ANTI-CORRUPTION HELPDESK

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PUBLIC PROCUREMENT LAW AND CORRUPTION

QUERY

Can you please provide information regarding good practice and standards in public procurement laws?

CONTENT

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SUMMARY

The existence of an adequate legal framework is the very first step to limit corruption opportunities in public procurement. While procurement laws should be designed in accordance with the country's context and legal tradition, there are some general issues that should be covered by all procurement regulations. They include, for instance: clear and objective rules regarding the available procurement methods and the grounds under which each of them should be used; transparent rules on the bidding process, including time limits, tender documents and contractor qualifications; and the evaluation criteria of bids and bidders.

Moreover, procurement laws should regulate complaint and redress mechanisms, sanctions for non-compliance, and provide for the effective monitoring of awarded contracts through, for instance, proactive disclosure rules and the participation of civil society as a watchdog. Other issues to be covered by procurement laws include measures to ensure the integrity of procurement officials and to protect whistleblowers.

1 GOOD PRACTICE IN PUBLIC PROCUREMENT LEGISLATION

Overview

Public procurement refers to the acquisition of goods or services by a government department or institution. A large percentage of public money is spent on procurement. It is estimated that an average of 13 to 20 per cent of gross domestic product (GDP) is spent worldwide on the procurement of services and goods in the public sector, which amounts to approximately US$9.5 trillion per year (Transparency International 2014).

Public procurement is comprised of mainly three stages: (i) the planning stage, covering the initial needs assessment, budget allocations, and initial market research through to the preparation of the tender; (ii) the tendering stage, including the evaluation of bids and award of contracts; and (iii) the post-award phase, covering the contract implementation and administration that is usually regulated by separate/dedicated laws and regulations (Transparency International 2014).

The size, the number and complexity of procurement transactions, combined with the usual high level of discretion enjoyed by procurement officials provide many incentives and opportunities for corruption in all stages of the process (Morgner & Chêne 2014).

Against this backdrop, given the complexity of the procedures involved, which often require a high level of technical expertise, preventing and detecting corruption in public procurement is very challenging.

The existence of an adequate legal framework is the very first step to limit corruption opportunities, but other measures, such us ensuring that the procurement process is part of an effective public financial management system, having strong oversight mechanisms with well-resourced and independent audit bodies, and encouraging external oversight by civil society and media, are essential to effectively curb corruption in public procurement.

International standards

International standards have highlighted the importance of adequate procurement systems. For instance, the United Nations Convention against Corruption (UNCAC) calls for the establishment of appropriate systems of public procurement based on the fundamental principles of transparency, competition and objective criteria in decision making[1]. According to the convention, signatory parties should take the necessary measures to ensure the adequate distribution of information related to public procurement and relevant pre-defined criteria with regard to the award of public contracts. The availability of redress mechanisms and measures to ensure the integrity of procurement officials are also essential.

International organisations, such as the OECD and Transparency International, have also published principles regarding integrity in public procurement processes and have called for effective procurement systems.

According to the OECD, a sound procurement system includes: (i) procurement rules and procedures that are simple, clear and ensure access to procurement opportunities; (ii) effective institutions to conduct procurement procedures and conclude, manage and monitor public contracts; (iii) appropriate electronic tools; (iv) suitable, in numbers and skills, human resources to plan and carry out procurement processes; and (v) competent contract management (OECD no year).

Within this context, the existence of an adequate legal framework is an essential part of an effective procurement system. There are some standards, such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement, that provide more specific recommendations with regard to the legal framework of public procurement.

[1] UNCAC Article 9
http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

The UNCITRAL model law is often referred to as a good practice example. It was designed to assist states in formulating a modern procurement law, with the objective of promoting competition, maximising economy and efficiency, and promoting integrity and transparency.

While procurement laws should be designed in accordance with the country's context and legal tradition, there are some general issues that should be covered by all procurement laws.

Based on existing principles, guidelines and recommendations, this answer provides an overview of the main issues to be considered when drafting a public procurement law so that it is effective in preventing and reducing corruption opportunities.

The next sections analyse the main areas to be covered by public procurement legislation within each of the procurement stages. More general provisions and provisions specifically focused on strengthening integrity and curbing corruption are also discussed.

2 PROCUREMENT LAW AND CORRUPTION: GENERAL PROVISIONS

Principles

The procurement law should include the main principles and objectives that guide its provisions (UNCITRAL 2011; UNODC 2013). Common principles usually include integrity, transparency, competition, fairness, objectivity, efficiency and professionalism (Transparency International 2014; UNODC 2013).

For instance, the UNCITRAL model law includes in its preamble that the government "considers desirable to regulate procurement as to promote the objectives of: (a) maximizing economy and efficiency in procurement; (b) fostering and encouraging participation in procurement proceedings by suppliers and contractors regardless of nationality, thereby promoting international trade; (c) promoting competition among suppliers and contractors for the supply of the subject matter of the procurement; (d) providing for the fair, equal and equitable treatment of all suppliers and contractors; (e) promoting the integrity of, and fairness and public confidence in, the procurement process; (f) achieving transparency in the procedures relating to procurement".

Scope of application

It is important that the scope of application of the law with regard to both categories of procurement (goods, works and services) covered and entities subjected to the law are clearly stated.

According to good practice, procurement laws should cover all categories of procurement using public resources, including goods, works, services, consulting services as well as concessions (UNODC 2013; OECD 2010).

The law should also cover the extent to which the procurement legislation applies to all public bodies, sub-national governments and entities when national budget funds are used. In this regard, all agencies or parts of the public expenditure excluded from the provisions of the law (for example, the army, defence, autonomous or specialised state-owned enterprises) should be listed (UNODC 2013). To the greatest extent possible, it is recommended that decisions on exclusions are made administratively only in exceptional cases to avoid manipulation and open opportunities for corruption to flourish (OECD 2010). Overall, uniformity and universality of coverage contribute to predictability and savings in the operation of the procurement system (OECD 2010).

Availability of information

Availability of information is considered key to ensure fair competition and the correct application of the law. In this regard, it is essential that all laws and regulations related to public procurement are published and easily accessible to the public at no cost. Information about specific procurement processes, such as procurement plans, call for tenders, award announcements and awarded contracts should also be made available (OECD no year; Transparency International 2014).

This can be achieved, for instance, through the establishment of an online portal containing all procurement-related information available to bidders, civil society, media and citizens in general (OECD no year).

In addition to including rules on proactive disclosure of procurement information by governments, procurement legislation may also include rules ensuring citizens' rights to request procurement-related information at any time.

Procurement methods

Procurement laws should also include clear provisions regarding allowed procurement methods and under which circumstances each of them should be used (Transparency International 2014).

The choice of procurement procedure is considered an important factor in the procurement process as it can have a significant impact on corruption (UNODC 2013). Some methods offer greater levels of transparency and favour public/external scrutiny. Others, however, leave greater room for negotiation between bidders and the procuring agency and may therefore offer greater corruption opportunities.

It is important that the procurement law lists (exhaustively) all possible methods and describes when and how they should be used. The law should therefore prohibit the use of methods not included in the law or a combination of methods. The decision on which method to apply usually depends on a wide-range of factors, including contract value, number of bidders, complexity of the relevant good, service or work, among others. In any case, the law needs to clearly state which method is the default method (that is, the method that should always be used unless another method is justified) as well as the conditions under which other less competitive methods can be used (UNODC 2013).

The literature offers a general classification of existing types of procurement methods (Transparency International 2014; UNODC 2013). This includes:

(i) Open procedures: through this method, all interested parties can submit a bid and compete according to pre-defined criteria that should also be included in the procurement law. The award is usually made to the bidder offering the lowest price. This method is considered the most transparent and competitive method and therefore should be applied in the great majority of contracts.

(ii) Restricted procedure: in this method only pre-selected qualified companies are allowed to submit a bid. In this case, the law should describe when the procedure can be used and define the criteria for pre-qualification, including whether the process should follow a public advertisement of the pre-selection or not.

(iii) Negotiated procedure: in this method the procuring entity and potential contractors negotiate the contractual terms. It is often used when it is not feasible to formulate exhaustive technical specifications beforehand or when the tendering process failed (for example, if no tenders were submitted). Negotiated procedures may also be used in the case of an emergency or a catastrophic event. In any case, the law needs to state whether and under which circumstances this method may be used.

(iv) Single-sourced (direct award): this method usually allows the procuring agency to select the contracting partner without following any competitive process. It is often a very opaque process, offering great opportunities for corruption. As such, its use should be limited, and the law should list all exceptional circumstances that allow for the direct award of public contracts. Grounds for direct award frequently include: low value of the contract, urgent needs, a catastrophic event, purchase of goods or services available only from a particular provider, and concerns with national security, among others.

Good practice recommends that, in order to prevent corruption and increase competition, the open method is made the default method of procurement (Transparency International 2014; OECD 2010, UNODC 2014; UNCITRAL 2011).

In the case of restricted, negotiated and particularly single-sourced procedures, in addition to clearly specifying the grounds under which they may be used, good practice also recommends that the

procurement law includes specific approval requirements (for example, the decision to use a certain non-competitive method needs to be approved by a second public official or group of officials and be justified) (OECD 2010). The law should also specifically prohibit the fractioning of contracts to avoid open competition. (OECD 2010; Heggstad & Frøystad 2010).

3 PROCUREMENT LAW AND CORRUPTION: PLANNING PHASE

The planning or pre-tender phase includes several important decisions. In this phase, the government decides which goods, services and works need to be purchased, usually by conducting a needs assessment, and prepares a budget for the planned purchases. Moreover, this phase also includes the preparation of all necessary tender documents and the definition of requirements that will apply to a specific procurement process (Heggstad & Frøystad 2010).

There are several corruption risks in the planning stage. For instance, the needs assessment can be manipulated, inflated or artificially induced to select projects with higher contract value or purchase goods or services that are unnecessary, overly luxurious or of low quality. Projects can also be identified to serve the interests of particular bidders or the private interests of procurement officials (Morgner & Chêne 2014). Tendering documents may be tailored for one company, restricting competition, or unnecessarily complex, facilitating corruption and hindering monitoring. Companies may be short-listed or pre-qualified due to illegal payments or favouritism, among others (Heggstad & Frøystad 2010)

Against this backdrop, the following issues need to be regulated by procurement laws to prevent corruption during the planning phase:

Needs assessment

As mentioned, needs assessment involves the government's decisions on purchasing needs, including quantity, technical requirements and timeline.

Given the corruption risks described above and in order to ensure that the principles of efficiency and integrity are respected, public procurement law should require that a needs assessment is conducted prior to the decision of procuring goods or services. Good practice recommends the assessment to be conducted by more than one member of the procuring team, particularly for high-value projects (UNODC 2013).

Transparency International also recommends that the law includes provisions requiring procuring authorities to share the needs assessments for public comments (for example, through written submissions or public hearings) (Transparency International 2014).

The law should also include provisions related to the participation of external (technical) consultants in the needs assessment and in the preparation of tender procedures. These consultants should be selected according to the public procurement law. They should be independent and free of conflict of interest (UNODC 2013).

Budgeting

The procurement law should also include requirements regarding the preparation of a proposed budget for the expected construction works and other major purchases (UNODC 2013). Public procurement process should only be initiated if there are guaranteed public funds to pay for the goods and services within the proposed timeframe. (Transparency International 2014).

Structure of the bidding process

Tender documents

At this stage, procuring agencies define the procurement method to be used (as discussed above) and develop the tender documents containing the applicable terms and conditions of a given procurement. This includes setting all the requirements that bids must meet in order to be considered and the criteria based on which they will be assessed.

While the specific content of the tender documents

varies on a case-by-case basis, it is recommended that the procurement law specifies the minimum content to be included in the tender documents. This helps to increase transparency and significantly reduce room for manipulation by procurement officials (UNODC 2013).

The minimum content usually included in procurement laws related to tender documents cover the timeframes for bidding, communications in procurement, information on the qualification of suppliers and contractors, selection and award criteria, criteria for rejection of bids and disqualification of a bidder, legal terms and conditions, among others (UNCITRAL 2011).

Overall, it is expected that tender documents contain sufficient information to enable bidders to submit responsive tenders and allows the transparent evaluation of bids and a fair award process (OECD 2010).

Procurement methods and procedures

As previously mentioned, to ensure competition and transparency and to reduce opportunities for corruption, the procurement law should establish the open procedure as the rule. All other procurement methods should be used under strictly regulated circumstances. The law should call for enhanced transparency and documentation, particularly when less competitive procedures are used (UNCITRAL 2010; Transparency International 2014).

In addition, the procurement law should determine the procedures to be used when procuring goods and services. This includes, for example, determining whether the bids have to be submitted on paper or electronically to the procuring entity or whether procedures should take place online through an electronic procurement platform.

Recent procurement laws have included e-procurement as one of the procurement modalities of have required all open tenders in the country to be conducted electronically. E-procurement is seen as an effective mechanism to ensure transparency and access to public tenders, increasing competition, simplifying processes for awarding contracts and management. Nevertheless, before setting e-procurement as the default process, an assessment of the country context should be made to ensure that the use of an electronic system would not generate implementation risks and challenges to small and medium size enterprises (Martini 2014).

Time limits

The procurement law usually also regulates the time that should be provided between the publication of opportunities by the procuring authority and the submission date, taking into consideration the procurement method chosen and the complexity of the tender.

According to good practice, the law should prescribe the minimum time period the procuring authority must allow for the submission of the tender, obliging the procuring agency to include this information in the tender documents. The law should also define rules regarding the possibilities to reduce or extend the defined time limit (for example, when material changes are made to the tender document) (UNODC 2013).

The existence of a minimum time period and strict rules with regard to the reduction or extension of this period may prevent public officials from manipulating tenders.

Contractor qualification

The procurement law usually sets an exhaustive list of criteria that the procuring agency should use to assess the qualification of suppliers (UNODC 2013). To ensure competition and avoid favouritism and discrimination, the procurement law often requires the procuring agency to stick to the list provided by law and prohibits the establishment of any additional criteria for contractor qualification (UNCITRAL 2011).

As a general principle, all companies, including foreign companies, should not be excluded from participating in a tendering process for reasons other than the lack of qualifications (OECD 2010).

Qualification criteria that are usually included in procurement laws and which are in accordance with good practice include (UNCITRAL 2011):

- necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment, experience, managerial capacity
- legal capacity
- ethical standards
- compliance with taxes and social security obligations
- clean record with regard to criminal convictions, including corruption, related to the professional conduct of the bidder, their directors or officers over a certain period of time
- not having being disqualified or debarred from contracting with the public administration
- requirements to submit a declaration of integrity and/or any documentary evidence

Transparency International also believes that the legal framework on public procurement should include provisions that companies should only be permitted to tender if their ownership structure is clear and publicly available (Transparency International 2014).

4 PROCUREMENT LAW: REGULATING THE TENDERING PHASE

The tendering phase includes the publication of the procurement notice, followed by the publication of the bidding document, the submission of proposals by interested bidders, their evaluation by the procuring agency and the award of the contract (Heggstad & Frøystad 2010).

There are many opportunities for corruption during the tendering phase. For instance, bidders may collude to fix the outcome of a bid and inflate contract prices, procurement officials may be offered a kickback for turning a blind eye to such practices or be bribed to influence the award decision or provide confidential information. The submission and evaluation of bids may be manipulated or the criteria subjectively interpreted to benefit a certain bidder, among others (Morgner & Chêne 2014).

Public notice

The procurement law should require procuring entities to publish a public notice of its intent to procure goods and services. According to good practice, the intent notice should at least include information on the subject matter of the procurement, deadline for bid submissions, where tender documents will be available, as well as contact information in case of questions (UNODC 2013).

It is also essential that the law establishes where the information on public procurement should be advertised, to guarantee that all potential bidders have access to the same level of information and at the same time. Within this framework, the law should require the publication of notices and open tenders in the country's official gazette, a newspaper of wide national circulation and/or on a unique website (OECD no year)

Bid opening

The procurement law should also establish the rules governing the opening of the bids. Overall, good practice requires maximum transparency when opening the bids submitted. Moreover, the law should include regulations regarding when bids should be opened and whether or not bidders are allowed to be present.

According to good practice, bids should be opened immediately after the deadline to prevent the (intentional) loss or alteration of proposals, and in a public session where bidders, civil society and other interested parties are allowed to participate (UNODC 2013; OECD 2010).

The OECD also recommends that the law or regulations establish that, for open tendering, the names and addresses of the bidders and the tender prices are disclosed and recorded. These records should be made available when necessary, including for review or for audit purposes (OECD 2010).

Evaluation of tenders and bidders

It is crucial that the procurement law establishes the minimum provisions related to the evaluation process as to ensure the criteria used is objective, transparent and known to all competitors (UNODC 2013). According to the OECD, objective criteria mean using, to the extent possible, quantifiable or pass/fail criteria.

The procurement law should also prohibit the use of assessment criteria different from those set out in the tendering documents (OECD 2010).

Evaluation criteria may include price, the costs of operating, maintaining or repairing goods, terms of payment and guarantees to the subject matter of the procurement, preference for domestic suppliers or domestically produced goods, preference to state-owned enterprises, among others (UNCITRAL, see Article 11).

In addition to establishing pre-defined, objective evaluation criteria, the procurement law also defines who is responsible for evaluating the bids. Good practice suggests the evaluation be carried by a group of individuals rather a single public official (Transparency International 2014).

The law should also establish rules on confidentiality to ensure fair competition and avoid undue influence throughout the process (OECD 2010).

Contract award

With regard to the award decision, the procurement law should contain rules related to the publication of the decision and the timeframe between the award decision and the signing of the contract, allowing competitors to request a review (UNCITRAL 2011). For instance, EU regulations require a minimum "standstill period" of 15 days (10 days for electronic tendering) between the selection of the winning bid and the signing of the contract (Agator 2013).

Complaints and remedies

The procurement law should clearly state the complaint and review mechanisms available to competitors and the timeframe within which complaints may be submitted, the body responsible for receiving the review and the opportunities for appeal to an independent body. The law should also establish clear provisions regarding the matters that are subjected to review (OECD 2010).

Good practice calls for the existence of an independent mechanism to deal with complaints in a fair, timely and transparent manner. A robust and effective appeal process, that is able to suspend the procurement process until the final decision is made, should also be in place (Transparency International 2014).

For more information on mechanisms for challenging public procurement processes, please refer to a previous Helpdesk answer available here.

5 PROCUREMENT LAW AND THE POST-AWARD PHASE

The post-award phase includes managing the contract, monitoring the delivery of goods and overseeing the payments. This phase also offers several risks of corruption: goods and works delivered may be of lower quality than specified in the contract or may not be delivered at all, and unnecessary amendments to the contract may be made, incurring extra costs for the public administration, among others.

Nevertheless, in many countries this phase is not regulated by procurement law, but covered by civil and contract law, which is often less focused on transparency and accountability than procurement laws (OECD 2007). Good practice in this area recommends the setting up of an effective monitoring system regarding the verification of compliant contract performance, for both contract terms and specifications. Contract changes should be allowed only if this possibility is provided for in the contract or the law (UNODC 2013).

Moreover, contract change orders that changes to the price or description of work beyond a cumulative threshold should be monitored and approved at high level (Transparency International 2014).

Transparency should also be a pre-requisite throughout the implementation of the contract. The procurement law should thus include requirements to publish awarded contracts, preferably online and in user-friendly formats, allowing public scrutiny (Transparency International 2014, Open Contracting Initiative no year). For more information on the benefits of open contracting, please refer to a previous Helpdesk answer available here.

Procurement law should also include effective remedies in situations where the contract has already been concluded. This includes the possibility of setting aside contracts that have already been

concluded if they were the product of a flawed formation process. If this is not feasible, procuring agencies could be obliged to pay penalty payments for having entered into public contracts in breach of public procurement law (OECD 2010).

6 OTHER ISSUES TO BE CONSIDERED IN PUBLIC PROCUREMENT LAWS

To effectively curb corruption, other issues should be considered when designing/reforming public procurement legislation. This includes having public procurement laws establish provisions to guarantee external oversight by civil society, protecting whistleblowers, ensuring the integrity of procurement officials, and providing for proportionate and dissuasive sanctions.

Integrity of procurement officials

In public procurement, conflict of interest may arise in various stages of the procurement process whenever public officials' decisions or actions are influenced by their private interests. In this case, procurement legislation should also include provisions to prevent conflict of interest and ensure the integrity of procurement officials.

Also, the regulation of conflict of interest in public procurement may include provisions prohibiting officials and members of the evaluation committee from: holding ownership stakes in companies doing business with the government; accepting, for a certain period of time after leaving public office, a position in companies with which the government did business; holding another position in a different branch of the government; or holding a position in a statutory organ of a private entity.

In addition, the procurement law may require procurement officials or members of the evaluation committee to declare their interest when assuming office and/or in specific cases.

Procurement laws may also require bidders to testify the absence of conflict of interest and corruption. A few countries require bidders to make a declaration that they fulfil the requirements to participate in the procurement process, including not being subject to exclusion from the award procedure, or that they have a satisfactory record of integrity (for example, compliance with anti-corruption laws) (OECD 2007).

For more information on conflict of interest in public procurement please refer to a previous Helpdesk answer available here.

External oversight by civil society

External oversight may play a key role throughout the procurement process, ensuring tenders are designed, planned, awarded and implemented in an effective and fair manner, consequently reducing corruption opportunities.

Transparency International thus recommends that that the procurement law includes a provision requiring that, for procurements above a certain threshold, parties should agree on an integrity pact (Transparency International 2014).

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

Sanctions for non-compliance

Existing standards, such as the UNCAC, and good practice put forward by international organisations underline the necessity of establishing sanctions that are effective, proportionate and dissuasive in the procurement process.

As such, procurement legislation should include a wide-range of administrative, civil and criminal sanctions to companies and individuals violating procurement rules.

In addition to the usual criminal and administrative sanctions applied to public officials, companies and executives for bribery and corruption, sanctions for non-compliance with public procurement regulations may include:

- exclusion of suppliers or contractors involved in corruption: for instance, Article 21 of the UNCITRAL model law 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."
- confiscation of gains obtained through bribery and corruption: 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: those affected by the illegal award of a procurement contract should have an opportunity for redress (Transparency International 2006).
- cancellation of contracts: the termination of contracts in case corruption is uncovered should be possible (Transparencia Mexicana 2013).
- debarment/blacklisting: the law may provide for procedures that exclude companies and individuals involved in wrongdoing from participating in tendering projects in the future (Martini 2013)[2].

Whistleblowing protection

Whistleblowers are usually key in detecting corruption cases inside their companies and organisations. It is therefore fundamental that the law provides for effective mechanisms to ensure their protection. While the topic is usually regulated through the adoption of dedicated laws and regulations, given the specific risks of corruption in public contracting, procurement legislations should also contain provisions guaranteeing anonymous and safe mechanisms for whistleblowers (Transparency International 2014).

This includes accessible and reliable channels to report wrongdoings robust protection from all forms of retaliation, among others (Transparency International 2014).

[2] More information on debarment can be found in a previous Anti-Corruption Helpdesk answer on blacklisting in public procurement.

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