BLACKLISTING IN PUBLIC PROCUREMENT

QUERY

Which countries have already introduced blacklists of conspirators? What were the results of introduction of the conspirators blacklists?

PURPOSE

We are starting an advocacy campaign aimed at introducing a legal provision for the creation of the Unified State Register of sole proprietors and legal entities who abuse the tender legislation demands. People also call it "the conspirator register" or "the blacklist of unfair bidders

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SUMMARY

Blacklisting, or debarment, typically refers to the procedure that excludes companies and individuals involved in wrongdoings from participating in tendering projects. A blacklisting register is often consolidated in one place, and can either be made available to the wider public or only to contracting authorities. In order to have an efficient and fair system in place, blacklisting should be based on clear rules and on the principles of fairness and accountability, transparency, good judicial practice, and uniformity.

Many countries and international organisations, such as multilateral development banks, have introduced blacklisting systems due to corruption, but few have established a public and central register or database of all companies and individuals that have been debarred. However, public blacklists are available in some countries, including Bangladesh, Brazil, Pakistan and Uganda. In the United States, state and government agencies usually have an online register of for all blacklisted companies, but a public database is still lacking at the federal level. Despite the use of blacklists, there is very limited evidence of the impact of such lists in reducing corruption.

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1 BLACKLISTING AS AN ANTI-CORRUPTION TOOL

What is blacklisting?

Blacklisting or debarment is the procedure where companies and individuals are excluded from participating or tendering projects (Transparency International 2009). This happens if, after an investigation, a company or individual is found to have been involved in the use of corruption to secure past or current procurement contracts, or to have failed to meet contract obligations (U4 Anti-Corruption Resource Centre 2012).

A blacklisting register is often consolidated in one place, and countries may choose either to make this list available to the public, or only to contracting authorities, who will consult the list prior to making any public purchase. Best practice would require such lists to be publicly accessible and binding on public procurement decisions within the respective jurisdiction (Transparency International 2006).

The objectives of blacklisting

Countries and development banks may have different objectives for introducing blacklisting or debarment systems as part of their anti-corruption efforts. Debarment may be used as (UK Anti-Corruption Forum 2007; ADB/OECD 2006):

1. A form of (administrative or criminal) **sanction** to those companies and individuals involved in corruption.

2. A **deterrent** to corrupt behaviour. Once debarred, companies can suffer severe economic losses if prohibited from contracting with the public administration, and experience serious reputational damage if the list is made available to the wider public. Debarred companies may also lose business opportunities if other companies are looking for partners or subcontractors that have not been involved in corruption or other wrongdoing.

3. **An incentive for companies** to establish appropriate anti-corruption policies and to cooperate with authorities in cases of wrongdoing; such efforts may be considered as mitigating factors when deciding on the length of debarment or on the criteria for de-listing, for example.

4. As a means to strengthen and promote open and **transparent procurement processes**, and as a means to support honest competitive bidding (Moran, Pope and Doig 2004).

Requirements for an efficient and fair blacklisting system

In order to have an efficient and fair system in place, blacklisting should be based on clear rules and on the principles of fairness and accountability, transparency, good judicial practice (for example, due process, conditions for removal, etc.), and uniformity.

- Fairness and accountability: Blacklisting may have serious economic and reputational consequences for companies and individuals. Therefore, it is instrumental that it is guided by clear rules and procedures, particularly with regard to the kinds of offences that will lead to debarment, the procedures to be applied by the responsible agency to determine the debarment, and the length of the suspension and debarment, among others (Transparency International 2006; OECD 2005).

  Exclusion from public procurement may be based on different procedural outcomes and take effect in various ways. It can be established following a discretionary decision based on the lack of compliance by the bidder with certain rules, including integrity rules, or following a final criminal conviction, in which case exclusion from procurement is automatic.

  The majority of countries which have debarment policies in place have opted for the discretionary criteria. Debarment thus is an administrative sanction or a preventive measure that can be applied by the purchasing agency or responsible government body irrespective of a criminal conviction. It is often based on a confession by someone involved, on reliable information by a investigations (OECD 2005).

- Length of debarment: There should be clear rules regarding the amount of time a company or an individual will be suspended or debarred from contracting with the public administration. The debarment period should be proportionate to the type and severity of the conduct that led to the process in the first place (OECD 2005; Transparency International 2006). If one of the objectives of creating a blacklist is to encourage firms to act with integrity and take a stand against corruption, then mitigating circumstances, such as the implementation by companies of anti-corruption policies or cooperation with authorities to investigate corrupt acts, should be taken into consideration when determining the period of debarment (UK Anti-Corruption Forum 2007).

- Applicability of debarment: Debarment may apply to natural persons (for example, a company's director or manager), and/or to legal entities. In the case of legal entities, debarment may also reach all sub-contractors and agents associated with the problematic/corrupt tender, and all subsidiaries of the company (OECD 2005).

- Assurance of due process: The process of suspension or exclusion of a company or individual from contracting with the public administration should ensure that due process is respected, and that those involved have an appropriate opportunity to defend themselves. In addition, clear rules for removing individuals and companies from the blacklist should be in place, as well as referral mechanisms in case the information provided in debarment registers is incorrect.

- Transparency: It should be clear to companies and to the public in general what types of offences will lead to debarment. It is considered best practice to maintain a register with details of all debarred companies, including the relevant offence, the length of the debarment and the reasons for debarment (Transparency International 2006). Public officials involved in government contracting should be required to consult the list prior to any procurement process. Preferably, the list should be made publicly available so that citizens and other companies have access to the information (UK Anti-Corruption Forum 2007; Transparency International 2006).

- Uniformity: In cases where more than one government agency is responsible for blacklisting companies and individuals, guidelines should be in place to ensure that there is coordination among these agencies and that debarment procedures and penalties are applied uniformly. In addition, exceptions to debarment rules should not be granted, for example to big and powerful companies to the detriment of smaller firms (Moran, Pope and Doig 2004).

  In case of debarment by an international institution, agreements should be in place to facilitate the full and timely exchange of relevant information.

Effectiveness of blacklisting in public procurement processes

Assessing how effective debarment systems and mechanisms are is a complex task, particularly in countries where corruption is widespread. There is very limited information, and therefore no real assessment of the impact of such mechanisms on corruption in public procurement.

It is unlikely that debarment by itself will solve corruption-related issues in public procurement, particularly in countries where corruption is systemic (Trept 2005). But debarment is certainly an important step in the fight against corruption (Moran, Pope and Doig 2004). It is expected that the consequences of debarment (for example, reputational damage, economic losses, etc.) would act as a disincentive to companies to engage in corrupt behaviour, and would therefore help to enhance transparency and fairness in public procurement.

In fact, research conducted by the Humboldt-Viadrina School of Governance (Schöberlein, Biermann and Wegner 2012) shows that companies find that restrictions on business opportunities and operations, such as blacklists, are considered to be the most effective mechanisms to motivate business to fight corruption. According to 32 per cent of respondents, reputational considerations are a key factor for business to engage in the fight against corruption; for 60 per cent of those surveyed, negative publicity, such as "naming and shaming" approaches, offers a

strong incentive.

Furthermore, 88 per cent of the respondents agree that business representatives with a history of corruption should be excluded from contracting with the public administration (Schöberlein, Biermann and Wegner 2012).

However, in countries where debarment policies are in place, there are no assessments on whether it has helped to change corporate behaviour or not.

At a more technical level, the introduction of debarment mechanisms that are accompanied by a national electronic list of debarred firms and individuals could facilitate information-sharing among government bodies, development agencies and even across countries, reducing operating costs as well as enhancing efficiency and transparency in procurement procedures (Jennett 2007).

Main challenges involved in establishing blacklists

There are several challenges to establishing blacklisting systems. In particular, experts have raised concerns over the economic impact such systems may have if not applied fairly and uniformly.

In countries where corruption is widespread, there is also a lack of confidence in the integrity of debarment systems, as well as of procurement authorities (Moran, Pope and Doig 2004). For instance, if the debarment system lacks clear rules and application criteria, it could offer further risks for collusion in markets where there are already few potential suppliers (OECD 2010).

Fairness in the application of debarment also appears to be a concern in developed countries, such as the United States. According to studies, debarment tends to be used more frequently against small firms, while large and powerful firms are rarely suspended or debarred from contracting with the public administration. For companies involved in wrongdoing, evidence from the United States shows that different penalties (e.g. fines) are applied (Moran, Pope and Doig 2004).

Other drawbacks of the system are related to human rights and the presumption of innocence, in cases where companies and individuals do not have avenues for defence and appeal.

2 EXAMPLES OF BLACKLISTING MECHANISMS

As mentioned, countries and international organisations may establish debarment mechanisms to prevent corrupt companies from participating in procurement procedures. This answer provides several examples of countries as well as multilateral banks which have implemented such mechanisms.

Country examples

Many countries have introduced regulations banning or suspending companies from contracting with the public administration due to corruption (for example, India, Singapore, Vietnam, etc.), but few have established a register or database of all companies and individuals that have been debarred by one or several procurement authorities/entities.

Among those countries that opted for the establishment of registers of suspended companies and individuals, there is a significant difference in the way the information is used and publicised. This answer highlights examples of countries that have established publicly accessible online databases of debarred companies (for example, Bangladesh, Brazil, Pakistan, Tanzania and Uganda), as well as examples of countries that have established such databases but focus on improving information-sharing between different procurement agencies, while restricting access to citizens and other companies (for example. Germany, Singapore, and the United States).

Countries with publicly available blacklists

Brazil

In Brazil, debarment is an administrative punishment administered by the responsible purchasing agency. At the federal level, temporary suspension and debarment of both individuals and companies can be applied only by federal ministries and the state secretary after an administrative procedure during which the contractor is entitled to present a defence. Debarred contractors may apply for reinstatement two years after the debarment decision (OECD 2012).

In 2008 the Office of the Comptroller General

launched the National Debarment List, which is a list of companies, individual suppliers and non-governmental organisations sanctioned by the government for committing fraud, acts of corruption and other misconduct in public contracts and tenders. The list aims to consolidate in one place those suspended and debarred by federal bodies, states, and municipalities. However, as of 2012, only eight (out of 27) Brazilian states were sharing information regarding debarred companies and individuals, and only very few municipalities were publicising information on companies debarred at the local level.

The list contains the name and registry number of the company or individual involved, the length of exclusion/suspension, the type of sanction, as well as the name of the public body responsible for the sanction. As of September 2011, there were more than 5,000 debarred companies and individual suppliers.

According to the act regulating the registry, all federal government bodies must refer to it before carrying out public procurement processes. The list also allows government agencies at all levels, citizens and other companies to track those involved in corruption. In fact, the private sector has also been using the list to acquire information on whether certain companies should be hired or included in their supply chain (Portaria 516, Office of the Comptroller General - CGU).

The list is available to the public and can be accessed at the website Transparency Portal (Portal da Transparencia).

Pakistan

In Pakistan, the procurement law requires that procurement agencies should establish the necessary mechanisms to permanently or temporarily exclude suppliers and contractors found to be involved in corruption or fraud from participating in their respective procurement procedures.

Procurement agencies should publicise debarment decisions and communicate them to the National Procurement Authority, who keeps a central register of all companies banned, including information on the name, address, duration of the suspension, and main reasons for the debarment.
The fact that each individual procuring agency is responsible for defining their own mechanisms for debarment could potentially lead to abuse and unfair application of the system, eliminating competitors that could be otherwise qualified from the procurement process (OECD 2010). A system in which procurement officials hold less discretionary powers with regard to debarment decisions could help to ensure that the system is applied in a fair, transparent, and uniform manner.

The register is available to the public and can be accessed here

The Pakistan Public Procurement Law is available here.

Tanzania

In Tanzania, the Procurement Law establishes that the Public Procurement Regulatory Authority (PPRA) can blacklist any supplier, contractor or consultant and exclude them from participating in procurement processes in the country for a specified timeframe. The decision is binding to all procuring entities.

According to the law, companies which were barred from taking part in public procurement by a foreign country, an international organisation or other foreign institution on grounds of fraud and corruption will be automatically blacklisted and barred from participating in procurement in Tanzania for the same period plus for a further period of up to ten years.

In addition, to avoid that owners of debarred companies simply start a new company operating under a new name, all blacklisted suppliers, contractors and consultants are not permitted to start a new business during the time of debarment.

As of July 2012, 358 firms (including their directors) and individuals were barred from participating in public procurement in the country. The debarred list includes 345 firms and individuals who have been debarred by the World Bank for fraud or corruption, and 13 who have been debarred by the Public Procurement and Disposal Authority of Uganda for fraud, corruption or breach of contracts. Among these debarred companies, only one is from Tanzania.

The list containing the name of the debarred company, the reason for debarment, and the duration

of the exclusion is made available to the public on the Procurement Authority website.

Uganda

In Uganda, the public procurement act and further regulations establish that the Public Procurement Disposal of Public Assets Authority (PPDA) can suspend providers who do not comply with the act or with the Code of Ethics for Providers. According to the law, procurement entities should submit a written recommendation to the Authority stating the reasons for suspension.

During the suspension period, which is determined by the Authority, providers and their directors are excluded from participating in any public procurement procedure. A list of all suspended providers is available at the PPDA website.

Other countries

Rwanda: List of blacklisted companies

Bangladesh: Central Procurement Technical Unit Debarment List

Mauritius: List of ineligible suppliers, contractors and consultants

Countries with blacklists only available to procurement officials

Germany

In Germany, government agencies at the state level (*Bundesländer*) may decide on the establishment of debarment sanctions. The decision is then made available to all purchasing authorities through a register (blacklist) (OECD 2005).

Criteria for the application of debarment vary from state to state. In general, a strong assumption of a corrupt act (for example, a confession or refusal to deny an accusation) could lead to debarment by the responsible procurement authority, after the company has been given the opportunity to defend itself. While the debarment system does not provide for a formal appeal mechanism, any debarment decision and entry in the register can be challenged in court (OECD 2005).

The main problem with Germany's debarment system is that consultation of the register prior to awarding a public contract is only mandatory for procurement officials acting on behalf of the state in question. Municipal and other procurement officials are not obliged to consult the list and may end up awarding contracts of significant value to debarred companies. Moreover, the information on debarred companies is not made available to the public (OECD 2005).

Transparency International Germany has been advocating for the creation of a centralised procurement registry, which could help to address the issue mentioned above, as well as to increase efficiency in procurement processes across the country (OECD 2005). While the government has demonstrated interest in reforming the current procurement system, to date, measures to establish such a register are not yet in place.

United States

The United States debarment system is among the oldest, and its grounds for debarment include anti-trust violations, tax evasion and bribery in procurement-related activities. Companies and individuals found guilty of fraud or bribery in government contracts can be debarred by both state and national government for a period of three years. Reinstatement is not automatic, but subject to the debarred company demonstrating that problems have been resolved (Moran, Pope and Doig 2004).

Many of the individual states (for example, North Carolina and New Jersey) and government agencies (such as USAID and the Environmental Protection Agency) keep a list (System for Award Management), accessible to the public, with the names of firms and individuals who have been excluded from participating in procurement processes. Yet, at the central level, a broader list containing all organisations, firms and individuals that have been suspended or debarred from receiving any federal government funds can only be accessed by government officials.

The Office of the Inspectorate General, however, also created a public list that helps track contractors who have been debarred or suspended by state governments. The list is not complete, but it is

available to the public and could be a supplement to the System for Award Management described above. The list is available here.

Examples from Multilateral Development Banks

Multilateral development banks, including the Asian Development Bank, the Inter-American Development Bank, the African Development Bank, the European Bank for Reconstruction and Development and the World Bank, have all established debarment systems as part of the range of administrative sanctions that can be applied to companies involved in corruption, fraud, and collusive practices.

While these banks have their own offices responsible for conducting investigations and deciding upon the sanctions to be applied, they have agreed on general principles and guidelines for sanctions in order to ensure fairness and uniformity in the process. In addition, these banks have also agreed on the criteria for mutual enforcement of debarment decisions. An online register of all blacklisted companies is available on the website of all multilateral banks and can be consulted by the wider public.

Between 2011 and 2012, 111 firms and individuals were cross debarred and prevented from doing any business in any project financed by these multilateral development banks, anywhere in the world.

More information on the range of sanctions, as well as the aggravating and mitigating circumstances that can be applied, is available here.

The list of all debarred entities is available here.

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