ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

OVERVIEW OF PRINCIPLES FOR MONITORING AND CHALLENGING PUBLIC PROCUREMENT CONTRACTS

QUERY

Can you please provide an overview of the main international or European instruments and principles related to monitoring public procurement and awarded contracts, including information on sanctions (for example administrative sanctions, cancellation of contracts) and means to challenge procurement processes and concessions?

CONTENT

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SUMMARY

Public procurement monitoring is instrumental in ensuring the most efficient use of public funds. Standards put forward by international treaties as well as international and non-governmental organisations have highlighted the importance of establishing mechanisms for internal and external control exercised by independent auditors, bidders and competitors, and civil society, among others, covering all phases of the procurement process, including the contract implementation.

Moreover, there are several international and European standards relating to procurement monitoring and sanctioning in case of corruption. Common elements include the need for internal controls and external audits, as well as autonomy of oversight units. The strongest instruments also require the involvement of civil society and the systematic blacklisting of companies involved in wrongdoings.

In addition, international standards require states to implement effective redress mechanisms to any person having or having had an interest in obtaining a particular public procurement contract, and who has been or is liable to be harmed by an alleged infringement.

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1 INSTRUMENTS AND GENERAL PRINCIPLES APPLICABLE THROUGHOUT THE PROCUREMENT PROCESS

Overview

Public procurement is an area of operation with high corruption risks, as the large amounts of funds involved and the frequently high levels of discretion and bureaucracy provide both incentives and opportunities for rent-seeking behaviours (Transparencia Mexicana, 2012).

Several international and European instruments of a diverse nature have been designed to promote integrity in the procurement process. Some consist of general, universally-recognised principles while others are specific, legally-binding conventions.

Various internationally-recognised principles are also applicable throughout the procurement process and are instrumental for its effective monitoring and sanctioning, including the principles of transparency and accountability, non-discrimination, as well as economy and efficiency. This answer briefly introduces first the main instruments applicable and the internationally-recognised principles that should be mainstreamed throughout the procurement process. It then deals with specific standards regarding the monitoring of contracts, administrative sanctions and remedies processes that help to confront cases of corruption after the award of the contract, concession or Public Private Partnerships.

International binding instruments

United Nations Convention against Corruption

The United Nations Convention against Corruption (UNCAC) has specific provisions on public procurement and financial management in its Article 9. It requires state parties to take measures to ensure transparency and accountability in these areas, and lists a few measures such as the establishment of internal control mechanisms (Article 9.2d) as well as of a system of domestic review to ensure legal resources and remedies in case of wrongdoings (Article 9.1d).

Government Procurement Agreement

The plurilateral Government Procurement Agreement (GPA) was negotiated in the context of the World Trade Organisation in 1994, and renegotiated in 2012. It contains general and detailed provisions on the public procurement process, including requirements on a domestic bid challenge system. These involve minimal periods between the call for tenders and the award, as well as details on review systems. The EU and all member countries are part of the agreement. However, the agreement may apply only above certain contract value thresholds. The FYROM (former Yugoslav Republic of Macedonia) is not a party, but became observer at the end of June 2013.

European binding instruments

EU legislation on public procurement

The EU has adopted specific legislation on public procurement, including three main directives that set the framework of national procurement processes, as well as matching directives on remedies, dealing specifically with how individuals can challenge procurement decisions.

These directives do not cover all public procurement contracts, but only those above certain value thresholds for specific goods and services. One of these specifically covers utilities (Directive 2004/17/EC), another deals with public works, supply and services ("Classic" Directive 2004/18/EC), and a third focuses on defence and security tenders (Directive 2009/81/EC). This answer mostly refers to the Classic Directive on public works, supply and services.

The contracts directly regulated by these EU procurement rules represent about 19 per cent of the European public procurement (420 billion euros in 2009) (European Commission, 2013).

While the directives do not include specific rules regarding the monitoring of procurement processes, they set important standards to ensure that contracts are awarded in a fair and efficient manner.

In addition, the European Commission considers that some general principles on procurement and concessions can also be derived from the EU treaties themselves, and shall therefore be applied at the

national level regardless of contract value or sector. These basic principles are detailed in a 2006 Communication.

Similarly, for Public Private Partnerships, the European Commission estimates that the EU procurement rules apply.

It must finally be noted that since 2011, the EU has started a reform process for procurement regulations. An agreement seems to have been reached and a report on the future directive should be released at the beginning of autumn 2013. More information on this reform can be found here.

Council of Europe Criminal Law & Civil Law Conventions on Corruption

These two conventions ratified in 1999 cover measures to be taken by state parties in terms of criminal and civil law on corruption. Provisions on sanctions (Criminal Law Convention) and on the validity of contracts (Civil Law Convention) in case of corruption are included.

Non-binding instruments and leading standards

Organisation for Economic Co-operation and Development (OECD)

The OECD has developed the most comprehensive principles on public procurement integrity. Key documents include the OECD'S *10 Principles for Integrity in Public Procurement* of 2007. It acknowledges the role of four central pillars in promoting integrity in this context: transparency, good management, prevention of misconduct, and accountability and control. The OECD has further developed these general principles into comprehensive, detailed recommendations on various aspects and stages of the public procurement process. Examples of best practices are also listed.

Transparency International's minimum standards for public contracting

Transparency International standards for public contracting cover the whole procurement cycle – from needs assessment to contract implementation. The standards also apply to all types of government contracts, including privatisations, concessions and licensing (Transparency International, 2006).

With regard to monitoring, the standards highlight that procurement authorities should ensure the existence of internal and external control, as well as independent audit bodies. A regional policy paper produced as part of Transparency International's European National Integrity Systems study conducted in 25 European countries further stresses the need to strengthen national monitoring systems for procurement, to tackle the deficiencies identified in most EU member states. It recommends the establishment of an effective "red flag" indicator, with a common set of criteria and methodology to allow for cross-country comparisons (Transparency International, 2012).

Moreover, states should encourage the participation of civil society organisations to monitor both the tender and contract implementation.

Open Contracting Global Principles

The Open Contracting Global Principles is a new set of principles for public contracts that promote full disclosure and participation of the public at every stage of procurement. These are spearheaded by the World Bank Institute.

INTOSAI guidelines for internal control standards

The International Organisation of Supreme Audit Institutions (INTOSAI) had developed in 1992 guidelines for developing standards of internal control within public sector organisations, which are especially relevant regarding procurement.

World Bank procurement guidelines

The World Bank's own procurement guidelines have inspired several model and national laws and are considered a good basis for drafting procurement regulations. Among other things, the guidelines state that independent external agencies should be hired to verify the contract implementation (World Bank, 2011; Transparency International 2006).

Internationally-accepted principles for integrity in public procurement applicable throughout the process

Most of the instruments and recommendations provided above agree on a set of integrity principles that are essential throughout the procurement

process and fundamental to ensure proper control and monitoring in the award and implementation of contracts. These include the following principles:

- *Transparency:* all major instruments on procurement integrity underline the key role of transparency in avoiding and unveiling corruption in public procurement, including during the implementation phase (OECD, 2009; Transparency International, 2006; UNCAC). Transparency also allows other bidders, administrative control bodies and other stakeholders to detect suspicious contracts and challenge the process at a later stage. In particular, details of final contracts and subsequent amendments should be made public, including contracts both above and below thresholds (Transparency International, 2012).

- *Accountability:* the accountability of the public procurement cycle is another key integrity feature. It refers to the obligation of government officials and suppliers to abide by all procurement regulations and to face possible consequences in case of infringement. This is one of the key pillars of the OECD Principles as well as one of the provisions of the UNCAC (Article 9).

- *Non-discrimination:* non-discrimination between suppliers is also a consensual principle promoted in a number of instruments. While this might originally have been designed to ensure fair and efficient competition between bidders and prevent discrimination of non-domestic companies or small and medium enterprises, these provisions can play an important role in ensuring that access to contracts and concessions are not limited based on discretionary power or corruption (European Commission 2006).

- *Economy and efficiency:* these principles are also crucial in enforcing the integrity of the process. Concrete provisions based on the economy principle may require the procuring authority to choose a bid with the lowest prices, or the "most economically advantageous" bid that balances price and quality criteria. Deviations from this principle may be signs of wrongdoings (EU Directive 2004/18/EC).

  The efficiency principle refers to procurement systems that are responsive, efficient and operate in a timely manner with limited bureaucracy. Cumbersome and irresponsive procurement systems may create incentives for corruption, and may undermine possibilities to seek satisfactory legal redress (OECD 2007, 2009).

2 INTERNATIONAL STANDARDS FOR MONITORING THE AWARD AND IMPLEMENTATION OF PUBLIC CONTRACTS

Monitoring the procurement process is instrumental in detecting possible wrongdoings and ensuring that decisions are made taking into account the public interest.

The OECD, Transparency International and other sources insist on the use of both internal and external controls at all stages of the procurement cycle, from the preparation of the tender by the relevant public officials to the implementation of the contract by the supplier. Controls in this last phase are considered to be at least as important as during the bidding process (OECD, 2013).

Control systems play an important role in enhancing the accountability and transparency of public procurement processes. According to the various instruments, they should include internal control by an independent government agency, and external audit as well as external monitoring by citizens, civil society groups and the media. Effective monitoring of both the award and implementation of contracts will thus depend to a great extent on a sound procurement legal framework that is set in accordance with the principles discussed above.

Monitoring the award of public contracts

Internal and external controls

Internal controls

Internal controls are deemed crucial in order to guarantee the integrity of public procurement, including the information reported by procuring entities. Their existence is among the binding requirements under Article 9 of the UNCAC, as states must implement measures such as "effective and efficient systems of risk management and internal control" in order to promote accountability in the management of public finances. This is further detailed by the OECD Principle 3, which proposes measures of internal control that can ensure that funds are used according to their intended purposes, from the budget planning phase to final payments.

Internal controls encompass management control, financial control and internal audit. INTOSAI defined a series of guidelines for setting up **internal control standards**. These include:

- Specific control objectives should be set for each activity of the organisation, and be appropriate, comprehensive and reasonable. They should also be integrated into the organisation's overall objectives.
- Managers and employees are to maintain a supportive attitude to the standards at all times and are to have the integrity and sufficient competence to meet the standards.
- The system provides reasonable assurance that the objectives of an internal control system will be met.
- Managers are to monitor their operations continually and take prompt remedial action where necessary.
  (Taken from OECD, 2013)

Among the key aspects of internal controls is "**sound reporting**" within the public sector hierarchy, where officials clearly report how procurement activities follow the intended purpose of the budget, and high-ranking officials up to the minister level state explicitly their responsibility in financial reports.

In addition, there is a strong recommendation that the officials in charge of these internal controls should be independent from those undertaking the procurement, with a clear **separation of functions in the procurement process**. The OECD Principles thus state that "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 to avoid collusion" (OECD, 2009).

Electronic systems are suggested to ensure these different units work closely together while preventing direct contact between individuals. Transparency International's *Handbook for Curbing Corruption in Public Procurement* also describes separation of these tasks as a best practice, as "whenever people perform double or multiple functions, natural checks and balances are foreclosed" (Transparency International, 2006).

In order to target controls on high-risk areas and yet to provide effective oversight, it is recommended that internal control units use **risk assessments and adapted detection tools** to collect signals of potential corruption. Detection tools include:

- "Blinking indicators" based on data-mining and electronic systems (OECD, 2009).
- "Red flag" indicators and checklists. The World Bank, the EU and Transparency International have developed their own lists of best indicators depending on the stage and context.

For more information please see Transparency International's Gateway topic guide on public procurement.

Furthermore, a key recommendation is that the officials in charge of these controls should be **specialised and regularly trained** on the new trends and methods of corruption (OECD, 2009). Moreover, it is fundamental that those in charge of internal control are independent from the other branches of government and have sufficient financial

and human resources to conduct their tasks.

External audits

According to the OECD, "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". The audits of financial reports by independent entities such as Supreme Audit Institutions or Parliamentary Committees are therefore also recommended (OECD, 2009).

These audits should go **beyond checking financial accuracy and legality of spending decisions**, but also examine whether they follow government needs. Performance audits may also assess the "attainment of the physical and economic objectives of the investment". Supreme Audit Institutions may also be tasked with providing recommendations on procurement processes (OECD, 2007).

The reports or contracts to be audited by external auditors may be selected on several criteria, for instance on a random basis, or based on their importance, complexity or level of corruption risks (OECD, 2007).

Furthermore, a key dimension for the effectiveness of both internal external audits is to ensure that any detection of wrongdoing is promptly addressed (Transparency International, 2006).

The role of civil society in procurement monitoring

External control can also be exercised by civil society groups and citizens in general for both the awarding and implementation of the contract. In fact, the OECD Principles stress the need to "empower civil society organisations, media and the wider public to scrutinise public procurement" (Principle 10). This encompasses the publication of information on major contracts and reports of oversight institutions, as well as "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" (OECD, 2009).

Similarly, the Open Contracting Global Principles encourage governments to create an "enabling environment, which may include legislation, that recognizes, promotes, protects, and creates opportunities for public consultation and monitoring of public contracting, from the planning stage to the completion of contractual obligations" (paragraph 8).

Within this framework, civil society support in monitoring public procurement can happen in all phases of the process. Successful examples include, for instance, the adoption of "integrity pacts" (Transparency International, 2006).

The integrity pact is essentially an agreement between a government/government department and all bidders for a public contract. Besides defining rules and obligations of both parts, the pact also provides for a monitoring system to increase government accountability in the public contracting process, where an expert or members of civil society are appointed to participate in/oversee different phases of the process. Their task is to ensure that the pact is implemented and that decisions are taken based on the public interest (Transparency International, 2006).

In Mexico, following amendments to the procurement law in 2009, procurement monitoring under the Integrity Pact and Social Witnesses Programme, pioneered by Transparency International's chapter Transparencia Mexicana, became legally required in procurements above a certain threshold (Transparencia Mexicana, 2012).

The social witness is an independent and respected technical expert in the field who acts as an external observer of the procurement process. This expert takes part in every single meeting regarding the discussion of terms of reference, its implementation and the evaluation and award of the bidding process.

The social witness programme has significantly reduced the costs of public contracts and has increased the number of bidders participating in the procurement process in Mexico (Transparencia Mexicana, 2012).

In addition, countries should seek to establish a well-functioning whistleblowing system, which will help to promote accountability by encouraging the disclosure of information about misconduct and possibly corruption while protecting the whistleblower from retaliation.

Monitoring the implementation of public contracts

While most of the procurement regulations do not cover the post-award or implementation phase, international organisations and procurement experts have highlighted the importance of establishing monitoring mechanisms focusing specifically on ensuring the correct implementation of the contract awarded (Heggstad & Frøysta, 2011).

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The risks involved during this last phase are various, including the possibility of non-compliance with the initial contract or offer, renegotiations which could significantly increase the final price of the awarded contract, lax supervision or collusion between public officials responsible for oversight and suppliers, and price increase during the execution, among others (Heggstad & Frøysta, 2011).

Against this backdrop, countries should seek to establish monitoring mechanisms, including (Transparency International, 2006):

- setting up an independent monitoring system to oversee the contract implementation
- conducting random on-site checks
- establishing clear and pre-determined limits for contract change orders, and ensuring that change orders that alter the price significantly are monitored at a high level, preferably by the decision-making body that awarded the contract (Transparency International's minimum standards for public contracting)
- establishing online reporting and electronic systems
- enacting whistleblower policy and establishing hotlines where wrongdoings can be denounced

3 SANCTIONS

Establishing sanctions in case of corruption is a requirement under several binding treaties, including the UNCAC and Council of Europe Conventions. Yet some treaties leave it to state parties to choose between criminal and non-criminal sanctions for certain offences. Both conventions also encourage signatory parties to establish criminal liability of legal entities for corruption. Where only administrative sanctions can be applied, it is crucial that these allow for an effective, proportionate and dissuasive sanction in order to have a significant impact (Transparency International, 2006).

While international treaties and standards mainly underline the necessity of establishing sanctions that are effective, proportionate and dissuasive, there is a variety of sanctions that can be applied when wrongdoings occur in the procurement process, including:

Exclusion from the procurement procedure

The United Nation Commission for International Trade Law **(UNCITRAL) Model Law**, which has been used as a basis for national procurement legislation in about 30 states worldwide, sets standards with regards to punishing wrongdoings in the award of public contracts. For instance, Article 21 underscores that a supplier or contractor should be excluded from the procurement proceeding if: "(a) the supplier or contractor offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, so as to influence an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings;
or (b) the supplier or contractor has an unfair competitive advantage or a conflict of interest, in violation of provisions of law of this State."

Forfeiture / confiscation of illegal gains

Transparency International's *Handbook on Curbing Corruption in Public Procurement* (2006) considers forfeiture or confiscation of gains obtained through bribery or corruption to be an effective sanction. In these cases, companies that have won a bid through bribery or other forms of corruption should be required to return not only the amount illegally obtained, but the entire payment of the contract (Transparency International, 2006).

Liability for damages

Liability for damages should also be included as one of the possible sanctions to be applied in case of corruption during the procurement process, to provide those affected by the illegal award with an opportunity for redress (Transparency International, 2006).

Cancellation of contracts

There seems to be no single leading legal principle on the cancellation of public contracts as an administrative sanction. This may be due to the fact that in a number of countries, the phases before or after the bidding phase are not necessarily covered by procurement regulations but by civil or contract law. (OECD, 2007, BP A to Z) The cancellation of contract may therefore be governed by different legal principles according to the national context.

Nonetheless, for contracts covered by the European procurement regulations, the Directive on Remedies establishes a number of situations where contracts may be considered ineffective by an independent review body, including in some cases of:

- award without the mandatory publication of a contract notice
- deprivation of a bidder of the possibility of using pre-contractual review processes when another infringement has affected the bidder's chance of obtaining the contract (EU Directive 2007/66/EC, Article 2b)

Furthermore, some recommend the use of **integrity clauses** in order to ensure the possibility of administrative contract cancellation regardless of thresholds (Transparency International, 2006). Integrity clauses in contracts "normally stipulate that the supplier:

(i) has not been convicted, and has not been formally investigated of a corruption crime and
(ii) has not and will not resort to bribery or any other form of corruption in the context of the respective contract.

Misinformation by the supplier under such a clause would give the principal the right to cancel the contract unconditionally." (Taken from Transparency International, 2006).

Similar clauses are used by a number of public entities, including the European Commission, and establish the termination of contracts in case corruption is uncovered. Yet, while this may effectively allow for ending contracts, it does not necessarily come with other sanctions, such as full refund of received payments or liability for damages to other bidders. It may also require independent monitoring to be fully implemented (Transparencia Mexicana, 2013).

Debarment / blacklisting

"Blacklisting or debarment typically refers to the procedure that excludes companies and individuals involved in wrongdoings from participating in tendering projects." (Taken from Martini 2013).

This practice is widely shared and is mandatory under the EU legislation. The EU Directive on Public works contracts, public supply contracts and public service contracts thus calls for the exclusion of public contracts of tenderers who have been found guilty of corruption – among other offences – but leaves to national law the implementation of this principle (EU Directive 2004/18/EC, Article 45). The World Bank's own debarment register, which is now part of a cross-debarment system with other multilateral banks, is sometimes considered to be the most effective, functioning mechanism (Transparency International,

2006). For more about the World Bank's sanction system, see World Bank 2013.

Key elements in ensuring that debarment systems are efficient in sanctioning and preventing corrupt behaviours must go in hand with "transparency, accountability and good judicial practice" (such as the right to appeal) "and uniformity" in order to keep the process fair (Martini, 2013).

According to Transparency International's *Handbook for Curbing Corruption in Public Procurement*, conditions for an effective system also include:

- Finding the right "evidentiary requirement" between final convictions and mere suspicions (the World Bank).
- Public access to the register.
- Binding use of the register and full implementation of the exclusion.
- Specified debarment period of time depending on the severity of the violation.
- Clear legal conditions for the blacklisting of subsidiaries or partners.
- Clear legal conditions for removal from the list. This can include the termination of employment of responsible individuals, or the implementation of credible anti-corruption policies.

(Transparency International, 2006)

More information on debarment can be found in a previous Anti-Corruption Helpdesk answer on Blacklisting in Public Procurement.

Criminal or disciplinary action against employees of the government

Public officials involved in the procurement process should be held accountable for their actions. Governments should thus establish the necessary mechanisms to ensure disciplinary actions as well as criminal liability for passive corruption and collusion, for example (Transparency International, 2006).

4 REMEDIES TO PROCUREMENT DECISIONS

The right of bidders to challenge procurement decisions if they feel they were treated unfairly or that procurement regulations were not applied is a generally accepted procurement principle, as well as a mandatory provision. The UNCAC thus requires states to implement "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" (Article 9(d)). Such provisions are also found in the Government Procurement Agreement and EU regulations.

Furthermore, the OECD recommends that these procedures are applicable not only to contract awards, but to other steps in the procurement cycle such as the design of tenders (OECD, 2007).

Principles for a review system

All major instruments agree on a set of minimal principles for remedies systems, including the EU's Remedies Directive.

First, remedies should be available "at least to any person having or having had an interest in obtaining a particular public procurement contract and who has been or is liable to be harmed by an alleged infringement" (EU Directive).

The bidders or potential bidders should have the **possibility to seek redress directly from the procuring entity**. Under the Government Procurement Agreement (GPA), it is a requirement that "in such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system" (GPA, Article XX-1). In the EU legal framework, national laws may even make this a mandatory step for bidders before using further remedies. Alternatively, a simple notification to the procuring entity may be required. In any case, relevant information should be provided in a timely manner explaining why a bid was not selected (OECD, 2007).

In parallel, bidders or potential bidders should have **sufficient time to present a request for review** before the contract is signed. For instance, EU regulations even require a minimal "standstill period" of 15 days (10 days for electronic tendering) between the selection of the winning bid and the signing of the

contract, so that parties may have time to analyse the decision.

Next, if a party decides to request review, this review should be addressed by an **independent review body**, different from the procuring authority (OECD, 2007). This is a mandatory requirement under EU remedies legislation. Under the GPA, it should be a body "with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment" (Article XX-2). Officials in charge of the review should also be protected from threats and intimidation (OECD, 2007).

Interim measures should be taken when relevant, such as the suspension of the award decision, in order to preserve the interest of all parties while the review is being addressed. Under the EU Directive on Remedies, **suspension of the award decision is automatic**. However, in that framework the body in charge of the review must take into account the potentially harmful impact of interim measures, including on public interest. Similar provisions exist in the GPA.

Finally, the OECD recommends that the review body should be able to enforce interim decisions, cancel contracts and impose penalties (OECD, 2007).

Judicial appeal and challenge

In order to ensure that remedies are dealt with fairly, the possibility to **appeal procurement** – or administrative review – **decisions in courts** is requested in a number of instruments. In the GPA (Article XX), suppliers must be able to challenge procurement decisions in a court, including the review body's decisions. An exception to this rule is if the review body meets a series of rigorous criteria.

The two EU Remedies Directives (Article 2.9) make the possibility of appealing a review decision in a court mandatory. It may also be possible **to challenge the validity of contracts** in courts, based on the Council of Europe Civil Law Convention on Corruption. As a matter of fact, this requires states to implement provisions in "internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void" (Article 8, Council of Europe, 1999).

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