Board. In Slovenia, reports of the Court of Accounts and the Ministry of Finance are addressed to the Committee for Control of Public Finance, which has also the right to invite parties for hearings.

Co-ordinating controls

Public procurement operations are subject to various controls: local controls, accounting controls, controls made by fiscal authorities, as well as external controls and audits. As public procurement has become more decentralised, a key concern is the **lack of co-ordination** between various controls, which has led to some loopholes and overlaps in controls over the

procurement process. Only a few countries have mechanisms to ensure co-ordination of control. For example, the Austrian Court of Audit co-ordinates its audits at an early stage with other external audit institutions and internal auditors of procurement authorities through the review of their audit plans and results and through regular reporting on its own activities.

A related difficulty is to **maximise the use of information produced by different controls**. Some countries have developed solutions to address it. For instance, in the United States, while information related to internal audits is generally not released to the public, both internal investigations conducted by Inspectors General in procuring agencies and external investigations conducted by the General Accountability Office are usually released to the public and the Congress. These investigations have resulted in Congressional hearings and enactment of laws, primarily the procurement integrity statutory provisions.

TAKING A RISK-BASED APPROACH

There is growing recognition across countries that a sound system of **internal and external controls** therefore depends on a thorough and regular evaluation of the nature and extent of the risks to which the organisation is exposed. A specific focus has been to identify **risks to integrity** in the procurement process resulting from a simple mistake in performing an administrative task to a deliberate transgression of relevant laws and related policies. In order to prevent and detect individual irregularities and systemic failures in procurement processes, governments have increasingly mapped out risk factors and vulnerabilities to the integrity of the public procurement process (e.g. in Belgium, Brazil, France, Korea and the Netherlands). In Korea, *ex-post* audits focus on specific corruption-prone work areas that are identified through an annual internal survey on the level of integrity. This has helped raise awareness among auditors and public officials of the areas most prone to irregularities and corruption. In Belgium, internal and external control mechanisms have helped identify risks to integrity at different points of the public process and provide recommendations for tackling vulnerable points (see Box IV.5).

Box IV.5. Identifying risks and providing recommendations in Belgium

With the help of internal and external control mechanisms, the Belgian Federal Public Procurement Service has identified potential risks to integrity at various points of the public procurement process, including:

- **Definition of specifications**: The definition of specifications of a concrete project is adjusted in order to favour a specific bidder.
- **Selection procedure**: When using restricted procedures, the selection of potential suppliers is not based on objective criteria, with the risk of limiting the number of participating bidders.
- **Bids submitted after the delay of submission**: Bids are accepted after the delay of submission, including during the official opening of the submitted bids.
- **Change in bid description**: Certain elements of the initial contract notice are changed during the selection and award process, which can positively influence the matter of a privileged bidder.
- **Award**: When selection criteria are defined in too general terms, the risk of a subjective evaluation that favours a specific bidder is more common.
- **Contracts with low monetary value**: Overestimated prices are used for purchases of low monetary value, resulting in significant mismanagement of public funds.
- **Contract management**: Contracts are invoiced but not completed.

In order to reduce identified risks, several **recommendations** were elaborated by the Consultancy and Policy Office on Federal Public Procurement, including:

- In order to avoid bias in the definition of specifications, the public official who is responsible for the definition of specifications must justify that these are based on the results of a market study about the needs. The definition of specifications must be clear and detailed.
- To avoid modifications of the bid during the process, it was recommended to use the four-eyes principle, with several persons signing the bid project.
- Effective accountability mechanisms are necessary to balance the discretionary power of the public official responsible for inviting suppliers in a restricted procedure.
- Several public agents should attend the official opening of the submitted bids.
- A database should be created containing information on past purchases to be used as a price reference system.

Source: Belgium, response to the OECD Questionnaire.

Other experiences include the development of a **risk mapping methodology together with civil society –** for example national chapters of Transparency International **–** to identify vulnerabilities, point out aspects that need to be controlled in each process to lessen risks, and improve

procurement processes. Box IV.6 illustrates the recent development in Brazil of a methodology to map out risks of corruption in key processes of public institutions, and its pilot application for public procurement. Experience with the risk mapping exercise in countries in Central and Latin America – such as Argentina, Brazil and Colombia – has highlighted a number of conditions for it to be effective:

- **Involvement of stakeholders**: The methodology should be developed jointly with the actors directly involved in the public procurement process and therefore subject to those risks;
- **Comprehensiveness**: The analysis should cover all potential risks, including aspects linked to political corruption;
- **Action oriented**: Based on the findings of the risk mapping, practical alternatives and ways to protect procurement officials against the risks identified should be worked out together with the main stakeholders.

Box IV.6. Methodology for risk mapping in Brazil

In Brazil, the General Controller's Office and *Transparencia Brasil* have recently developed a methodology for mapping out **risks of corruption in key processes** of public institutions. The methodology focuses on a combination of activities involving the transfer of financial resources that receive input information and produce outputs according to a pre-established logic.

The methodological framework has been applied as a pilot for public procurement processes. It has reviewed key decision steps in procurement:

- Starting with **input** information (e.g. is the necessary information included in procurement regulations, is the information available timely?);
- Through the **decision itself** (e.g. do decision makers have the necessary knowledge, is the decision oriented towards economic efficiency?);
- To **outputs** (e.g. is the final procurement in line with the decision, is there a systematic recording of the process?).

To gain a better understanding of the public procurement process, performance indicators have been used such as the average time to complete the process, the average value of procurements, the percentage of procurement processes completed and the degree of compliance with regulations. Against these indicators, the results of the risk mapping have helped to identify dysfunctions and irregularities in the public procurement process and define solutions together with stakeholders to address them and improve the overall efficiency.

The methodology will be applied not only in public procurement but also in other processes that are vulnerable to corruption, that is processes involving substantial resources transfer, or direct contact with the private sector (e.g. provision of certificates or licenses for companies) or with citizens (e.g. taxation).

Sources: - Brazil, response to the OECD Questionnaire.
- Case study provided by Transparencia Brasil for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

Some countries have also started to employ a "**probity auditor**" **for conducting external audits** of procurements that are at risk because of their complexity, high-value or sensitivity. A probity auditor is an independent person who verifies that processes followed by an agency are consistent with Government regulations and good practice principles in terms of fairness, transparency and openness in procurement (e.g. in Australia, Canada and New Zealand). The objective of engaging a probity auditor is to provide:

- A level of independent assurance about the conduct of a bid process, in particular its openness and fairness to all parties concerned;
- Additional oversight of the procurement process, especially in contracts that are vulnerable to mismanagement and potentially corruption.

To be effective, the circumstances in which a probity auditor may be required should be clearly defined. One potential pitfall is that probity audits are used by agencies as an 'insurance policy' to avoid accountability for decisions made. Box IV.7 illustrates the guidelines developed in Australia for determining circumstances in which a probity plan could be used, as well as the criteria for selecting the probity auditor.

Box IV.7. Probity auditors in Australia: Independent review of projects at risk

The probity auditor is an independent auditor who confirms if a government procurement process has been conducted fairly through monitoring, assessing and, where necessary, correcting a bidding process. In Australia, all probity auditors' reports are made available in full for scrutiny by the Parliament, the Auditor-General and anyone else with an interest.

The probity auditor is responsible for providing an independent view of the procurement process with the provision of opinions, conclusions and findings that are impartial and are viewed as impartial by knowledgeable third parties. The probity auditor should possess adequate professional proficiency for the tasks required, including technical procurement abilities and a good knowledge of the government's probity framework.

The probity auditor should only be used in specific circumstances to verify that processes followed by an agency are consistent with Government regulations and good practice principles, in particular when the project is politically sensitive and potentially controversial; very complex; or has a significant financial impact.

This has proved particularly useful for projects where the integrity of the process may be called into question or to avoid perception of favouritism. However, there is a risk that this might be used as an 'insurance policy' to avoid accountability for decisions made, or become a substitute for good management practices. To avoid this risk, the Independent Commission Against Corruption in New South Wales has developed guidelines and criteria to be used by public sector agencies in determining whether and how a probity auditor should be engaged.

Sources: - Australia, response to the OECD Questionnaire.
- *Memorandum No: 98-12 to all Ministers on the Use of Probity auditors by public sector agencies and Whole-of- Government Contract for Probity Auditors*, ICAC, New South Wales.

In order to help prevent and detect irregularities and corruption in public procurement and constantly improve the system, there is growing awareness of the need to provide **specialised training for both procurement officials as well as investigators**. The objectives of module training may vary accordingly:

- For procurement practitioners, to introduce preventive and effective internal control procedures. The training may take the form of an analysis of existing laws and regulations, a typology of risks as well as proposals for improving internal controls.

- For control and investigation officers in charge of verifying procurement procedures, to help them detect fraud and corruption. This may be done through a list of indicators of fraud making it possible to identify, demonstrate and prove fraudulent arrangements.

In particular, the Central Service of Corruption Prevention in France has developed specialised training material for procurement practitioners, as well as control and investigation officers (see Box IV.8).

Box IV.8. Specialised training for public procurement in France

This case study is an example of training material for public procurement developed by the Central Service of Corruption Prevention, an inter-ministerial body attached to the Ministry of Justice in France. It illustrates the challenges faced by various actors at different steps of the procedure, from the mayor's verifications through internal control to the investigation carried out by the Ministry of Justice. It also highlights the **difficulty of gathering evidence** on irregularities and possibly corruption in procurement.

Issue at stake

Following an open invitation to bid, an unsuccessful bidder complains to the mayor of a commune accusing the bidding panel of irregularities because his bid was lower than that submitted by the winning bidder. How should the mayor deal with the problem?

Stage one: Checking compliance with public procurement procedures

The firm making the complaint is well known and is not considered « litigious ». The mayor therefore gives its claim his attention and requests the internal audit service to check the conditions of award of contract, particularly whether the procedure was in compliance with the regulations (the lowest bidder is not necessarily the best bidder) and with the notices published in the official journal. The mayor learns from the report prepared by the bidding committee that although the procedure was in accordance with the regulations, the bid by the firm in question had been revised upwards by the technical service responsible for comparing the offers. Apparently the firm had omitted certain cost headings which were added on to its initial bid.

Stage two: Replying to the losing bidder

The mayor lets the losing bidder know exactly why its bid was unsuccessful. However, by return post, he receives a letter pointing out that no one had informed the company of the change made to its bid, which was in fact unjustified since the expenditure which had purportedly been omitted had in fact been included in the bid under another heading.

Stage three: Suspicions

The internal audit service confirms the unsuccessful bidder's claim and points out that nothing in the report helps to establish any grounds for the change made by the technical service. It also points out that it would be difficult for an official with any experience, however little, not to see that the expenses had been accounted for under another heading. The mayor now requests the audit service to find out whether the technical service is in the habit of making such changes, whether it has already processed bids from the winning bidder and if contracts were frequently awarded to the latter. He also requests that it check out the background of the officials concerned by the audit. Do they have experience? Have they been trained? Do they have links with the successful contractor? Could they have had links with them in their previous posts? What do their wives and children do? Examination of the personnel files of the officials and the shares of the company which won the contract fail to find anything conclusive: the only links between the officials or their families and the successful bidder are indirect.

Stage four: Handing the case over to authorities of the Ministry of Justice

Having suspicions, but no proof, the mayor hands over information so that investigations can begin. The investigators now have to find proof that a criminal offence (favouritism, corruption, undue advantage, etc.) has been committed and will exercise their powers to examine bank accounts, conduct hearings, surveillance, etc. The case has now moved out of the domain of public procurement regulations and into the domain of criminal proceedings.

Conclusion

Unable to gather any evidence and with no authority to conduct an in-depth investigation or question the parties concerned, the mayor takes the only decision that is within his power, which is to reorganise internally and change the duties of the two members of staff concerned. However, he must proceed cautiously when giving the reasons for his decision so as to avoid exposing innocent people to public condemnation or himself to accusations of defamation while the criminal investigation is in progress.

The mayor also decides that from then on the report by the technical services to the bidding committee should give a fuller explanation of its calculations and any changes it makes to the bids, as well as inform systematically bidders of any changes.

Source: Case study for specialised training, Jean-Pierre Bueb, Counsellor, Central Service for Corruption Prevention, France.

CHALLENGING PROCUREMENT DECISIONS: COMPLAINT AND RECOURSE MECHANISMS

A sound procurement system uses the participation of bidders, public officials and other stakeholders as part of the control system by establishing a clear regulated process for facilitating the exposure of wrongdoing in the administration, as well as enabling the fair and timely resolution of bidders' complaints.

Reporting mechanisms for officials

Whistleblowing can be defined as a means to promote accountability by encouraging the disclosure of information about misconduct and possibly corruption while protecting the whistleblower against retaliation. If two-thirds of countries have developed procedures for public officials to facilitate the exposure of wrongdoing in the administration (e.g. complaint desk, hotline, etc.), **few countries have developed whistleblowing protection** in the public service (e.g. Canada, Korea, the United Kingdom and the United States).

There is growing recognition of the potential of this mechanism for **detecting large-scale irregularities** and corrupt acts in the use of public funds, including in public procurement, which would not have been identified by other control mechanisms (see below the example of Canada and the Gomery report). Another famous example is a whistleblowing case that revealed in 2004 that government contractors in Irak were using offshore companies in countries commonly known as "tax havens" to fraudulently overcharge on contracts of the government in the United States.

However, the **number of cases** of breaches detected through whistleblowing is **still limited**. One of the main reasons is that whistleblowers are often the target of retaliations such as harassment, intimidation, demotion, and dismissal. Other frequent barriers in countries include the duty of loyalty and fidelity to the employer as well as a cultural resistance from employees stemming from the assimilation of whistleblowers with "informants" or "denunciators" in past history.

Box IV.9. Reporting wrongdoing in public procurement: Whistleblowing cases in Canada

In the last five years, whistleblowing cases in Canada have been linked mainly to the following categories of misconduct:

- Violation of laws or regulations;
- Mismanagement;
- Harassment, abuse of authority, interpersonal conflict;
- Misuse of public funds and assets.

The following chart highlights the cases related to the misuse of public funds.

Whistleblowing cases reported in the government of Canada involving the misuse of public funds and assets (2002-2005)

	2002-2003	2003-2004	2004-2005	Total
Public Service Integrity Officer (PSIO)	6 cases (1/3 related to procurement)	6 cases (none of them related to procurement)	6 cases (1/2 related to procurement	18 cases
Office of Public Service Values and Ethics (OPSVE)	3 cases	3 cases	Not available	6 cases

A significant example of a whistleblowing case is the Sponsorship Programme and Advertising Activities: Public Works and Government Services. It illustrates the potential of whistleblowing for revealing major corruption scandals. In 1995, an employee disclosed his concerns regarding contracting irregularities within the Sponsorship Programme. After investigations it was found that funds disbursed through the Sponsorship and Advertising Programmes that were intended for the promotion of national unity and the enhancement of the image of the Federal Government had been diverted from their intended proposes, in some cases towards political activities, and spent regardless of economy and probity.

Following this case, the Auditor General's and the Justice's recommendations touched on several areas from required improvements to contracting control and documentation to political governance. A number of individuals involved in the mismanagement of the Sponsorship Programme's funds have been criminally charged. The Federal Accountability Act introduced several measures to reinforce citizens' confidence in procurement (see Box III.2).

Considering that the number of reported whistleblowing cases is still limited, efforts have been initiated to ensure a better protection of whistle blowers against retaliation with the approval of the Public Servants' Disclosure Protection Act[23] in November 2005.

Source: Case study provided by Canada for the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.

23. The Public Servants Disclosure Protection Act in November 2005 defines "protected disclosure" as a disclosure that is made in good faith by a public servant: in accordance with the Act; in the course of a parliamentary proceeding; in the course of a procedure established under any other federal statute; or when lawfully required to do so.

Encouraging employees to blow the whistle and protecting them from reprisals are two interconnected issues: any increase in protection has the potential to encourage people to disclose wrongdoing. This may take the form of measures to prevent reprisals or on the contrary compensation schemes where reprisals occur. A number of countries - such as Canada, Korea and Norway - have recently initiated reforms to introduce or **strengthen the protection** for whistleblowers in the public service, through legal protection, anonymity or the setting up of a protection board.

In Australia, various disclosure systems are used for ensuring anonymity. This includes systems that operate on the basis of anonymously provided information (e.g. on-going communication through anonymous email exchanges, special phone line), exclude the identity of the whistleblower as a subject of investigation, or impose a duty upon the recipient of the disclosed information not to reveal the discloser's identity. In the United States, whistleblowers receive further protection from the financial impact that their disclosure may have on their lives as a result of reprisals (e.g. reinstatement, difference between what the employee was paid and the amount that should have been paid, litigation costs, and attorney fees). An emerging approach is to provide incentives to **encourage whistleblowing**, for example through financial rewards or advantage in career progress. For example, this was introduced in Korea in 2003, and was proposed by the Federal Accountability Act in Canada, sent to Parliament in 2006.

Recourse systems for challenging procurement decisions

Recourse systems, like audit systems, fundamentally serve a procurement oversight function. They provide a means of monitoring the activities of government procurement officials, enforcing their compliance with procurement laws and regulations, and correcting improper actions. Furthermore, they provide an opportunity for bidders and other stakeholders to contest the process and verify the integrity of the award. For instance, in the United States, any interested party – actual or potential bidder – can file a protest with the Government Accountability Office.

There is common recognition that effective recourse systems for challenging procurement decisions should provide timely access, independent review, efficient and timely resolution of complaints and adequate remedies. However, the practice varies significantly across countries.

Timely access to recourse mechanisms

Both the procurement and the recourse system itself must be organised in a manner that permits bidders to initiate recourse before the contract starts. Following the European Court of Justice case law Alcatel[24], several countries have recently introduced a **mandatory standstill period** between the contract award and the beginning of the contract to provide the bidder with a reasonable opportunity for the award to be set aside - for instance in the Netherlands, Norway and the United Kingdom. In Portugal, a report with the intention of award is sent to all bidders after evaluation by the committee so that suppliers may question the results (that is procedure, applicability and choice of solution for procurement) and challenge procurement actions accordingly in the following five days.

While countries generally provide a recourse mechanism after the award, bidders are also able in some countries to challenge procurement decisions at other stages of procurement, and even sometimes after the end of the contract. In Sweden, there is a possibility to make a complaint at **any stage of the procurement** process and even after one year through a claim for damage in civil court. The records for the procedure are made available not only for bidders but also for other interested parties.

Independence of complaint and review systems

In order to avoid litigation and provide an opportunity for contracting authorities to make the necessary adjustments, a vast majority of countries encourage and in some cases, for instance in Germany, make it mandatory for bidders to submit their complaints directly to the **procuring authority**.

A complaint to the contracting authority may offer clear advantages, especially in cases when a genuine or obvious mistake rather than a deliberate breach of public procurement law is the reason for the dispute or when the case involved "delicate" interpretations of the law. Furthermore, the bidder can **avoid confrontation** with the contracting authority as well as the costs involved when using quasi-judicial or judicial review.

On the other hand, time-consuming complaint proceedings can **prolong the overall review procedure** if it only the prelude to quasi-judicial or judicial review. Another concern is to ensure that the decision is not **biased** by the public official or the procuring agency's interests. For instance, in

24. In its Alcatel judgment (Case C-81/98), the Court of Justice stipulated that Member States were required to set up review procedures permitting a decision awarding a public procurement contract to be suspended and annulled at a stage where the infringement can still be rectified. For further details, see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0081:EN:HTML.

Belgium, the heads of procuring agencies rather than contracting officers determine whether protests have merit in order to avoid individual conflict-of-interest situations. Furthermore, recourse is also available to Mediators that provide independent oversight over actions of the Belgian administration.

Efficient resolution of complaints

Several countries introduced a **specific public procurement mechanism** to improve the efficiency of the resolution of complaints (e.g. in Austria, Canada, Denmark, Germany, Hungary, Japan, Norway, Poland, the Slovak Republic and Slovenia). This contributes to reinforcing the legitimacy of decisions that are grounded on specific professional knowledge and reducing the time for resolving complaints. In Japan, members of the Government Procurement Review Board are scientists, scholars and other experts with relevant experience in government procurement (see Box IV.10).

Box IV.10. The Government Procurement Challenge System in Japan

In 1995, the Japanese Government established a complaint mechanism tailored to public procurement. This mechanism combines and strengthens the voluntary measures which Japan has previously taken. It is applied to all central government entities covered by the WTO Government Procurement Agreement (GPA).

The review mechanism of complaints is incumbent on two entities:

- First, the *Office of Government Procurement Review* that has adopted the "Complaint Review Procedures for Government Procurement". It details the process to be followed.
- Secondly, the *Government Procurement Review Board*, which receives and reviews the actual complaints. Any supplier may file a complaint with the Board, who believes that a government entity has behaved in an inappropriate manner, or was inconsistent with the GPA. The Board is composed of 23 members. The Board is responsible for reviewing complaints filed by suppliers with regard to procurements by central government entities and central-government-related entities. Members of the Board are scientists, scholars and other experts with relevant experience in government procurement.

The Board must prepare a written report on his findings within 90 days after the complaint has been filed. In this report, it must state whether or not the procurement was inconsistent with the GPA or the government entity has behaved in an inappropriate manner. In case of inconsistence or inappropriateness, the Board must recommend remedies. Furthermore, in its report, the Board is authorised to consider additional factors. These include the seriousness of deficiencies in the procurement process, the good faith of the complainant and the entity concerned, as well as the impact of the recommendations on the operations of the entity. Information on regulations and past

complaints is available in English on the website of the Office for Government Procurement Challenge System (http://www5.cao.go.jp/access/English/chans_about_e.html). If the entity does not comply with the recommendations, it must report its reasons to the Board.

Since the establishment of the Board in 1995, only six complaints have been filed, while other inquiries have been resolved through consultation.

Sources: - Japan, response to the OECD Questionnaire.
- J.H. Grier: An Overview of the Japanese Government Procurement System. *Public Procurement Law Review*, Issue 6.

In a growing number of countries – including Austria, Denmark, Luxembourg, Norway, Sweden, and Switzerland – there is a body for dispute resolution to encourage **informal problem solving.** Box IV.11 on the experience of the Public Procurement Board in Norway illustrates the potential advantages in terms of efficiency and lowering the costs compared to formal litigation. Other countries, such as Finland, Germany and the United Kingdom, have set up contact points that render advice and assist companies facing problems specifically in cross-border cases. The national ombudsman may also play a role in public procurement disputes between bidders and contracting authorities, for instance in Belgium, Luxembourg, and the Netherlands.

Box IV.11. Efficient and timely resolution of complaints: Informal problem solving in Norway

In Norway, dissatisfied suppliers in a public procurement procedure have had the choice to take a formal complaint to ordinary courts since 1994. This formal review has been available to secure correct and effective application of procurement rules, as required by the Remedies Directives of the European Commission. The courts have had the power to suspend procurement process before awarding the contract and also grant compensation for damages (e.g. loss of expenses, profit, etc). However, the courts have received only very few complaints in the past ten years.

In January 2003 an **advisory complaint board** – the Public Procurement Complaint Board (KOFA) – was created with the objectives to:

- Make the enforcement of the public procurement regulations more efficient;
- Solve disputes in a faster and more flexible way (e.g. lower the litigation costs); and
- Increase the level of competence on public procurement (e.g. through publishing the opinions and clarifying the interpretation of the rules and principles).

The Public Procurement Complaint Board is an independent advisory body that consists of ten highly qualified lawyers. Three members of the Board participate in the handling of each complaint. Although its decisions are not legally binding, due to the high quality of its recommendations, the Board's opinions are followed by the parties in nearly all cases. The Board's activity has led to a noticeable increase in knowledge of the application of public procurement rules.

The public procurement legislation grants involved bidders the right to complain after a contract has been awarded. The complaint must be submitted to the Complaint Board within six months after the contract has been signed.

When the complaint is submitted within the standstill period the Complaint Board asks the contracting authority to postpone the signing of the contract until the case is closed. Furthermore, the Board gives priority for reviewing those complaints where the contracts are not yet signed. By January 2006 the average time for decisions was:

- 51 days in case of contracts that had not been signed; while
- 224 days in case of already signed contracts.

The Board has handled approximately 850 cases since its creation in 2003.

The Norwegian administration has not experienced any major problems related to this public process of handling complains, which is also open to media oversight. The principle that all written information is recorded in public archives, also apply in this field. However, the Freedom of Information Act provides exceptions from this principle.

Furthermore, a procedure was set up in 2006 to handle cases when contracting authorities disregard the rules as a whole by not advertising competition. For direct illegal procurement, an **administrative fee** can be levied by the complaint board (up to 15% of the contract value), which is a legally enforceable decision.

An evaluation of the Public Procurement Complaint Board is under way by an external firm to assess whether the original objectives have been achieved or adjustments are necessary to accomplish them, for example in the Board's composition, competence, cost, and the capacity in the Board and its Secretariat.

Sources: - Norway, response to the OECD Questionnaire.
- Report concerning the Study on Pre-Contract Problem-Solving Systems, August 2002.

Other solutions include the possibility of a decision in a shorter period of time if the complaint is related to the award. For instance, in the Netherlands, in case of urgency (e.g. pending the procurement process), an action can be brought before the president of a district court in **a summary injunction procedure**, where the annulment of the award decision and the order of a new public procurement process for the public contract can be requested.

Adequate remedies

A core element of the integrity of a procurement system is the availability of remedies that can be awarded when an unsuccessful bidder considers that the process was conducted in an inappropriate manner or raises the possibility of violation of the procurement regulations. The recourse system must have the authority to define and enforce interim measures, as well as final remedies that correct inappropriate procuring agency actions and compensate bidders. In Ireland, a complainant may seek to have an award process suspended, an award decision rescinded or be awarded compensation for loss or damages. Box IV.12 illustrates the findings from a recent study of the Programme Support for Improvement in Governance and Management (SIGMA) that identified five main categories of available remedies in the European Union Member States.

Box IV.12. Remedy systems in European countries: Findings from a SIGMA study

The SIGMA Programme is a joint initiative of the OECD and the European Union (EU), principally financed by the EU, with the mission of providing support to partner countries in their efforts to modernise public governance systems. SIGMA carried out in 2006 a comprehensive study of the Public Procurement Review and Remedy Systems in the European Union. The study identified five main categories of available remedies:

Setting aside of public procurement decisions, including the award decision

This remedy is generally available in the EU as a decision prior to the conclusion of a specific contract. Individual award decisions to be set aside can concern an unlawful contract notice, discriminatory specifications or bid documents, an illegal qualification decision, illegal short listing decisions, and even the contract award decision itself. Moreover, review bodies may, for example, order the removal or amendment of specifications and other bid documents or the recommencement of the procurement procedure in total or from a specific point in time. The burden of proof is generally on the applicant.

Interim measures

In a limited number of Member States, filing a lawsuit has an automatic suspensive effect, interrupting the procurement procedure. In most countries bidders have to specifically request the review body to apply interim measures, for example the discontinuation of the procedure. The review body can then apply interim measures pending a final decision, taking into account the probable consequences of interim measures for all interests likely to be harmed, including the public interest, and decide against awarding such measures whenever their negative consequences would outweigh their benefits.

Annulment of a concluded contract

This remedy takes effect after the conclusion of the procurement contract and affirms its cessation. Without the possibility of annulment of an already concluded contract the only remedy remains the damages, so this remedy has particular importance. The annulment of a concluded contract is a widely available remedy in the majority of the EU Member States. However, in practice it is difficult to obtain the annulment of a concluded contract, if it is possible at all. To allow the setting aside of the contract award, many jurisdictions have introduced a standstill period of 7-30 days between the contract award decision and the conclusion of the contract, which is a period given to bidders to initiate review proceedings.

Damages

The requirements for the award of compensation for damages are usually the following: loss (pecuniary or otherwise) suffered by the claimant, a breach of the law by the contracting authority or entity, causality (that is that the loss must be caused by the breach of law). The bid costs are reimbursed in all EU Member States. Regarding damages for lost profits, it is very difficult in most Member States to provide the evidence required for damages for lost profits. Consequently, the number of requests for damages is relatively low in most countries, as are judgements in favour of the complainants.

Pecuniary penalties and periodic penalty payments

Payments are not available remedies for unsuccessful bidders, but form part of the public procurement remedy systems. They are applied in order to force contracting authorities and entities to comply with their judgments. Without acquitting the pecuniary penalties or the periodic penalty payments, the contacting authority cannot continue with the award procedure.

Sources: - Presentation at the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Procurement, November 2006.
- *Public Procurement Review and Remedies Systems in the European Union*, SIGMA Paper N°41, 2007.

Some countries do not provide an **automatic suspension** of the procurement procedure in case of review, which leads in practice to the fact that damages after the conclusion of the contract are often the only available remedy. In Slovenia, the submission of a claim to the National Review Commission has an automatic suspension effect (see Box IV.13). In the United States, when a bidder files a timely protest, the procuring agency is required to put the procurement on hold until the protest is resolved, whether the protest is raised pre- or post-award to the agency or to the General Accountability Office. If the negative consequences of the automatic suspension outweigh its benefits, some countries provide the possibility that the contracting authority asks the review body for **permission to continue** the procurement procedure, except for the conclusion of the contract. They may even allow the possibility of entering into the contract during review proceedings, for instance in Germany.

Box IV.13. Automatic suspension effect of procurement reviews: The National Review Commission in Slovenia

The Public Procurement Act in Slovenia sets up a two-stage review process for procurement decisions. The first procedure consists of a complaint filed directly to the contracting authority, which is a rather formalised procedure with an appointed Review Expert from a list maintained by the Ministry of Finance.

In the second stage, the bidder may initiate proceedings before the National Review Commission in case the bidder does not agree with the decision of the contracting authority or if the contracting authority does not decide in due time (15 days). The National Review Commission is an **independent body under the Parliament**, which was established in 1999 and is responsible for the review of complaints in public procurement. In addition to disappointed bidders, the Public Procurement Office, the State Attorney's Office and the Office of Competition have the right to file a complaint to the Commission.

The submission of a review claim to the Commission has an **automatic suspension effect**. In case of violation of the basic principles of public procurement the Commission examines all the relevant information and decides authoritatively. The National Review Commission consists of five members, of whom one acts as President and one as Deputy-president; all members are appointed by the Parliament. Expert support to the work of members is done through twelve consultants. Two types of decisions can be adopted by the Commission: the claim can be rejected or sustained. In the second case the procedure in question will partially or entirely be invalidated.

The National Review Commission only has the competences of an appellate body to annul decisions of contracting authorities. But the Commission can advise a contracting authority on how to implement the procedure regarding the invalidated element. Such advice can be binding on the authority and in case of a breach the Commission can report to the supervisory body of the contracting authority or to the Government.

The Commission reviews about 300 cases per year. It is obliged to give its judgment within 15 days from receipt of the claim, which can be extended by a further 20 days in justified cases. The average time for handling the complaints is approximately 20 days.

Sources: - Slovenia, response to the OECD Questionnaire.
- *Public Procurement Review: Slovenia,* SIGMA, June 2003.

ENSURING PUBLIC SCRUTINY

There is an emerging trend in several countries to involve more and more stakeholders – not only private sector organisations but also end-users, civil society, the media and the public at large – in the procurement process. Interestingly, in recent years some countries have introduced direct social control mechanisms by involving stakeholders in scrutinising integrity in public procurement.

Independent oversight bodies

In order to ensure public scrutiny, it is common for the legislative branch to undertake reviews of procurement activities, either through a permanent committee or an *ad hoc* committee for investigating a specific issue. Several countries formed a **parliamentary committee** to review projects, conduct investigations and/or organise hearings on large-scale procurements, which hold important risks for public funds (e.g. in Greece, Mexico, the Netherlands, Slovenia and Turkey). Countries that have established a parliamentary committee for procurement usually aim at preventing mismanagement and corruption by:

- Making the link between the procedures for financial planning and control for major public procurement projects;
- Providing the Parliament with a formal position in the agenda setting process; and
- Empowering the Parliament's budget's right.

Box IV.14 illustrates the results of a recent Dutch parliamentary inquiry in big infrastructure projects and the role of the parliamentary committee in reinforcing political control over major projects.

Box IV.14. Strengthening parliamentary control in big infrastructure projects: Findings of the Dutch parliamentary inquiry

Large infrastructure investments contain particularly high risks because of their long planning horizons where the budget scheduling may not be adequate for reasons such as unplanned events or the change of scope of the project.

In order to verify the integrity of decisions made on high-valued public investments, the Netherlands established a Parliamentary Committee to review the realisation of large infrastructure projects, The Committee showed that in **nine cases out of ten decisions about large infrastructure projects are misinformed** about costs and benefits, cost overruns and benefit shortfalls being the most common pitfalls. This is illustrated by two cases that have been investigated by the Committee:

- *The Betuwe Route construction:* This route is a 160 km long railway line that enables the growing flow of goods from the international seaport of Rotterdam to be transported via the European hinterland. In this special case, the analysis of the Committee showed that the budget for the project had doubled between 1983 and 2005 due to price increases (34% of the total cost increase) and to the change of scope (42% of price increase).
- *Reconstruction of the High Speed Line South:* this route between the Netherlands and Belgium is a project that showed a 43% difference between the original bidding price and the current costs for the budget.

One recommendation of the investigation of the Parliamentary Committee was that earlier involvement of the Parliament would have been necessary. Political control could be reinforced on government procurements through an explicit parliamentary agreement on the need for the infrastructure project. Furthermore, the Parliament should have put more effort into controlling government purchases and spending.

These conclusions indicate a possible shift in balance of power between Parliament and the administration in procurement to promote a higher level of transparency and better information sharing. The Parliament should be able to check crucial information about major projects involving important risks for public funds.

Source: Parliamentary Committee on Infrastructure Projects, Keynote speech of the Netherlands at the OECD Expert Meeting on Integrity in Public Procurement, June 2005.

Another common form of independent oversight is the Ombudsman/Mediator, who may conduct investigations into procurement activities and resolve matters by conciliation (e.g. Australia, Belgium, Brazil, Luxembourg, New Zealand and the United Kingdom). Last but not least, Supreme Audit Institutions also contribute to scrutinising government actions, with the preparation of reports for Parliaments. For instance, in Poland, the award of the contract is subject to control from the Supreme Chamber of Control, a constitutional body independent from the government administration that reports to Parliament. This scrutiny keeps public servants accountable for their actions, ultimately, to the public.

The international community also plays a key role in monitoring progress in public procurement reforms, in particular in aid recipient countries. In particular, the OECD Development Assistance Committee (DAC) Joint Venture for Procurement is working together with multilateral and bilateral donor members and partner countries to assess the performance and quality of public procurement systems in developing countries (see Box IV.15).

Box IV.15. Assessments in developing countries: The OECD-DAC Joint Venture for Procurement

The OECD-DAC Joint Venture for Procurement is developing with donor members and partner countries a common, country-led approach to strengthening the quality and performance of public procurement systems.

The latest version of the **methodology** has been developed to be the first test version of this "mutually agreed framework" for procurement systems. It consists of several instruments, in particular:

- **The Baseline Indicators** are made up of four "pillars": I – Legislative and Regulatory Framework, II – Institutional Framework and Management Capacity, III – Procurement Operations and Market Practices and IV – Integrity and Transparency of the Public Procurement System (see Annex E for details on pillar IV).

- **The Compliance and Performance Indicators** help identify areas of weak compliance or performance. Indicators are associated with the Baseline Indicators but are not scored at this point in time. As there are no agreed standards of performance, analysis of available data and information can determine the degree of compliance of the system with the country's own policies and regulations. The use of indicators has to be determined on a country-by-country basis taking into consideration the specific capacities and available data and information.

A pilot exercise involving 22 pilot countries in Africa, Latin America and Asia is starting up in 2007 by means of a series of regional orientation workshops; these workshops aim at raising awareness about the structure and the application of the latest version of the common methodology for benchmarking and assessing public procurement systems. The workshops will also focus on the country-led teams of development partners that are to plan and manage the pilot exercise process, including the diagnosis/assessment phase and the development of procurement capacity development Action Plans.

Issues such as transparency, fairness and accountability (to donor and partner parliaments) will be given special consideration in discussions between pilot country and development partner representatives about the validation of assessment results. The roles and capacities of civil society and the private sector in monitoring and supporting transparency and accountability will be examined in the different country contexts during the pilot exercise.

Direct social control

An emerging practice is the use of direct social control by involving stakeholders in scrutinising integrity in public procurement. The **involvement of stakeholders** – private sector, end-users, civil society, the media or the public at large – aims at ensuring integrity in procurement, either through monitoring of the process, as a simple observer, or direct participation of stakeholders at key decision-making points.

Although a majority of countries have strong accountability mechanisms, more and more countries have involved representatives from NGOs, academics, end-users organisations and/or industries to **scrutinise the integrity of the procurement process**. In particular Integrity Pacts have been used in various regions of the world to bind both government officials and stakeholders to ethical conduct, using civil society as an independent eye in the process. They have two main objectives, namely to enable:

- **Companies** to abstain from corruption by providing assurance to them that the competitors will similarly refrain from corruption, and the government agencies are also committed to prevent corruption; and
- **Governments** to reduce the high costs and the distortion effect of corruption in public procurement.

Stakeholders may be involved in monitoring the whole process from the pre-bidding to the contract management and payment, for instance in Mexico, or at specific vulnerable points in the process (e.g. observation of the opening of bids, of the negotiations, contract management, etc.). It is usually organised on an ad hoc basis (e.g. signature of a specific agreement between the procuring authority and the bidders) but may take a more permanent institutionalised form. For instance, in Luxembourg, members of the Chamber of Commerce and of the Association of Professions are systematically invited to attend the opening of bids.

Direct social control mechanisms have a potential not only to promote the integrity of the public procurement process, but also to improve overall efficiency. This has proved particularly useful in the contract management to help ensure the efficiency of the contract, for example, through social auditing or citizens' oversight. Box IV.16 illustrates how stakeholders, 'Social Witnesses', testify the integrity of the process, as well as provide recommendations to improve procurement processes.

Box IV.16. Direct social control in procurement: Social Witness in Mexico

The social witness is a representative of civil society, who acts as an external observer in a specific public procurement process. In order to promote transparency, diminish the risk of corruption and improve overall efficiency of procurement, this practice has been used for several years on a voluntary basis by public organisations in Mexico, following *Transparencia Mexicana*'s recommendation. The social witness not only provides a public testimony on the procurement process but may also provide non-binding recommendations during and after the process.

The social witness must be a highly honourable, recognised and trusted public figure who is independent from the parties involved in the process. The social witness has full access to the information and documentation in the procedure and also has the right to participate in critical stages of the procurement process, in particular:

- Checking the basis of the bid and the bidding notice;
- Observing all the sessions that are held with possible bidders to clarify any doubts they may have;
- Receiving the unilateral integrity declarations from the parties;
- Witnessing the delivery of technical and economic proposals;
- Observing the session in which the awarding will be announced.

Since December 2004, a strict regulation specifies the criteria for participation of social witnesses in procurement. In order to obtain a registration, they should in particular:

- Prove that they are not public officials;
- Have no penal antecedents nor have been sanctioned or disqualified;
- Declare formally that they will not participate in a procurement that could lead to a conflict-of-interest situation (e.g. family or personal relationship, business interest, etc.);
- Have knowledge of legal regulations related to procurement (if not they will attend a training session provided by the government).

In case of disrespect of ethical standards or disclosure of information on the procedure, the social witness is liable to sanctions.

The use of social witness has proved successful for the procurement of the *Comision Federal de Electricidad* (Federal Electricity Commission). The recommendations of the social witness have led to significant improvements, including an increase by 50% of the number of suppliers that have submitted bids, the expansion of the time limit for the presentation of bids and the provision of more precise and clear answers to the questions of bidders. The government estimated that the involvement of the social witness has led to a saving of USD 26 million in the overall cost of this procurement of hereditary insurances.

The actual list of registered social witnesses in Mexico can be found on the website of the Ministry of Public Administration (http://www.funcionpublica.gob.mx/unaopspf/unaop1.htm).

Source: Mexico, response to the OECD Questionnaire.

Alternatively, stakeholders may be actively **participating in decision-making points** of the public procurement process. Active participation means that stakeholders take a role in the exchange on policy making, for

example by suggesting policy options. In Belgium an advisory commission is used for important projects. In some cases, decisions are made in co-operation and consent between authorities and representatives of stakeholders, for instance in Korea and the United States. This is an advanced two-way relation between government and stakeholders based on the principle of partnership.

Participation is usually carried out on an ad hoc basis. For example, the procuring team in the United States balances many competing interests in the acquisition process, by involving not only representatives of the technical, supply and procurement communities but also sometimes the customers they serve, and the contractors who provide the products and services. Furthermore, in some countries, the participation is integrated in the review of complaints raised in the procurement process. For instance, two of the members of the Public Procurement Board in Turkey, which is the regulatory and review procurement body, are selected by the Cabinet among persons who have necessary qualifications and are nominated by the Union of Chamber of Commerce and Trade and the Confederation of Turkish Businessman Union.

A concern has been to ensure that the process for selecting stakeholders is based on sound criteria for selection (e.g. personal integrity of stakeholder, relevant expertise) and that clear restrictions are defined to prevent conflict-of-interest situations (e.g. absence of a relationship with contracting parties, etc.). The stakeholders monitoring the procurement process may be paid by civil society directly or possibly by the authority that is being monitored provided that the contract is transparent. Furthermore, both officials and stakeholders should be **liable for their actions**. In Korea, the Memorandum of Integrity Pact for suppliers, that is included in contract terms and conditions, includes the possibility of cancellation of contract, forfeiture of bond, liquidated damages and debarment of suppliers in case of proven corruption. Similarly, all employees from the Public Procurement Service who submit integrity pledges based on the Integrity Pact are held liable for compensation when they, on purpose or by mistake, cause damage to assets of government organisations. Box IV.17 highlights some of the results that have been achieved by the government of Korea.

Box IV.17. Adopting Integrity Pacts in Korea

An Integrity Pact (IP) is a multilateral and **mutual pact** against corruption among government organisations and bidders to prevent corruption in public procurement which establishes mutual rights and obligations.

In Korea, the Seoul Metropolitan Government adopted the concept of the Integrity Pact in July 2000, followed by the Public Procurement Service of Korea that implemented the Pact in March 2001. For the monitoring and full implementation of the Integrity Pacts, an IP Ombudsman System with five Ombudsmen has been introduced that organises **public hearings** at critical stages of the process for major construction, supply or consultant contracts. Experience indicates good acceptance and recognition by bidders of the benefits. For example, a survey by TI Korea in 2004 shows that after the adoption of Integrity Pacts, 91.4% of private sector respondents noticed a positive change in the attitude of public sector officials in connection with corruption; and 72.2% of public sector officials noticed a positive change in the attitude of private sector actors.

Since their original conception, Integrity Pacts have been used in 16 countries worldwide. They have proved to be **adaptable to different legal and economic** contexts from Colombia through Korea to Germany (e.g. the international airport in Berlin-Schönefeld) and have also been used for very sensitive purchases such as defence.

Sources: - OECD Symposium Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement, November 2006.
- Transparency International Integrity Pact and Public Contracting Programme.

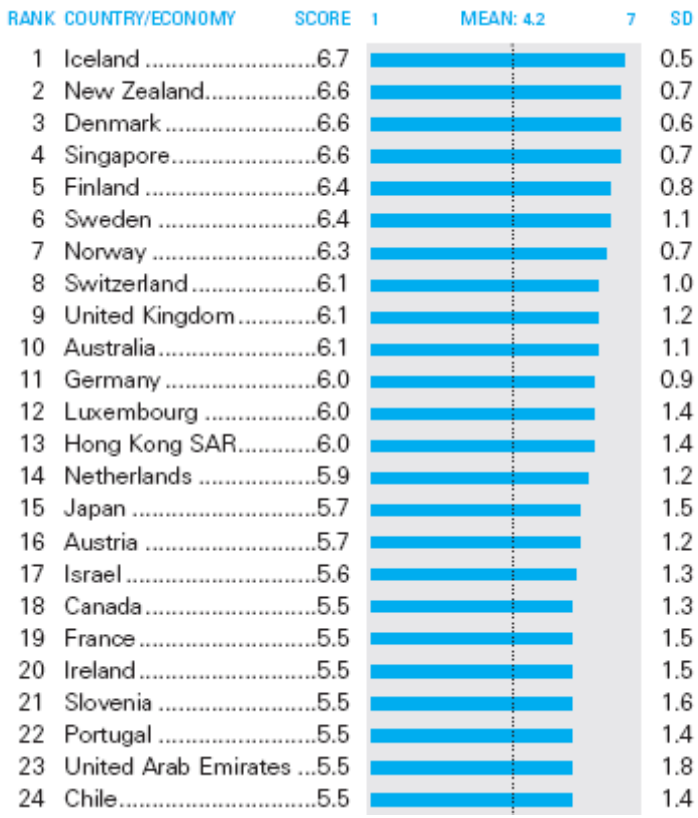
More generally, experience with Integrity Pacts in various countries shows that the conditions for successful implementation include:

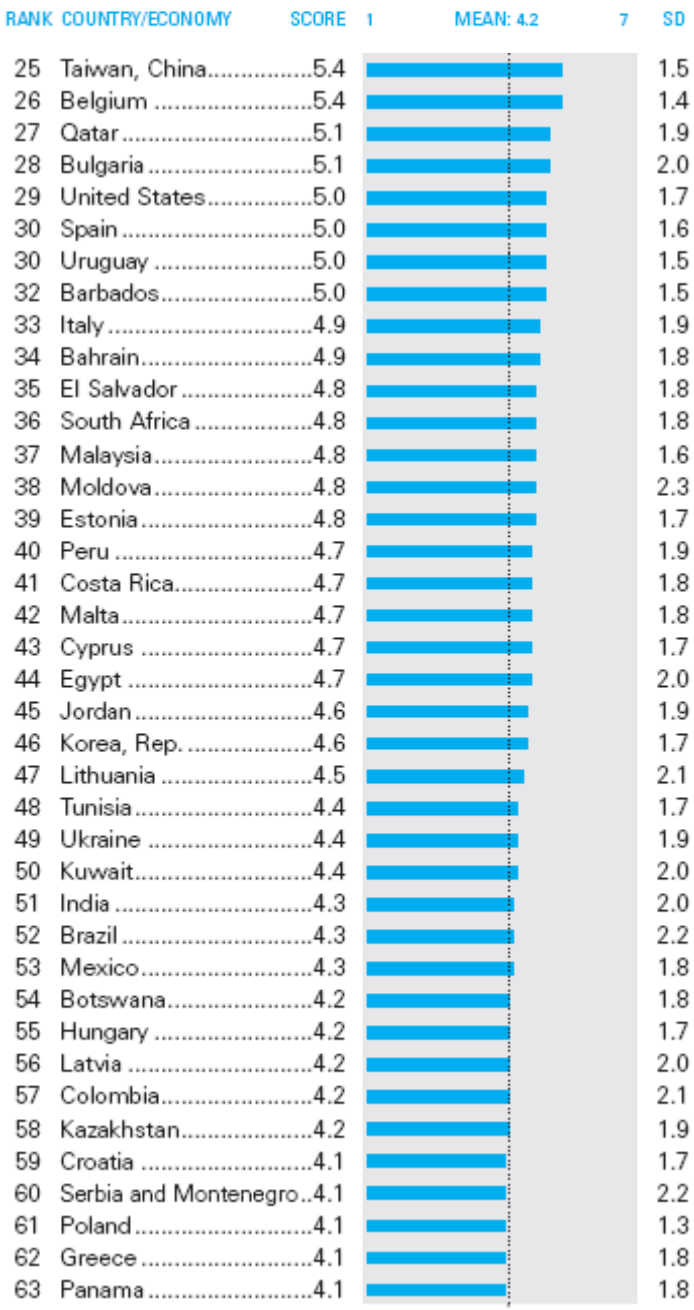
- Ensuring transparency at all steps of the process, from needs assessment to contract management and payment, through unrestricted access to all documents for the Monitor and for all activities, including when using consultants;
- Building a coalition of the main stakeholders with a strong commitment demonstrated by the public authority for the implementation of the Pact;
- Providing adequate incentives and sanctions for both the public authority and bidders;
- Ensuring independent monitoring of all phases of procurement that brings both policy and technical expertise to the project; and
- Helping provide the right conditions for detecting corruption, in particular through a whistleblowing system that both encourages and protects against potential retaliation.

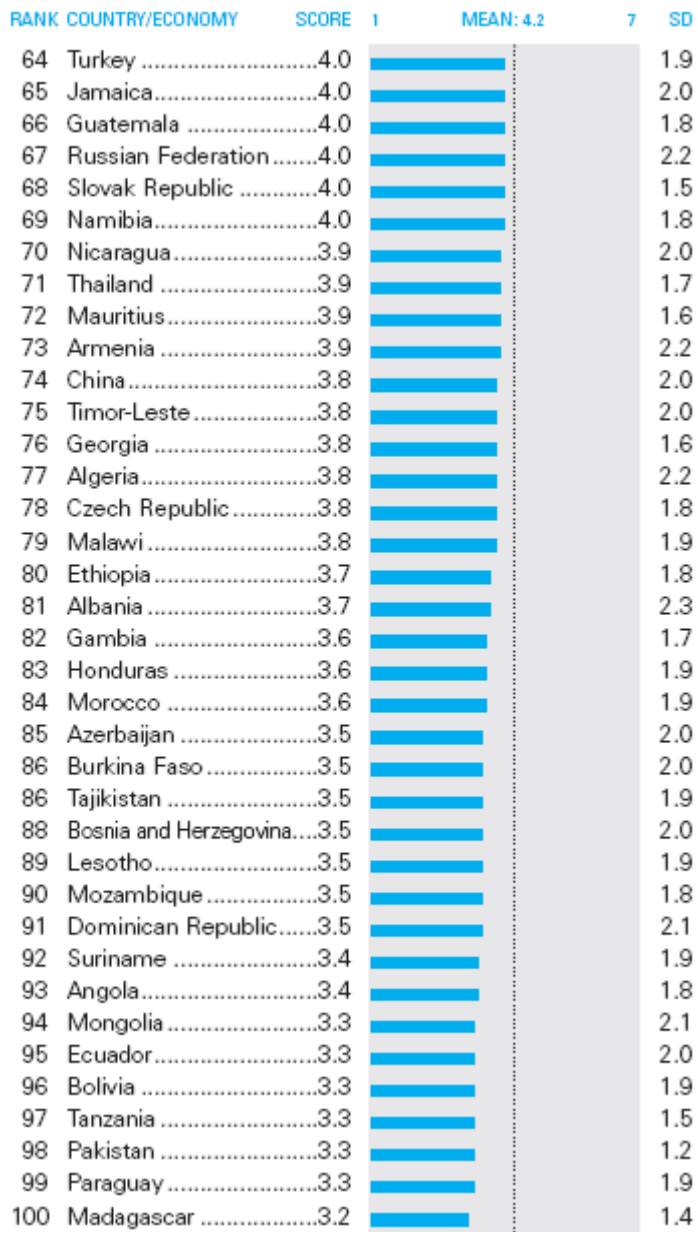
ANNEX A

IRREGULAR PAYMENTS IN PUBLIC CONTRACTS

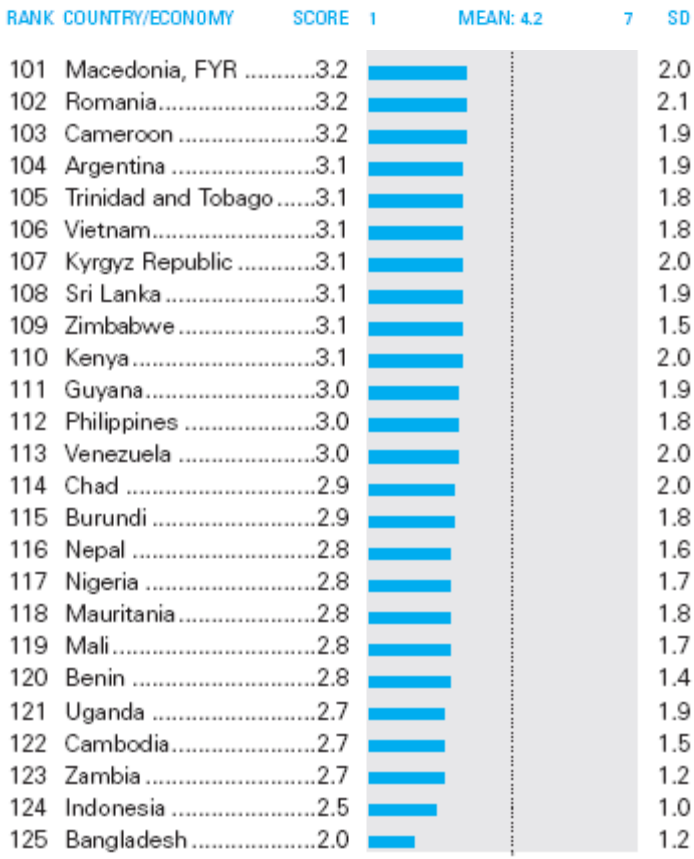
In your industry, how commonly would you estimate that firms make undocumented extra payments or bribes connected with awarding of public contracts (investment projects) (1 = common, 7 = never occur)?




RANK COUNTRY/ECONOMY SCORE 1 MEAN: 4.2 7 SD
25 Taiwan, China 5.4 1.5
26 Belgium 5.4 1.4
27 Qatar 5.1 1.9
28 Bulgaria 5.1 2.0
29 United States 5.0 1.7
30 Spain 5.0 1.6
30 Uruguay 5.0 1.5
32 Barbados 5.0 1.5
33 Italy 4.9 1.9
34 Bahrain 4.9 1.8
35 El Salvador 4.8 1.8
36 South Africa 4.8 1.8
37 Malaysia 4.8 1.6
38 Moldova 4.8 2.3
39 Estonia 4.8 1.7
40 Peru 4.7 1.9
41 Costa Rica 4.7 1.8
42 Malta 4.7 1.8
43 Cyprus 4.7 1.7
44 Egypt 4.7 2.0
45 Jordan 4.6 1.9
46 Korea, Rep. 4.6 1.7
47 Lithuania 4.5 2.1
48 Tunisia 4.4 1.7
49 Ukraine 4.4 1.9
50 Kuwait 4.4 2.0
51 India 4.3 2.0
52 Brazil 4.3 2.2
53 Mexico 4.3 1.8
54 Botswana 4.2 1.8
55 Hungary 4.2 1.7
56 Latvia 4.2 2.0
57 Colombia 4.2 2.1
58 Kazakhstan 4.2 1.9
59 Croatia 4.1 1.7
60 Serbia and Montenegro 4.1 2.2
61 Poland 4.1 1.3
62 Greece 4.1 1.8
63 Panama 4.1 1.8



RANK	COUNTRY/ECONOMY	SCORE	SD
64	Turkey	4.0	1.9
65	Jamaica	4.0	2.0
66	Guatemala	4.0	1.8
67	Russian Federation	4.0	2.2
68	Slovak Republic	4.0	1.5
69	Namibia	4.0	1.8
70	Nicaragua	3.9	2.0
71	Thailand	3.9	1.7
72	Mauritius	3.9	1.6
73	Armenia	3.9	2.2
74	China	3.8	2.0
75	Timor-Leste	3.8	2.0
76	Georgia	3.8	1.6
77	Algeria	3.8	2.2
78	Czech Republic	3.8	1.8
79	Malawi	3.8	1.9
80	Ethiopia	3.7	1.8
81	Albania	3.7	2.3
82	Gambia	3.6	1.7
83	Honduras	3.6	1.9
84	Morocco	3.6	1.9
85	Azerbaijan	3.5	2.0
86	Burkina Faso	3.5	2.0
86	Tajikistan	3.5	1.9
88	Bosnia and Herzegovina	3.5	2.0
89	Lesotho	3.5	1.9
90	Mozambique	3.5	1.8
91	Dominican Republic	3.5	2.1
92	Suriname	3.4	1.9
93	Angola	3.4	1.8
94	Mongolia	3.3	2.1
95	Ecuador	3.3	2.0
96	Bolivia	3.3	1.9
97	Tanzania	3.3	1.5
98	Pakistan	3.3	1.2
99	Paraguay	3.3	1.9
100	Madagascar	3.2	1.4



Source: World Economic Forum, Executive Opinion Survey 2006, The Global Competitiveness Report 2006-2007, Creating an Improved Business Environment (2006).

ANNEX B

SURVEY METHODOLOGY

In order to test the hypotheses put forward by participants at the 2004 Global Forum on Governance: Fighting Corruption and Promoting Integrity in Public Procurement, the OECD launched a survey collecting countries' experiences in promoting integrity in public procurement.

FOCUS OF THE SURVEY

The Expert Meeting on Integrity in Public Procurement on 20-21 June 2005 provided insights into countries' views on the relevant focus for launching the survey on integrity in public procurement**:**

- The survey focuses primarily on **practices** - but may also include relevant formal laws and institutions - for promoting integrity in public procurement at **all stages** of the procurement process. There is an increasing recognition that risks of corruption often lie before or after the bidding process, in the assessment of needs and the contract management.
- The Questionnaire aims at collecting information on OECD countries' experiences at the central level in **fostering transparency, integrity and accountability** in public procurement.

METHODOLOGY

Country experts have been nominated by the OECD Public Governance Committee delegates to take part in the survey. Nominated experts are primarily practitioners in charge of designing, supervising and managing procurement processes at the central level. In order to provide a full view of the public procurement cycle, auditors, members of competition authorities and anti-corruption specialists have also been involved in the survey.

The Questionnaire was developed and tested with an informal task force of volunteer experts of this network – from Canada, France, Germany, Korea, Mexico, Spain, Sweden, the United Kingdom and the United States.

It was then applied to 29 OECD countries and three observers, namely Brazil, Chile and Slovenia.

The findings and identified good practices were reviewed by nominated government procurement experts, as well as representatives from civil society and private sector at the OECD Symposium: Mapping out Good Practices for Integrity and Corruption Resistance in Public Procurement on 29 and 30 November 2006.

Furthermore, participants at the Symposium and the back-to-back Global Forum on Governance: Sharing Lessons on Promoting Good Governance and Integrity in Public Procurement, on 30 November and 1 December 2006 called for the inclusion of selected good practices from non-OECD countries in the report. The good practices from non-OECD countries that have been included are based on discussions at the Global Forum, as well as on results of former work by the OECD-DAC Joint Venture on Procurement.

QUESTIONNAIRE

In accordance with the focus of the Report, the Questionnaire helped to collect OECD countries' experiences at the central level on three key aspects:

I. Government practices that help **provide a level playing field for bidders through an adequate level of transparency** at all stages of the public procurement process. The first part of the Questionnaire explores recent trends in the information disclosed to bidders, potentials and limits of procedures for providing equal and timely access to information, as well as limitations to transparency.

II. Preventative mechanisms that help **identify and address risks of mismanagement and corruption** in procurement. The second part of the Questionnaire focuses on risk management instruments and techniques that increase the predictability, transparency and integrity of procurement processes.

III. Mechanisms to **ensure control and accountability**, from the assessment of needs (e.g. planning, budgeting) to contract management (e.g. payment). The third part of the Questionnaire reviews traditional as well as emerging mechanisms to keep public officials and bidders/intermediaries/contractors accountable.

The Questionnaire comprises 10 main questions. In addition, guidance is provided to help experts fill in the answers by clarifying the type of expected information.

I. Providing a level playing field for bidders through an adequate level of transparency in public procurement: From policy to practice

- How is information made available in practice to bidders/intermediaries/contractors at the different stages of the procurement process?
- What specific instruments and procedures are used for providing equal, timely and consistent access to information for bidders, and in particular what is the role of information and communication technologies?
- Under what circumstances are exceptions made to the general public procurement rules? In these circumstances, what are the measures available for ensuring a level playing field for bidders/intermediaries/contractors?

II. Preventative mechanisms to identify and address risks of mismanagement and corruption in public procurement

- Where have the risks for mismanagement and corruption been identified in the procurement process, from the assessment of needs and planning to contract management (e.g. payment)?
- What are the internal instruments and techniques for ensuring that public funds are used in public procurement according to the purposes intended, for minimising risks of mismanagement, and for improving value for money?
- What specific anti-corruption and conflict-of-interest policies help promote integrity in public procurement?

III. Mechanisms for ensuring control and accountability in the public procurement process

- What have been the developments in your country in the last five years to balance the discretionary power of public officials (e.g. procurement officers, elected officials, etc.) with the need for accountability?
- How are public officials and bidders/intermediaries/contractors kept accountable at all stages of the public procurement process?
- Have stakeholders – in particular private sector, end-users, civil society or the public at large – been involved in the procurement process, if so how?
- How do you ensure fair and timely resolution of formal administrative complaints related to the procurement process?

Additional information

- Please take this opportunity to share the document(s) that include good practices related to procurement that might have been developed in your country (e.g. guidebook, audit report, etc.). Please indicate how these good practices have been identified and the conditions for their effective functioning.
- In addition, please provide a description in a few lines of the relevant legal and institutional frameworks, including the legislative framework for public procurement processes (e.g. reference to relevant laws and regulations), the central institutions for supervising and monitoring public procurement, the mechanism for handling complaints, and the institutions and procedures for internal and external control and audit.

GUIDANCE FOR COMPLETING THE QUESTIONNAIRE

The sub-questions are intended to **help you fill in the answers** by clarifying the type of expected information.

The primary aim of the Questionnaire is to collect **good practices** at the **central level**, to be included in the Report. In order to gain a better understanding of the conditions for ensuring integrity in public procurement, you might also provide examples of problems, highlighting the reasons and factors for failure.

In your answers, please focus on the measures used in **daily practice.** You may also include information on formal laws and institutions when relevant.

1. How information is made available in practice to bidders/ intermediaries/contractors at the different stages of the procurement process?

Please use the **table** below to summarise:

a) How is **information** made available in: (a) assessment of needs/specifications; (b) selection and award/criteria; (c) debriefing of award results; and (d) contract management/payment.

b) **Who** can have access to the information (e.g. supplier, unsuccessful bidders).

c) To what extent procurement regulations define specific **restrictions on release of privileged information** related to procurement.

	How information is made available in practice	**To whom** (supplier/bidders /intermediaries/contractors)	**Specific restrictions on release of privileged information**
Assessment of needs/ Specifications			
Selection and award/ Criteria			
Debriefing of award results			
Contract management/ Payment			

2. What specific instruments and procedures are used for providing equal, timely and consistent access to information for bidders, and in particular what is the role of information and communication technologies?

Please specify in particular:

a) The main features of the **procurement information system** and in particular the contribution of information and communication technologies in providing a level playing field for bidders (e.g. an e-procurement system that provides a one-shop service, avoids

personal contact, etc.). Please provide the web link to the e-procurement system.

b) What instruments are used for ensuring timely and **consistent disclosure** of information (e.g. model bid documentation including terms and conditions of the contract), how they are tailored to the type of goods and services, updated to reflect the needs of stakeholders and communicated to them.

c) In case of **change in information,** or **demand for clarification** of information, what are the procedures for ensuring that the same level of information is provided to each bidder (e.g. criteria for defining how to disclose additional information, contact points for enquiries, etc.)

3. Under what circumstances are exceptions made to the general public procurement rules? In these circumstances, what are the measures available for ensuring a level playing field for bidders/intermediaries/contractors?

Please describe the circumstances and specify what precautionary measures ensure a level playing field (e.g. transparency, additional guidance, monitoring, etc.) in these circumstances, such as:

a) **When the procedure cannot be fully completed** (e.g. none of the bids fulfil the technical requirements as defined in the call for bidding, requirements turn out to be unrealistic in the contract management).

b) When general public procurement rules do not apply, in particular the difference between procurement procedures used above and below the threshold as well as the procedures used in specific circumstances (e.g. national security, emergency, etc.).

d) When using pre-qualification (e.g. restricted bid, agreed vendors' list, framework agreement etc.).

e) When taking into account economic and social considerations in procurement (e.g. favouring bidders from economically disadvantaged areas).

4. Where have the risks for mismanagement and corruption been identified in the procurement process, from the assessment of needs and planning to contract management and final payment?

Please specify in particular:

a) **What risks** have been identified in the procurement system, to whom these findings have been disclosed, and whether these findings have resulted in **recommendations** (e.g. suggested modifications in laws, development of specific preventative instruments, etc.).

b) How the risks have been identified: the **mechanism** used (e.g. government-wide spending control and public finance management programme, internal management accountability framework, audit, etc.), and the **technique** (e.g. random sample testing of risks in procurement)

c) The **focus** of the review, such as contracts below thresholds (e.g. the number of contracts per year just below approval thresholds, aggregated value of procurement contracts over a year to prevent "contract splitting") or circumstances that require exceptions to public procurement procedures (criteria used under the threshold, justification for invoking emergency in procurement contract variations, etc.).

5. What are the internal instruments and techniques for ensuring that public funds are used in public procurement according to the purposes intended, for minimising risks of mismanagement, and for improving value for money?

Please specify in particular:

a) The management mechanisms to ensure that public funds for procurement are **used for the purposes intended** (e.g. procedure for approval and monitoring of funding by government and within departments in accordance with laws and budget documents, ability to report publicly on procurement expenditures, etc.)

b) The main instruments for improving **the planning and implementation process** in public organisations – particularly in the case of decentralised units (e.g. annual procurement plans,

internal control based on materiality[25] and risk, procedures for management approval of business cases to justify major contracts, model for risk sharing between government and bidder, etc.).

c) Whether there is a **system/database for collecting statistical information** on public procurement (e.g. national statistical office), the main **objective** of the system (e.g. procurement planning, benchmarking, detection of possible corrupt practices, etc.), and how it is used in **policy making** (type of data collected, integration of data in financial reporting, capacity to analyse patterns and trends in a department or at a government-wide level, data reported publicly and fed back into the system).

d) The accountability chain for **officials working in vulnerable positions** in relation to procurement (e.g. general managers such as budget holder, procurement officials, etc.) and what **capacity-building measures** are in place to ensure **integrity** (e.g. professional training that includes integrity issues) and to respond to a potential need or dilemma (e.g. advisory service).

6. What specific anti-corruption and conflict-of-interest policies help promote integrity in public procurement?

Please specify in particular:

a) The general requirements for officials/contractual staff involved in procurement to prevent corruption in the process (e.g. clear separation of duties and authorisations between the individuals/bodies, rotation of officials, four-eyes principle, disclosure requirements such as declarations of financial interests, etc.), and the exceptions to their application (e.g. discretionary power below threshold).

b) What ethical standards, prohibitions and restrictions apply to officials/contractual staff involved in procurement as well as bidders/intermediaries/contractors, in what form (e.g. anti-corruption clause, integrity pact, code of conduct, Business Integrity Management Systems, etc.) and how they are communicated and enforced (e.g. condition for entry into an awarding procedure).

25. Materiality can be defined as the magnitude of an omission or misstatement of accounting information that make it probable that the judgment of a reasonable person relying on the information would have been changed or influenced by the omission or misstatement. Therefore, risk is a measure of uncertainty, whereas materiality is a measure of magnitude or size.

c) Whether there are specific policies to establish or verify the integrity of bidders/ intermediaries/contractors (e.g. "white listing", assessment of integrity and/or financial competence, disclosure of commissions paid to individuals/firms for services provided in the procurement process) and whether they apply to all contracts.

7. What have been the developments in your country in the last five years to balance the discretionary power of public officials (including procurement officers, elected officials, etc.) with the need for accountability?

Please specify in particular:

a) In a context of delegated authority, how standards, incentives (e.g. staff performance evaluation process) as well as accountability mechanisms for procurement officers help find the right balance between flexibility (e.g. being rapid and responsive) and control (e.g. preventing and detecting corruption) in procurement.

b) How the integrity of public officials' decisions is verified at different stages of the procurement process (e.g. review of how criteria for the selection and evaluation of bids are determined, whether they are strictly applied in decisions, how selection requirements can be waived, whether specifications are defined in a non-discriminatory manner, reasons for delays in payment, etc.).

8. How are public officials as well as bidders/intermediaries/ contractors kept accountable at all stages of the public procurement process?

Please specify in particular:

a) The main accountability mechanisms for public officials and bidders/intermediaries/contractors, in particular in the contract management phase (e.g. policies for approving/monitoring/ recording/reporting contract variations, policies for ensuring due diligence in payment processes, etc.).

b) What internal control processes over individual transactions ensure the management of the procurement function, and how co-ordination is ensured between internal control and external audit of procurement processes.

c) Whether information is available on the number and type of breaches filed (for example, in 2005) and the sanctions applied for suppliers/intermediaries as well as public officials.

9. Have stakeholders – in particular private sector, end-users, civil society, the media or the public at large – been involved in the procurement process, if so how?

Please specify in particular:

a) Whether their role was rather advisory (e.g. consultation of private firms in the definition of needs through preparation of a study, etc.) or control-oriented (e.g. verifying the integrity of the process), and at what stage of the procurement process they were involved.

b) How you ensure that the process for integrating the views of stakeholders is not biased (e.g. criteria for selection, representative sample, identification of conflict-of-interest situations, etc.)

c) Whether independent watchdogs are also involved in monitoring the process (e.g. role of the legislative power in providing a framework for integrity in public procurement, for instance a Parliamentary Committee monitoring the management of large procurement projects).

10. How do you ensure fair and timely resolution of formal administrative complaints related to the procurement process?

Please specify in particular:

a) The internal and external complaint mechanisms, in particular whether a procedure to report mismanagement and corruption exists for procurement personnel, suppliers and other stakeholders.

b) What information is kept in the records, the protection available against retaliation when making a complaint, the precautionary measures to limit the number of unfounded complaints.

c) The institution(s) in charge of handling administrative complaints, the average time for resolution, and whether the procedure provides the possibility of challenging government actions prior to or after the award.

ANNEX C

PROBITY PLANNING CHECKLIST IN AUSTRALIA

The probity plan, in line with established probity guidelines and procedures, is mainly used in Australia when the procurement is of high value and in need of careful management, or if the procurement is likely to encounter ethical problems. Where utilised, probity plans carefully take into consideration the relevant characters of the procurement case, such as its size, complexity and risks. The following checklist of probity issues can be used in the construction of a probity plan:

PROBITY PLANNING	☑
Determine whether a probity auditor and/or adviser is needed	☐
Obtain conflict of interest declarations from team members	☐
Obtain confidentiality agreements from external participants	☐
Finalise the probity plan, if one is being used	☐
Consider confidentiality requirements	☐
Set up physical security procedures, such as the document register or data room	☐
Ensure team members are familiar with all relevant policies and documents	☐
Set up procedures so all potential suppliers have access to the same information	☐

PROCUREMENT PROCESS	☑
Review probity at the end of the bid preparation process	☐
Set up a process for receiving, recording and acknowledging submissions	☐
Set up a procedure for opening the bid box	☐
Document any changes that occur, and notify all potential suppliers	☐
Ensure evaluation of submissions is fair, consistent and competitive	☐
Review probity at the end of the evaluation process	☐
Notify the successful bidder as soon as possible	☐
Notify the unsuccessful bidders as soon as possible	☐
Debrief unsuccessful bidders	☐
Ensure all actions are documented, and the documents are stored appropriately	☐
Review probity at the end of the process	☐

Source: Australia, Guidance on Ethics and Probity in Government Procurement, Financial Management Guidance, N° 14, January 2005. (http://www.finance.gov.au/procurement/ep_appendices.html#ChecklistforProbityPlanning).

ANNEX D

Comparative Overview of Public Procurement Structures in EU Member States by SIGMA

Member State	Key Institutions	Number of Staff	Sub-ordination	Main Functions
1. Austria (Semi-centralised structure)	Section for Procurement Law	4	Federal Chancellor's Office	Drafting primary and secondary legislation; International co-ordination; Advisory functions; Monitoring and control; Information.
	Federal Procurement Ltd.	58	Ministry of Finance	Business development and co-ordination; Central purchasing.
2. Bulgaria (Centralised structure)	Public Procurement Agency	38	Ministry of Economy and Energy	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Publication and information; Professionalisation and capacity-strengthening.
3. Cyprus (Centralised structure)	Public Procurement Directorate	14	Treasury	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Professionalisation and capacity-strengthening.

4. Czech Republic (Centralised structure)	Public Investment Department	17	Ministry for Regional Development	Drafting primary and secondary legislation; Advisory functions; International co-ordination; Monitoring and control; Publication and information (partially).
5. Estonia (Centralised structure)	Public Procurement Office	19	Ministry of Finance	Advisory and operations' support; International co-ordination; Monitoring and control; Publication and information; Professionalisation and capacity-strengthening.
	State Aid and Public Procurement Unit, Public Governance Department	4	Ministry of Finance	Drafting primary and secondary legislation.
6. Finland (Decentralised structure)	Trade Department	4	Ministry of Trade and Industry	Drafting primary and secondary legislation; International co-ordination (shared); Advisory functions (shared). Monitoring and control; Information; Professionalisation and capacity-strengthening (shared).
	Budget Department	2	Ministry of Finance	Overall policy.
	Haus Ltd	2	Ministry of Finance	Professionalisation and capacity-strengthening (shared).
	Hansel Ltd	50	Ministry of Finance	Business development and co-ordination; Central purchasing.
7. France (Semi-centralised structure)	Public Procurement Department, Directorate for Legal Affairs	40	Ministry of Economy, Finance and Industry	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Information.

8. Germany (Semi-centralised structure)	BMWi	10	Federal Ministry of Economy and Technology	Drafting primary legislation; Drafting secondary legislation (shared); International co-ordination; Advisory functions; Monitoring and control; Information.
	Bundesverwaltungsamt (Federal office for administration)	9	Federal Ministry of Interior	Publication.
	Ministry of Transport, Building and Urban Affairs			Professionalisation and capacity-strengthening (shared with many).
9. Hungary (Centralised structure)	Public Procurement Council	35	Parliament	Advisory and operations' support; International co-ordination; Monitoring and control; Publication and information; Professionalisation and capacity-strengthening.
	Department of Civil Law, Codification and International Private Law	4	Ministry of Justice and Law Enforcement	Drafting primary and secondary (shared) legislation; International co-ordination.
10. Ireland (Semi-centralised structure)	National Public Procurement Policy Unit	12	Department of Finance	Drafting primary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Professionalisation and capacity-strengthening.
11. Italy (Semi-centralised structure)	Public Works Authority	237	Parliament	Monitoring and control.
	CONSIP (limited public company)	500	Ministry of Economy and Finance (owner)	Advisory and operations' support; Professionalisation and capacity-strengthening; Business development and co-ordination; Central purchasing.
	Council of Ministers			Drafting primary legislation.

12. Latvia (Centralised structure)	Procurement Monitoring Bureau	32	Ministry of Finance	Advisory and operations' support; International co-ordination; Monitoring and control; Publication and information; Professionalisation and capacity-strengthening; Complaints review and remedies.
	Ministry of Finance	3		Drafting primary and secondary legislation; International co-ordination.
13. Lithuania (Centralised structure)	Public Procurement Office	60	Office of the Prime Minister	Drafting secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control Publication and information'; Professionalisation and capacity-strengthening.
	Ministry of Economy	3		Drafting primary legislation; International co-ordination.
14. Luxembourg (Semi-centralised structure)	Ministry of Public Works	1		Drafting primary legislation; Advisory functions; International co-ordination; Monitoring; Information.
15. Malta (Centralised structure)	Department of Contracts	40	Ministry of Finance	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Publication and information; Professionalisation and capacity-strengthening; Business development and co-ordination; Central purchasing; Complaints review and remedies (Appeals Board).

16. Poland (Centralised structure)	Public Procurement Office	116	Office of the Prime Minister	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Publication and information. Professionalisation and capacity-strengthening; Complaints review and remedies (Bureau of Appeals) – PPO administers the system.
17. Portugal (Decentralised structure)	Directorate General for State Property; Directorate for European Affairs; Department for Public Procurement; Institute for Public Works	9	Council of Ministers	Policy functions and drafting primary legislation (government); International co-ordination; Business co-ordination; Central purchasing; Monitoring and control; Capacity-strengthening.
18. Romania (Centralised structure)	National Authority for Regulating and Monitoring Public Procurement	70	Office of the Prime Minister	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control; Information; Professionalisation and capacity-strengthening.
19. Slovak Republic (Centralised structure)	Office for Public Procurement	110	Council of Ministers	Drafting primary and secondary legislation; Advisory and operations' support; International co-ordination; Monitoring and control Publication and information'; Professionalisation and capacity- strengthening; Complaints review and remedies.

20. Slovenia (Semi-centralised structure)	Department for Public Procurement, Public Utilities and Concessions	8	Ministry of Finance	Drafting primary and secondary legislation; Advisory functions; International co-ordination; Monitoring and control; Information.
21. Sweden (Semi-centralised structure)	Board for Public Procurement	10	Ministry of Finance	Advisory functions; International co-ordination (shared); Monitoring; Information; Professionalisation and capacity-strengthening.
	Ministry of Finance	3		Drafting primary and secondary legislation; International co-ordination.
22. United Kingdom (Semi-centralised structure)	Office of Government Commerce	25 (500)	HM Treasury (Ministry of Finance)	Drafting secondary legislation; Advisory and operations' support; International co-ordination; Monitoring; Information; Professionalisation and capacity-strengthening (shared); Business development and co-ordination (shared)

ANNEX E

METHODOLOGY FOR ASSESSMENT: OECD-DAC JOINT VENTURE FOR PROCUREMENT

Pillar IV. Integrity and Transparency of the Public Procurement System

Pillar IV of the methodology developed by the OECD-DAC Joint Venture on Public Procurement covers four indicators that are considered necessary to provide for a system that operates with integrity, has appropriate controls that support the implementation of the system in accordance with the legal and regulatory framework and has appropriate measures in place to address the potential for corruption in the system. It also covers important aspects of the procurement system that include stakeholders as part of the control system. This Pillar takes aspects of the procurement system and governance environment and seeks to ensure that they are defined and structured to contribute to integrity and transparency.

Indicator 9. The country has effective control and audit systems

The objective of this indicator is to determine the quality, reliability and timeliness of the internal and external controls preferably based on risk assessment and mitigation. Equally, the effectiveness of controls needs to be reviewed in terms of expediency and thoroughness of the implementation of auditors' recommendations. The assessor should rely, in addition to their own findings, on the most current Country Financial Accountability Assessment (CFAA) or other analysis including PEFA/PFM assessment that may be available. This indicator has five sub-indicators (a-e) to be rated.

Sub-indicator 9(a) – A legal framework, organisation, policy, and procedures for internal and external control and audit of public procurement operations are in place to provide a functioning control framework.

National legislation normally establishes which agencies are responsible for oversight of the procurement function. Control and oversight normally start with the legislative bodies that must review and act on the findings of the national auditing agency and legal watch dog agencies (e.g. the comptroller general reports, attorney general reports, etc.).

There should also be provisions for the establishment of internal controls such as internal audit organisations that periodically produce recommendations to the authorities of the individual agencies based on their findings. Internal audit should be complemented by internal control and management procedures that provide for checks and balances within an agency for processing of procurement actions. Internal audit and internal control procedures can assist external auditors and enable performance audit techniques to be used that look at the effectiveness and application of internal control procedures instead of looking at individual procurement actions.

Even though no single model exists, it is important that the basic principles of oversight and control exist in the legal and regulatory framework of the country and that they are of universal application.

Scoring Criteria	**Score**
The system in the country provides for: (a) Adequate independent control and audit mechanisms and institutions to oversee the procurement function. (b) Implementation of internal control mechanisms in individual agencies with clearly defined procedures. (c) Proper balance between timely and efficient decision making and adequate risk mitigation. (d) Specific periodic risk assessment and controls tailored to risk management.	**3**
The system in the country meets a) plus two of the above.	**2**
The system meets a) but controls are unduly burdensome and time consuming hindering efficient decision making.	**1**
Controls are imprecise or lax and inadequate to the point that there is weak enforcement of the laws and regulations and ample risk for fraud and corruption.	**0**

Sub-indicator 9(b) – Enforcement and follow-up on findings and recommendations of the control framework provide an environment that fosters compliance.

The purpose of this indicator is to review the extent to which internal and external audit recommendations are implemented within a reasonable time. This may be expressed as a percentage of recommendations implemented within six months, a year, over a year or never implemented.

Scoring Criteria	Score
Internal or external audits are carried out at least annually and recommendations are responded to or implemented within six months of the submission of the auditors' report.	**3**
Audits are carried out annually but response to or implementation of the auditors' recommendations takes up to a year.	**2**
Audits are performed annually but recommendations are rarely responded to or implemented.	**1**
Audits are performed erratically and recommendations are not normally implemented.	**0**

Sub-indicator 9(c) – The internal control system provides timely information on compliance to enable management action.

The following key provisions should be provided:

(a) There are written standards for the internal control unit to convey issues to management depending on the urgency of the matter.

(b) There is established regular periodic reporting to management throughout the year.

(c) The established periodicity and written standards are complied with.

Scoring Criteria	Score
All requirements (a) through (c) listed above are met.	**3**
Requirement (a) plus one of the above are met.	**2**
Only requirement (a) is met.	**1**
There is no functioning internal control system.	**0**

Sub-indicator 9(d) – The internal control systems are sufficiently defined to allow performance audits to be conducted.

There are written internal control routines and procedures. Ideally there would an internal audit and control manual. Finally, there is sufficient

information retained to enable auditors to verify that the written internal control procedures are adhered to.

Scoring criteria	Score
There are internal control procedures including a manual that state the requirements for this activity which is widely available to all staff.	**3**
There are internal control procedures but there are omissions or practices that need some improvement.	**2**
There are procedures but adherence to them is uneven.	**1**
The internal control system is poorly defined or non-existent.	**0**

Sub-indicator 9(e) – Auditors are sufficiently informed about procurement requirements and control systems to conduct quality audits that contribute to compliance.

The objective of this indicator is to confirm that there is a system in place to ensure that auditors working on procurement audits receive adequate training or are selected following criteria that explicitly requires that they demonstrate sufficient knowledge of the subject. Auditors should normally receive formal training on procurement requirements, principles operations, laws and regulations and processes. Alternatively, they should have extensive experience in public procurement or be supported by procurement specialists or consultants.

Scoring Criteria	Score
There is an established programme to train internal and external auditors to ensure that they are well versed in procurement principles, operations, laws, and regulations and the selection of auditors requires that they have adequate knowledge of the subject as a condition for carrying out procurement audits.	**3**
If auditors lack procurement knowledge, they are routinely supported by procurement specialists or consultants.	**2**
There is a requirement that the auditors have general knowledge of procurement principles, operations, laws, and regulations but they are not supported generally by specialists in procurement.	**1**
There is no requirement for the auditors to have knowledge of procurement and there is no formal training programme and no technical support is provided to the auditors.	**0**

Indicator 10. Efficiency of appeals mechanism

The appeals mechanism was covered under Pillar I with regard to its creation and coverage by the legal regulatory framework. It is further assessed under this indicator for a range of specific issues regarding efficiency in contributing to the compliance environment in the country and the integrity of the public procurement system. There are five sub-indicators (a-e) to be scored.

Sub-indicator 10(a) – Decisions are deliberated on the basis of available information, and the final decision can be reviewed and ruled upon by a body (or authority) with enforcement capacity under the law.

This sub-indicator looks at the process that is defined for dealing with complaints or appeals and sets out some specific conditions that provide for fairness and due process.

(a) Decisions are rendered on the basis of available evidence submitted by the parties to a specified body that has the authority to issue a final decision that is binding unless referred to an appeals body.

(b) An appeals body exists which has the authority to review decisions of the specified complaints body and issue final enforceable decisions.

(c) There are times specified for the submission and review of complaints and issuing of decisions that do not unduly delay the procurement process.

Scoring Criteria	Score
The country has a system that meets the requirements of (a) through (c) above.	**3**
The country has a system that meets (a) and (b) above, but the process is not controlled with regard to (c).	**2**
The system only provides for (a) above with any appeals having to go through the judicial system requiring a lengthy process.	**1**
The system does not meet the conditions of (a) – (c) above, leaving only the courts.	**0**

Sub-indicator 10(b) – The complaint review system has the capacity to handle complaints efficiently and a means to enforce the remedy imposed.

This indicator deals specifically with the question of the efficiency and capacity of a complaints review system and its ability to enforce the remedy imposed. It is closely related to sub-indicator 10(a) which also refers to

enforcement. This indicator will focus primarily on the capacity and efficiency issues.

Scoring Criteria	Score
The complaint review system has precise and reasonable conditions and timeframes for decision by the complaint review system and clear enforcement authority and mechanisms.	**3**
There are terms and timeframes established for resolution of complaints but mechanisms and authority for enforcement are unclear or cumbersome.	**2**
Terms and timeframes for resolution of complaints or enforcement mechanisms and responsibilities are vague.	**1**
There are no stipulated terms and timeframes for resolution of complaints and responsibility for enforcement is not clear.	**0**

Sub-indicator 10 (c) – The system operates in a fair manner, with outcomes of decisions balanced and justified on the basis of available information.

The system needs to be seen as operating in a fair manner. The complaint review system must require that decisions be rendered only on relevant and verifiable information presented and that such decisions be unbiased, reflecting the consideration of the evidence presented and the applicable requirements in the legal/regulatory framework.

It is also important that the remedy imposed in the decision be consistent with the findings of the case and with the available remedies provided for in the legal/regulatory framework. Decisions of a complaints body should deal specifically with process issues and the remedies should focus on corrective actions needed to comply with process.

Scoring Criteria	Score
Procedures governing the decision making process of the review body provide that decisions are: a) based on information relevant to the case; b) balanced and unbiased in consideration of the relevant information; c) can be subject to higher level review; d) result in remedies that are relevant to correcting the implementation of the process or procedures.	**3**
Procedures comply with (a) plus two of the remaining conditions above.	**2**
Procedures comply with (a) above.	**1**
The system does not comply with any of the above.	**0**

Sub-indicator 10(d) – Decisions are published and made available to all interested parties and to the public.

Decisions are public by law and posted in easily accessible places (preferably posted at a dedicated government procurement website on the Internet). Publication of decisions enables interested parties to be better informed as to the consistency and fairness of the process.

Scoring Criteria	Score
All decisions are publicly posted in a government website or another easily accessible place	**3**
All decisions are posted in a somewhat restricted access media (e.g. the official gazette of limited circulation).	**2**
Publication is not mandatory and publication is left to the discretion of the review bodies making access difficult.	**1**
Decisions are not published and access is restricted.	**0**

Sub-indicator 10(e) – The system ensures that the complaint review body has full authority and independence for resolution of complaints.

This indicator assesses the degree of autonomy that the complaint decision body has from the rest of the system to ensure that its decisions are free from interference or conflict of interest. Due to the nature of this sub-indicator it is scored as either a 3 or a 0.

Scoring Criteria	Score
The complaint review body is independent and autonomous with regard to resolving complaints.	**3**
NA	
NA	
The complaint review body is not independent and autonomous with regard to resolving complaints.	**0**

Indicator 11. Degree of access to information

This indicator deals with the quality, relevance, ease of access and comprehensiveness of information on the public procurement system.

Sub-indicator 11(a) – Information is published and distributed through available media with support from information technology when feasible.

Public access to procurement information is essential to transparency and creates a basis for social audit by interested stakeholders. Public information should be easy to find, comprehensive and user friendly providing information of relevance. The assessor should be able to verify easy access and the content of information made available to the public.

The system should also include provisions to protect the disclosure of proprietary, commercial, personal or financial information of a confidential or sensitive nature.

Information should be consolidated into a single place and when the technology is available in the country, a dedicated website should be created for this purpose. Commitment, backed by requirements in the legal/regulatory framework should ensure that agencies duly post the information required on a timely basis.

Scoring Criteria	Score
Information on procurement is easily accessible in media of wide circulation and availability. The information provided is centralised at a common place. Information is relevant and complete. Information is helpful to interested parties to understand the procurement processes and requirements and to monitor outcomes, results and performance.	**3**
Information is posted in media not readily and widely accessible or not user friendly for the public at large OR is difficult to understand by the average user OR essential information is lacking.	**2**
Information is difficult to get and very limited in content and availability.	**1**
There is no public information system as such and it is generally up to the procuring entity to publish information.	**0**

Indicator 12. The country has ethics and anti-corruption measures in place

This indicator assesses the nature and scope of the anti-corruption provisions in the procurement system**.** There are seven sub-indicators (a-g) contributing to this indicator.

Sub-indicator 12(a) – The legal and regulatory framework for procurement, including bidding and contract documents, includes provisions addressing corruption, fraud, conflict of interest, and unethical behaviour and sets out (either directly or by reference to other laws) the actions that can be taken with regard to such behaviour.

This sub-indicator assesses the extent to which the law and the regulations compel procuring agencies to include fraud and corruption, conflict of interest and unethical behaviour references in the bidding documentation. This sub-indicator is related to sub-indicator 2 b) on content for model documents but is not directly addressed in that sub-indicator.

The assessment should verify the existence of the provisions and enforceability of such provision through the legal/regulatory framework. The provisions should include the definitions of what is considered fraud and corruption and the consequences of committing such acts.

Scoring Criteria	**Score**
The procurement law or the regulations specify this mandatory requirement and give precise instructions on how to incorporate the matter in bidding documents. Bid documents include adequate provisions on fraud and corruption.	**3**
The procurement law or the regulations specify this mandatory requirement but leaves no precise instruction on how to incorporate the matter in bidding documents leaving this up to the procuring agencies. Bid documents generally cover this but without consistency.	**2**
The legal/regulatory framework does not establish a clear requirement to include language in documents but makes fraud and corruption punishable acts under the law. Few bidding documents include appropriate language dealing with fraud and corruption.	**1**
The legal framework does not directly address fraud, corruption or unethical behaviour and its consequences. Bid documents generally do not cover the matter.	**0**

Sub-indicator 12(b) – The legal system defines responsibilities, accountabilities, and penalties for individuals and firms found to have engaged in fraudulent or corrupt practices.

This indicator assesses the existence of legal provisions that define fraudulent and corrupt practices and set out the responsibilities and sanctions for individuals or firms indulging in such practices. These provisions should address issues concerning conflict-of-interest and incompatibility situations. The law should prohibit the intervention of active public officials and former public officials for a reasonable period of time after leaving office in procurement matters in ways that benefit them, their relatives, and business or political associates financially or otherwise. There may be cases where there is a separate anti-corruption law (e.g. anti-corruption legislation) that contains the provisions. This arrangement is appropriate as far as the effects of the anti-corruption law are the same as if they were in the procurement law.

Scoring Criteria	Score
The legal/regulatory framework explicitly deals with the matter. It defines fraud and corruption in procurement and spells out the individual responsibilities and consequences for government employees and private firms or individuals found guilty of fraud or corruption in procurement, without prejudice of other provisions in the criminal law.	**3**
The legal/regulatory framework includes reference to other laws that specifically deal with the matter (e.g. anti-corruption legislation in general). The same treatment is given to the consequences.	**2**
The legal/regulatory framework has general anti-corruption and fraud provisions but does not detail the individual responsibilities and consequences which are left to the general relevant legislation of the country.	**1**
The legal/regulatory framework does not deal with the matter.	**0**

Sub-indicator 12(c) – Evidence of enforcement of rulings and penalties exists.

This indicator is about the enforcement of the law and the ability to demonstrate this by actions taken. Evidence of enforcement is necessary to demonstrate to the citizens and other stakeholders that the country is serious about fighting corruption. This is not an easy indicator to score, but the assessor should be able to obtain at least some evidence of prosecution and punishment for corrupt practices. The assessor should get figures on the number of cases of corruption reported through the system, and the number

of cases prosecuted. If the ratio of cases prosecuted to cases reported is low, the narrative should explain the possible reasons.

Scoring criteria	Score
There is ample evidence that the laws on corrupt practices are being enforced in the country by application of stated penalties.	**3**
There is evidence available on a few cases where laws on corrupt practices have been enforced.	**2**
Laws exist, but evidence of enforcement is weak.	**1**
There is no evidence of enforcement.	**0**

Sub-indicator 12(d) – Special measures exist to prevent and detect fraud and corruption in public procurement.

This sub-indicator looks to verify the existence of an anti-corruption programme and its extent and nature or other special measures which can help prevent and/or detect fraud and corruption specifically associated with public procurement.

A comprehensive anti-corruption programme normally includes all the stakeholders in the procurement system, assigns clear responsibilities to all of them, and assigns a high- level body or organisation with sufficient standing and authority to be responsible for co-ordinating and monitoring the programme. The procurement authorities are responsible for running and monitoring a transparent and efficient system and for providing public information to promote accountability and transparency. The control organisations (supreme audit authority) and the legislative oversight bodies (e.g. the Parliament or Congress), are responsible for detecting and denouncing irregularities or corruption. The civil society organisations are responsible for social audits and for monitoring of procurement to protect the public interest. These may include NGOs, the academia, the unions, the chambers of commerce and professional associations and the press. The judiciary also participates, often in the form of special anti-corruption courts and dedicated investigative bodies that are responsible for investigating and prosecuting cases of corruption. There are normally government public education and awareness campaigns as part of efforts to change social behaviour in respect to corrupt practices and tolerance. Anti-corruption strategies usually include as well the use of modern technology to promote e-procurement and e-government services to minimise the risk of facilitation payments.

The assessor should assess the extent to which all or some of these actions are organised as a co-ordinated effort with sufficient resources and commitment by the government and the public or the extent to which they

are mostly isolated and left to the initiative of individual agencies or organisations.

Scoring Criteria	Score
The government has in place a comprehensive anti-corruption programme to prevent, detect and penalise corruption in government that involves the appropriate agencies of government with a level of responsibility and capacity to enable its responsibilities to be carried out. Special measures are in place for detection and prevention of corruption associated with procurement,	**3**
The government has in place an anti-corruption programme but it requires better co-ordination or authority at a higher level to be effective. No special measures exist for public procurement.	**2**
The government has isolated anti-corruption activities not properly co-ordinated to be an effective integrated programme.	**1**
The government does not have an anti-corruption programme.	**0**

Sub-indicator 12(e) – Stakeholders (private sector, civil society, and ultimate beneficiaries of procurement/end-users) support the creation of a procurement market known for its integrity and ethical behaviour.

This indicator assesses the strength of the public in maintaining a sound procurement environment. This may manifest itself in the existence of respected and credible civil society groups that provide oversight and can exercise social control. The welcoming and respectful attitude of the government and the quality of the debate and the contributions of all interested stakeholders are an important part of creating an environment where integrity and ethical behaviour is expected and deviations are not tolerated.

Scoring Criteria	Score
(a) There are strong and credible civil society organisations that exercise social audit and control. (b) Organisations have government guarantees to function and co-operation for their operation and are generally promoted and respected by the public. (c) There is evidence that civil society contributes to shape and improve integrity of public procurement.	**3**
There are several civil society organisations working on the matter and the dialogue with the government is frequent but it has limited impact on improving the system.	**2**
There are only a few organisations involved in the matter, the dialogue with the government is difficult and the contributions from the public to promote improvements are taken in an insignificant way.	**1**
There is no evidence of public involvement in the system OR the government does not want to engage the public organisations in the matter.	**0**

Sub-criteria 12(f) – The country should have in place a secure mechanism for reporting fraudulent, corrupt, or unethical behaviour.

The country provides a system for reporting fraudulent, corrupt or unethical behaviour that provides for confidentiality. The system must be seen to react to reports as verified by subsequent actions taken to address the issues reported.

Scoring Criteria	Score
There is a secure, accessible and confidential system for the public reporting of cases of fraud, unethical behaviour and corruption.	**3**
There is a mechanism in place but accessibility and reliability of the system undermine and limit its use by the public.	**2**
There is a mechanism in place but security or confidentiality cannot be guaranteed	**1**
There is no secure mechanism for reporting fraud, unethical behaviour and corruption cases	**0**

Sub-criteria 12(g) – Existence of Codes of Conduct/Codes of Ethics for participants that are involved in aspects of the public financial management systems that also provide for disclosure for those in decision-making positions.

The country should have in place a Code of Conduct/Ethics that applies to all public officials. In addition, special provisions should be in place for those involved in public procurement. In particular, financial disclosure requirements have proven to be very useful in helping to prevent unethical or corrupt practices.

Scoring Criteria	**Score**
(a) There is a Code of Conduct or Ethics for government officials with particular provisions for those involved in public financial management, including procurement. (b) The Code defines accountabilities for decision making and subjects decision makers to specific financial disclosure requirements. (c) The Code is of obligatory compliance and consequences are administrative or criminal	**3**
The system meets requirements (a) and (b) but is only a recommended good practice code with no consequences for violations unless covered by criminal codes.	**2**
There is a Code of Conduct but determination of accountabilities is unclear.	**1**
There is no Code of Conduct.	**0**

ANNEX F

GLOSSARY

AUDIT TRAIL

A chronological record of procurement activities which enables the reconstruction, review and examination of the sequence of activities at each stage of the public procurement process.

DEBARMENT

Exclusion or ineligibility of a contractor from taking part in the process of competing for government or multilateral agency contracts for a definite or indefinite period of time, if, after enquiry or examination, the contractor is adjudged to have been involved in the use of corruption to secure past or current projects with a government agency.

DIRECT SOCIAL CONTROL

The involvement of stakeholders – not only private sector representatives but also end-users, civil society, the media or the public at large – in scrutinising the integrity of the public procurement process.

FOUR-EYES PRINCIPLE

A requirement that a process will be effectively conducted by at least two individuals.

INTEGRITY

Integrity in the context of public procurement implies that:

- Procurement procedures are transparent and promote fair and equal treatment for bidders.
- Public resources linked to public procurement are used in accordance with intended purposes.

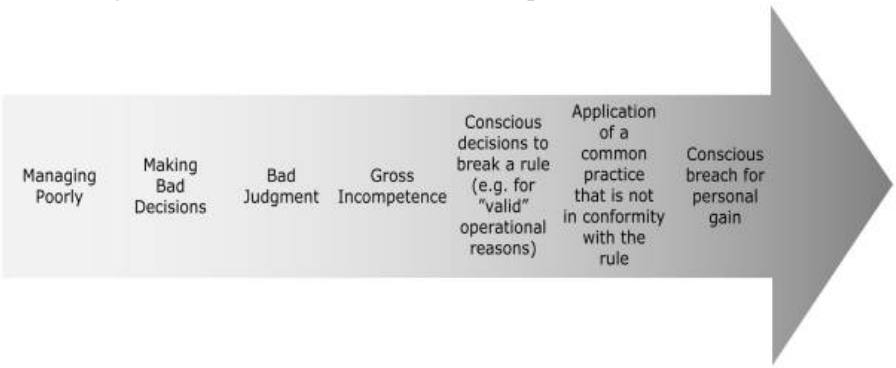
- Procurement officials' behaviour is in line with the public purposes of their organisation.
- Systems are in place to challenge procurement decisions, ensure accountability and promote public scrutiny.

INTEGRITY PACT

An agreement between a government or government department with all bidders for a public sector contract that neither side will pay, offer, demand, or accept bribes, or collude with competitors to obtain the contract or while carrying it out.

MISMANAGEMENT

Mismanagement could conceivably cover a range of actions from a simple mistake in performing an administrative task to a deliberate transgression of relevant laws and related policies[26].



PUBLIC PROCUREMENT

Public procurement is the purchase of goods and services by governments and state-owned enterprises. It encompasses a sequence of related activities starting with the assessment of needs through award to the contract management and final payment.

26. This definition has been extracted from the Canadian Financial Administration Act.

REVERSE AUCTION

In an auction there is a single seller and many potential buyers bidding for the item being sold. A reverse auction, used for e-purchasing and generally using the internet (an e-auction), involves on the contrary one buyer and many sellers. The general idea is that the buyer specifies what they want to purchase and offers it to many suppliers.

RISK-BASED APPROACH

The definition taken in this publication of a risk-based approach is rather restrictive. It is defined as an approach identifying potential weaknesses that individually or in aggregate could have an impact on the integrity of procurement-related activities, and then aligning to these risks controls that effectively mitigate the risk to integrity.

TRANSPARENCY

Transparency in the context of procurement refers to the ability of stakeholders to know and understand the actual means and processes by which contracts are defined, awarded and managed.

WHISTLEBLOWING

Whistleblowing can be defined as a means to promote accountability by encouraging the disclosure of information about misconduct and possibly corruption while protecting the whistleblower against retaliation.

ANNEX G

FOR FURTHER INFORMATION

This Annex provides web links for further information on public procurement and integrity. These cover OECD countries as well as non members in which elements of good practice have been identified.

The web links are listed accordingly:

- Information system(s) on public procurement (e.g. procurement portal, information on procurement opportunities);
- Organisation(s) in charge of public procurement (e.g. management of public procurement, design of procurement regulations) and/or related to the control and accountability of public procurement (e.g. complaint and review, audit);
- Guidance documents from governments for enhancing integrity in public procurement;
- Other relevant web links to enhance professionalism in public procurement (e.g. professional associations, research institutes, etc.).

AUSTRALIA	*The Australian Government Tender System:* All business opportunities with Australian Government agencies https://www.tenders.gov.au/federal/index.cfm *Government of Australia, Department of Finance and Administration* http://www.finance.gov.au/ *South Australia Tenders and Contracts:* Public procurement opportunities within South Australia http://www.tenders.sa.gov.au/index.do *Commonwealth Procurement Guidelines* http://www.finance.gov.au/ctc/commonwealth_procurement_guide.html *Mandatory Procurement Procedures: Financial Management Guidance* http://www.finance.gov.au/procurement/mandatory_procurement_procedures.html

	Guidance on Ethics and Probity in Government Procurement http://www.finance.gov.au/procurement/ethics_probity_govt.html *Guidance on Procurement Publishing Obligations* http://www.finance.gov.au/procurement/procurement_publishing_obligations html
AUSTRIA	Database of procurement opportunities http://www.auftrag.at/ *Federal Public Procurement Office* http://www.bva.gv.at/BVA/default.htm *Austrian Court of Audit* - provides recommendations for improving processes, including public procurement (see Box IV.4) http://www.rechnungshof.gv.at
BELGIUM	*Joint Electronic Public Procurement Portal: Federal Service e-Procurement portal* http://www.jepp.be/ *Bulletin des adjudications:* Procurement opportunities database http://www.ejustice.just.fgov.be/cgi_bul/bul.pl *European and Belgian Public Procurement* http://www.ebp.be
BRAZIL	*COMPRASNET:* Procurement Portal of the Federal Government http://www.comprasnet.gov.br *Office of the Comptroller General:* developed a methodology for mapping out risks of corruption (see Box IV.6) http://www.cgu.gov.br
CANADA	*The Government of Canada Electronic Tendering Service* http://www.merx.com/ *Public Disclosure of contracts above CAD 10,000* http://www.tbs-sct.gc.ca/pd-dp/dc/index_e.asp *Details on project spending on public works and government services* http://www.pwgsc.gc.ca/reports/text/rpp_2005-2006_sct3-e.html *Statement of Values, Procurement Community of the Government of Canada* http://www.tbs-sct.gc.ca/cmp/values/statementvalues_e.asp *Defence Ethics Program* http://www.dnd.ca/ethics/

CHILE	*ChileCompra:* E-marketplace www.chilecompra.cl
CZECH REPUBLIC	*Public Procurement and Concessions Portal* http://www.portal-vz.cz/index.php?lchan=1&lred=1 *Official Site of Public Contracts, Publishing Subsystem* http://www.isvzus.cz/usisvz/index.jsp?language=change *E-market places solutions for central administration* https://gem.b2bcentrum.cz/ http://www.allytrade.cz *Ministry for Regional Development* http://www.mmr.cz/ *Office for the Protection of Competition* http://www.compet.cz
DENMARK	*Gatetrade:* Electronic marketplace for business-to-government e-commerce https://www.oex.gatetrade.net/home.jsp *Danish Competition Authority:* Responsible for the implementation of the EU Directives on public procurement, handling of complaints and providing guidance in principal cases. http://www.ks.dk/ *The Complaints Board for Public Procurement* http://www.klfu.dk/ *Statistics Denmark:* Statistical data including on public procurement http://www.dst.dk/HomeUK.aspx *Anti-Corruption Portal for Small and Medium-Sized Enterprises:* Detailed information for investing in emerging markets, including on procurement http://www.business-anti-corruption.com
FINLAND	*Hansel:* the central procurement unit of the State of Finland (see Box III.4) http://www.hansel.fi/ *Ministry of Finance:* Public spending http://www.vm.fi/vm/en/09_national_finances/index.jsp *The Market Court:* Hearings of market law, competition and public procurement cases http://www.oikeus.fi/markkinaoikeus/

FRANCE	*Official Gazette for Public Procurement Bids (BOAMP)* http://www.journal-officiel.gouv.fr/jahia/Jahia/pid/1 http://djo.journal-officiel.gouv.fr/centre-editper12.htm *Legannonces:* Procurement bids in the regional press http://www.legannonces.com/ *Les Marchés publics.com:* Consultation on procurement opportunities http://www.les-marches-publics.com/ *Marchés Publics France:* Joint initiative for public procurement information with Luxembourg and the Netherlands http://www.marchepublicfrance.com *Ministry of Economy, Finance and Industry:* Public procurement regulations http://www.minefi.gouv.fr/themes/marches_publics/ *Observatory of Public Procurement* http://www.minefi.gouv.fr/colloc/ *Association for Public Purchasing* http://www.apasp.com/modules/movie/scenes/home/
GERMANY	*E-Vergabe:* E-procurement system at the Federal level http://www.evergabe-online.de/ *Federal Ministry of Economy and Technology:* in charge of procurement regulations http://www.bmwi.de/ *Procurement Agency of The Federal Ministry of The Interior:* manages purchasing for 26 federal authorities, foundations and research institutions under the responsibility of the Ministry of the Interior http://www.bescha.bund.de/enid/55.html
GREECE	*Ministry of Development* http://www.efpolis.gr/
HUNGARY	*Public Procurement Council:* Information system on public procurement http://www.kozbeszerzes.hu/
ICELAND	*Competition Authority* http://www.samkeppni.is/samkeppni/en/ *RIKISKAUP - The Icelandic State Trading Centre* http://www.rikiskaup.is

INDIA	*Central Vigilance Commission:* has used technologies for increasing transparency in vulnerable areas such as procurement (see Box II.8) http://www.cvc.nic.in/ *Guidelines for improvement in the procurement system* http://cvc.nic.in/vscvc/purguide.pdf
IRELAND	*Irish Government Public Sector Procurement Opportunities Portal* http://www.etenders.gov.ie *Government Supplies Agency:* Central procurement of goods, supplies and services on behalf of the Government http://www.opw.ie/services/gov_sup/fr_gov.htm *National Public Procurement Policy Unit* http://www.finance.gov.ie/ViewDoc.asp?fn=/documents/publications/publicprocurementindex.htm&CatID=49&m=c *Government Contracts Committee's Public Procurement Guidelines* (see Box III.9) http://www.etenders.gov.ie/xt_Docdownload.aspx?id=1324 *Ethics in Public Procurement:* Guidance document http://www.etenders.gov.ie/xt_Docdownload.aspx?id=1182
ITALY	*Consip:* Company in charge of implementation of e-procurement (see Box III.14) http://www.consip.it/scd/index.jsp *Public Procurement Portal* http://www.acquistinretepa.it/portal/page?_pageid=173,1&_dad=portal&_schema=PORTAL *The Monitor of Public Works* http://www.autoritalavoripubblici.it/
JAPAN	*Online database of Japanese government procurement notices* http://www.jetro.go.jp/en/matching/procurement/ *Office for Government Procurement Challenge System (CHANS)* http://www5.cao.go.jp/access/english/chans_main_e.html
KOREA	*Korea On-line Electronic Procurement System* http://www.pps.go.kr/english/ *Public Procurement Service of Korea* http://www.pps.go.kr/english/

LUXEMBOURG	*Public procurement portal of Luxembourg* http://www.marches.public.lu/ *CRTI-B:* Public procurement in the construction industry http://www.crtib.lu/index.jsp?section=FR *Ministry of Public Works* http://www.mtp.etat.lu/ *Information center for SMEs* http://www.eicluxembourg.lu/index.php
MEXICO	*COMPRANET:* Electronic system for government contracting http://www.compranet.gob.mx *Ministry of Public Administration:* Legal provisions on public procurement http://www.funcionpublica.gob.mx/unaopspf/unaop1.htm
NETHERLANDS	*TenderNed:* Public procurement portal http://www.tenderned.nl/boa.application/page.m?pageid=1 *Information on public procurement contracts above the EU threshold* http://www.aanbestedingskalender.nl *Act on Promotion of Integrity Assessment by the Public Administration (BIBOP)* http://www.justitie.nl/onderwerpen/criminaliteit/bibob/wat-is-bibob/ *Pianoo:* Knowledge center for public procurement http://www.ovia.nl/index.jsp
NEW ZEALAND	*Government Electronic Tenders Service:* Procurement opportunities http://www.gets.govt.nz/Default.aspx?show=HomePage *TenderLink:* Bid advertisements throughout Australia and New Zealand https://www.tenderlink.com/ *New Zealand Tenders Gazette Online* http://www.tenders-gazette.co.nz/ *Ministry of Economic Development:* Information on government procurement http://www.med.govt.nz/templates/StandardSummary____181.aspx *Controller and Auditor-General's reports on purchasing and contracting cases* http://www.oag.govt.nz/reports/by-subject/purchasing-contracting/

NORWAY	*Doffin.no: Announcements for procurement* http://www.doffin.no/ *Ministry of Government Administration and Reform, Department of Competition:* in charge of procurement policy http://www.regjeringen.no/en/ministries/fad.html?id=339 *National Public Procurement Complaint Board (KOFA)* http://www.kofa.no/index.php?id=4
PAKISTAN	*Public Procurement Regulatory Authority* http://www.ppra.org.pk/
POLAND	*National public procurement portal* http://www.portal.uzp.gov.pl/pl/site/ *The Polish Public Procurement Office* http://www.uzp.gov.pl/
PORTUGAL	*Compras:* Public procurement portal http://www.compras.gov.pt/Compras/
ROMANIA	*Public procurement portal* http://www.e-licitatie.ro/Public/Common/Content.aspx?f=PublicHomePage
SLOVAK REPUBLIC	*Public Procurement Office:* Information system on public procurement http://www.uvo.gov.sk/
SLOVENIA	*Official Gazette of the Republic of Slovenia* http://www.uradni-list.si/index.jsp *Ministry for Finance, Public Procurement, Public Utilities and Concessions Department* http://www.gov.si/mf/slov/javnar/javnar.htm *National Review Commission for public procurement* http://www.gov.si/dkom/?lng=eng
SOUTH AFRICA	*National Treasury* (see Box III.1) http://www.treasury.gov.za/ *The Institute of Procurement and Supply* http://www.ipsa.co.za/
SPAIN	*Public Administration Electronic Contracting Platform:* Public procurement portal http://www.pecap.org

	Journal of the Official Gazette http://www.boe.es/ *Ministry of Economy and Finance* http://www.meh.es/Portal?cultura=en-GB
SWEDEN	*AnbudsJournalen:* Procurement opportunities above thresholds http://www.ajour.se/ *National Board for Public Procurement (NOU)* http://www.nou.se/ *National Board of Trade:* Information on market mechanisms behind public procurement http://www.offentlig.kommers.se *The Swedish Association of Public Purchasers:* promotes the development of a professional procurement for the public sector http://www.soiorg.org/
SWITZERLAND	*Simap:* Public procurement portal https://www.simap.ch/ *GIMAP.CH:* Bidding opportunities at federal level http://www.gimap.admin.chf/index.htm
TURKEY	*Public Procurement Platform* https://www.ihale.gov.tr/ssl/ksp/ *The Public Procurement Authority* http://www.kik.gov.tr/index2.htm
UNITED KINGDOM	*Government Opportunities Public Procurement Portal* http://www.govopps.co.uk/ *OGC Buying Solutions* http://www.ogcbuyingsolutions.gov.uk/default.asp *E-Procurement Scotland:* the Scottish Executive's e-procurement service for the Scottish public sector http://www.eprocurementscotland.com/ *Buy 4 Wales:* Sourcing portal for the Welsh public sector https://www.buy4wales.co.uk/buy4wales.aspx *Office of Government Commerce:* Centre for sharing expertise (see Box III.7) http://www.ogc.gov.uk/index.asp?id=35 *Chartered Institute of Purchasing and Supply:* promotes good practices to the purchasing profession http://www.cips.org *Public Procurement Research Group* http://www.nottingham.ac.uk/law/pprg/index.htm

UNITED STATES	*Federal Acquisition Regulations System:* Single-point-of-entry for government procurement, with information on regulations, systems, resources, opportunities, and training http://www.acquisition.gov *FedBizOpps:* Federal government procurement opportunities over USD 25,000 http://www.fbo.gov/ *Federal Procurement Data System* https://www.fpds.gov *Central Contractor Registration* http://www.ccr.gov/ *Excluded Parties List System from Federal contracts and subcontracts* http://www.epls.gov *Federal Technical Data Solutions* https://www.fedteds.gov/ *Office of Management and Budget, Office of Federal Procurement Policy* http://www.whitehouse.gov/omb/procurement/mission.html *Bid Protest Regulations: Government Accountability Office* http://www.gao.gov/decisions/bidpro/bid/bibreg.html *Defence Contract Management Agency* http://www.dcma.mil
INTERNATIONAL ORGANISATIONS	INTER-GOVERNMENTAL ORGANISATIONS *OECD Public Governance and Territorial Development Directorate: Ethics and Corruption in the Public Sector* http://www.oecd.org/department/0,2688,en_2649_34135_1_1_1_1_1,00.html *SIGMA: Support for Improvement in Governance and Management* http://www.sigmaweb.org/pages/0,2966,en_33638100_33638151_1_1_1_1_1,00.html *OECD Development Cooperation Directorate, Aid Effectiveness: Procurement* http://www.oecd.org/department/0,2688,en_2649_19101395_1_1_1_1_1,00.html *OECD Directorate for Financial and Enterprise Affairs: Corruption* http://www.oecd.org/topic/0,2686,en_2649_37447_1_1_1_1_37447,00.html *ADB-OECD Anti-Corruption Initiative for Asia and the Pacific* http://www.oecd.org/document/39/0,2340,en_34982156_34982431_35028199_1_1_1_1,00.html

Asia-Pacific Economic Cooperation (APEC): Government Procurement Expert Group
http://www.apec.org/apec/apec_groups/committees/committee_on_trade/government_procurement.html

Group of States against Corruption in the Council of Europe (GRECO)
http://www.coe.int/t/dg1/greco/evaluations/index_en.asp

European Commission: Public Procurement
http://ec.europa.eu/internal_market/publicprocurement/index_en.htm

Public Procurement Network in Europe
http://www.publicprocurementnetwork.org/

United Nations Procurement Service
http://www.un.org/Depts/ptd/

United Nations Office of Project Services: Procurement Services
http://www.unops.org/UNOPS/Procurement/Overview/

United Nations Commission on International Trade Law
http://www.uncitral.org/uncitral/en/index.html

World Trade Organisation: Transparency in Government Procurement
http://www.wto.org/english/tratop_e/gproc_e/gptran_e.htm

MULTILATERAL DEVELOPMENT BANKS

World Bank: Procurement
http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,menuPK:51355691

African Development Bank
http://www.afdb.org/portal/page?_pageid=473,1&_dad=portal&_schema=PORTAL

Asian Development Bank: Procurement Guidelines
http://www.adb.org/Documents/Guidelines/Procurement/default.asp?p=prcrmnt

European Bank for Reconstruction and Development (EBRD): Procurement
http://www.ebrd.com/oppor/procure/index.htm

Inter-American Development Bank: Procurement Policies
http://www.iadb.org/exr/english/BUSINESS_OPP/bus_opp_procurem_procedurs.htm

Multilateral Development Banks e-Government Procurement Website
http://www.mdb-egp.org/ui/english/pages/home.aspx

	INTERNATIONAL PRIVATE SECTOR ORGANISATIONS *Business and Industry Advisory Committee to the OECD* http://www.biac.org/ *International Chamber of Commerce* http://www.iccwbo.org/ *International Federation of Consulting Engineers (FIDIC)* http://www1.fidic.org/about/ethics.asp INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS *Transparency International: Contracting* http://www.transparency.org/tools/contracting

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Integrity in Public Procurement

GOOD PRACTICE FROM A TO Z

Of all government activities, public procurement is most vulnerable to corruption. Just one example: in OECD countries, bribery by international firms is more pervasive in public procurement than in utilities, taxation, or judiciary. As public procurement is a key economic activity of governments – estimated at around 15% of GDP, this has a major impact on how taxpayers' money is spent.

Although it is widely agreed that all public procurement reforms should follow good governance principles, international efforts have focused exclusively on the bidding process. But this is only the tip of the iceberg. Recent corruption scandals have spotlighted grey areas throughout the whole public procurement cycle, including in needs assessment and contract management. Reform efforts have also often neglected exceptions to competitive procedures such as emergency contracting and defence procurement.

This publication goes beyond the general statement that good governance and corruption prevention matter in public procurement. It offers practical insights into how the profession of procurement is evolving to cope with the growing demand for integrity, drawing on the experience of procurement practitioners as well as audit, competition and anti-corruption specialists.

The book provides, for the first time, a comparative overview of practices meant to enhance integrity throughout the whole procurement cycle, from needs assessment to contract management. It also includes numerous "elements of good practice" identified not only in OECD countries but also in Brazil, Chile, Dubai, India, Pakistan, Romania, Slovenia and South Africa.

ALSO AVAILABLE

Fighting Corruption and Promoting Integrity in Public Procurement (2005).
Bribery in Public Procurement: Methods, Actors and Counter-Measures (2007).

www.oecd.org

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