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### **United Nations Convention against Corruption: implementing procurement-related aspects**

The enclosed paper (CAC/COSP/2008/CRP.2) that was before the Conference of the States Parties to the United Nations Convention against Corruption at its second session (Nusa Dua, Indonesia, 28 January-1 February 2008) is transmitted to Working Group I (Procurement) by the Secretariat for information.



**Conference of the States Parties to the  
United Nations Convention against Corruption**

**Second session**

Nusa Dua, Indonesia, 28 January-1 February 2008

**United Nations Convention against Corruption:  
implementing procurement-related aspects**

**Submitted by the United Nations Commission on International  
Trade Law**

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## I. Introduction

1. Against the background of studies indicating that procurement processes are vulnerable to corruption, collusion, fraud and manipulation (“[p]ublic procurement has been identified as the government activity most vulnerable to corruption”),<sup>1</sup> the United Nations Convention against Corruption (UNCAC)<sup>2</sup> makes provision for procurement as part of its “Preventive measures” Chapter. Its text includes an article setting mandatory minimum standards for procurement, requiring systems to be based on “transparency, competition and objective criteria in decision-making”, and “effective, inter alia, in preventing corruption”.<sup>3</sup>

## II. Essential elements of a procurement system

2. A well-functioning procurement system requires a holistic approach: it should comprise a legislative framework, supported by regulations as necessary, and by institutional, administrative and legal infrastructure. In other words, procurement rules and procedures alone are insufficient, and effective implementation and operational efficacy are vital.

3. Procurement is part of good governance – as the UNCAC provisions, which link procurement with the management of public finances, recognize. In the procurement context, this means that the objective of avoiding corruption (through the promotion of integrity in the system) has to be balanced with ensuring the efficient use of public resources – that is, achieving value for money in procurement (sometimes known as “allocative efficiency”).

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<sup>1</sup> Integrity in Public Procurement: Good Practice from A to Z (Organisation for Economic Co-operation and Development (OECD), 2007), available at [http://www.oecd.org/document/60/0,3343,en\\_2649\\_34135\\_38561148\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/60/0,3343,en_2649_34135_38561148_1_1_1_1,00.html). See, also, the OECD’s “Bribery in Public Procurement: Methods, Actors and Counter-Measures” (OECD, 2007) at [http://www.oecd.org/document/60/0,3343,en\\_2649\\_37447\\_38446908\\_1\\_1\\_1\\_37447,00.html](http://www.oecd.org/document/60/0,3343,en_2649_37447_38446908_1_1_1_37447,00.html), and “Fighting Corruption and Promoting Integrity in Public Procurement” (OECD, 2005); Transparency International’s “Handbook for Curbing Corruption in Public Procurement” available at <http://www.transparency.org/>, and discussion documents available from the World Bank at <http://go.worldbank.org/KVOEGWC8Q0>.

<sup>2</sup> The text of UNCAC is available at <http://www.unodc.org/unodc/en/treaties/CAC/index.html>. UNCAC entered into force on 14 December 2005, following the ratification of its text by 30 signatories. The objectives of UNCAC are to promote, facilitate and support: (i) measures to prevent and combat corruption more efficiently and effectively, (ii) international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery, and (iii) integrity, accountability, and proper management of public affairs and property.

<sup>3</sup> Article 9, Public procurement and the management of public finances. Article 9 (1) addresses procurement, and articles 9 (2) and 9 (3) address the management of public finances. UNCAC’s other provisions will also have procurement implications, notably those addressing preventive measures (preventive measures include anti-corruption policies, practices and bodies (Articles 5 and 6), codes of conduct for public officials (Article 8), and public reporting (Article 10). Further, the provisions of the criminalization and law enforcement chapter and cooperation between national authorities will apply to procurement-related offences, as may be the measures providing for international cooperation in investigating and prosecuting corruption, including extradition and asset recovery.

4. This note will consider how to balance these twin aims, and how to integrate them into a well-functioning procurement system.

### III. Corruption in procurement

#### A. What is corruption in procurement?

5. In the procurement context, corruption can take the following forms:

(a) “Corrupt practice”, i.e. offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence the action of a public official in the selection process or in contract execution,

(b) “Fraudulent practice”, i.e. a misrepresentation or omission of facts in order to influence a selection process or the execution of a contract,

(c) “Collusive practices”, i.e. a scheme or arrangement between two or more respondents with or without the knowledge of the procuring entity, designed to establish prices at artificial, non-competitive levels,

(d) “Coercive practices” means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in a procurement process, or affect the execution of a contract.<sup>4</sup>

6. Prosecutions for corruption in procurement have included offences such as bribery, embezzlement and obtaining property or services by deception.

#### B. What are the effects of corruption in procurement?

7. Corruption in procurement is sometimes considered to be an issue of relevance more in developing countries and countries in transition than in developed countries. Recent studies, and cases prosecuted in developed countries, have shown that it is, on the contrary, a ubiquitous problem.<sup>5</sup>

(i) *“Corruption has a major impact in all countries of the world. It undermines democratic accountability, diverts resources away from the public good and into private pockets, and ‘redistribut[es] wealth and power to the undeserving’.”*<sup>6</sup>

(ii) *“In poorer countries corruption has a ... devastating and immediate impact. It diverts public expenditure away from areas such as health and education in which bribery returns may be small, to more lucrative sectors such as construction, defence, and oil and gas. The poor end up paying*

<sup>4</sup> From [http://www1.fidic.org/resources/bimilaci/2007/10\\_lomo\\_ethics\\_in\\_procurement.ppt](http://www1.fidic.org/resources/bimilaci/2007/10_lomo_ethics_in_procurement.ppt), drawing on the definitions used, inter alia, by the World Bank and other multilateral development banks.

<sup>5</sup> See, also, [http://www.transparency.org/policy\\_research/surveys\\_indices/bpi/bpi\\_2002](http://www.transparency.org/policy_research/surveys_indices/bpi/bpi_2002): *“Politicians and public officials from the world’s leading industrial countries are ignoring the rot in their own backyards and the criminal bribe-paying activities of multinational firms headquartered in their countries.”* (Peter Eigen, Chairman of Transparency International, May 2002).

<sup>6</sup> Klitgaard, R., “Subverting Corruption”, *Finance and Development*, June 2000, Vol. 37, No. 2.

*directly for the consequences of contracts that have been signed in corrupt circumstances. They are most affected by “white elephant” projects such as power plants or dams that fail to meet their stated objective and that dislocate local communities and cause environmental damage. In the energy sector, they are affected by contracts awarded in dubious circumstances that have locked governments into paying excessively high rates for electricity, which are often passed on to the consumer in the form of higher tariffs.”<sup>7</sup>*

*(iii) “Corruption is not a charitable game; ‘winners’ have every intention of recovering their bribery costs.”<sup>8</sup>*

*(iv) “Although there is considerable variation in the degree of corruption from country to country, there is growing consensus among scholars, practitioners and donors that corruption constitutes a central challenge to democracy and social and economic development. Today corruption is seen not only as a consequence of weak governance, but also as a cause of poverty and under-development.”<sup>9</sup>*

8. Corruption in procurement manifests itself in unnecessary projects, substandard work or unnecessarily expensive work; the diversion of resources; and unjustified or unexpected price increases. It can also appear through abuse of provisions governing measures to protect certain sectors of an economy (price preferences, set asides, offsets or contents requirements), cost discrimination through subjective or inconsistent regulatory enforcement and artificial barriers to entry (e.g. unnecessary supplier qualification requirements).

### **C. How expensive a problem is corruption in procurement?**

9. Measuring corruption is far from an exact science. Estimates of the amount of procurement-related corruption therefore vary widely, but all indicate that the sums involved are significant. For example, one estimate of the amount of bribery worldwide is US\$ 1 trillion.<sup>10</sup> Other estimates are that 20-30 per cent of the value of procurement may be lost through corruption where it is systematic,<sup>11</sup> indicating very high amounts as procurement itself is estimated to constitute 15 per cent of gross domestic product in OECD countries,<sup>12</sup> a higher percentage in developing economies and up to 45 per cent of government spending in some economies.<sup>13</sup>

<sup>7</sup> Data from Corner House Briefing 30, “Underwriting Bribery Export Credit Agencies and Corruption”, by Dr. Susan Hawley, December 2003. <http://www.thecornerhouse.org.uk>, as reproduced in Corruption and the lack of transparency in defence procurement, 3 November 2005, Mark Pyman, Transparency International (UK). Presented to the conference ‘Arms trade and development’, Brussels, November 2-3, 2005.

<sup>8</sup> Donald Strombom, former chief of procurement for the World Bank, in “Underwriting Bribery”, Corner House, available at <http://www.thecornerhouse.org.uk/item.shtml?x=51986>.

<sup>9</sup> “Corruption in Latin America: A Desk Assessment”, Norma Parker, Gerardo Berthin, Roberto de Michele and Yemile Mizrahi, USAID, 2004, Washington, D.C.

<sup>10</sup> Myths and Realities of Governance and Corruption, Daniel Kaufmann, World Bank Institute, [http://www.worldbank.org/wbi/governance/pdf/2-1\\_GCR\\_Kaufmann.pdf](http://www.worldbank.org/wbi/governance/pdf/2-1_GCR_Kaufmann.pdf).

<sup>11</sup> “Corruption and Technology in Public Procurement”, January 2007, Schapper/World Bank.

<sup>12</sup> The Size of Government Procurement Markets, OECD, 2002, Offprint from OECD Journal on Budgeting Vol. 1, No. 4, March 2002, ISBN 9264196307.

<sup>13</sup> Corruption and Technology in Public Procurement, op. cit.

## D. Addressing corruption risks in procurement systems – goals and objectives of a national procurement system

10. The introduction to UNCAC article 9 provides that systems should be based on “transparency, competition and objective criteria in decision-making”, and be “effective, inter alia, in preventing corruption”.<sup>14</sup> The custodian of UNCAC (the United Nations Office on Drugs and Crime, UNODC) has published a Legislative Guide to UNCAC,<sup>15</sup> which notes that the introduction of the measures set out in the text may require amendments or new legislation or regulations, depending on the existing legal framework of each State Party.

11. The United Nations Commission on International Trade Law (“UNCITRAL”)<sup>16</sup> issued a Model Law on Procurement of Goods, Construction and Services in 1994 (the “UNCITRAL Model Law”, or “Model Law”).<sup>17</sup> The UNCITRAL Model Law is a model available to national governments seeking to introduce or reform procurement legislation.<sup>18</sup> It is intended to provide all the essential procedures and principles for conducting various types of procurement proceedings in a national system, focussing on both the achievement of value for money for the taxpayer, and avoiding abuse or corruption. It is in the course of revision, to allow for modern procurement methods and techniques, but its principles and main provisions will not change. The UNCITRAL Model Law can

<sup>14</sup> The chapeau to UNCAC article 9 (1) reads in full as follows: “*Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia ...*”.

<sup>15</sup> United Nations Publication Sales No. E.06.IV.16, ISBN-10: 92-1-133755-0, also available at [http://www.unodc.org/unodc/crime\\_convention\\_corruption\\_guide.html](http://www.unodc.org/unodc/crime_convention_corruption_guide.html).

<sup>16</sup> UNCITRAL is the legal body of the United Nations system in the field of international trade law, with a general mandate to further the progressive harmonization and unification of the law of international trade, through the issue of conventions and model laws, cooperation with other international organizations, and technical assistance.

<sup>17</sup> See Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1), annex I. Full text, and details of the revisions proposed to date are available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/1994Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html).

<sup>18</sup> There are many other international procurement legislative texts available from regional trade groupings such as the Asia-Pacific Economic Cooperation (APEC), the European Union (Procurement Directives 2004/17/EC and 2004/18/EC), the draft Free Trade Area of the Americas Agreement (FTAAA), the North American Free Trade Agreement (NAFTA), the Organization of American States (OAS) and the World Trade Organization (WTO)’s Agreement on Government Procurement (GPA). The scope and content of the UNCITRAL Model Law differs from those from other international procurement rules promoting cross-border trade, both in terms of level of detail for procedures, and (other than in the case of APEC) in objectives – the latter focus on cross-border trade and not on achieving the objectives of a national procurement system (value for money and avoidance of corruption). States Parties will be required to ensure that they comply with applicable international rules and address national requirements, in addition to those of UNCAC. The multilateral development banks, including the World Bank and the European Bank for Reconstruction and Development (EBRD) have issued procurement guidelines. See, for example, the World Bank’s procurement policies and procedures available at <http://go.worldbank.org/9P6WS4P5E1>, and the EBRD’s Procurement Policies and Rules (2000) available at <http://www.ebrd.com/about/policies/procure/ppr.pdf>.

thus serve as a reference point for considering how to incorporate the UNCAC legislative requirements (as explained in the Legislative Guide) into a procurement law; the Model Law addresses the requirements of UNCAC as regards the selection of suppliers in its text, and other aspects in the Guide to Enactment that accompanies it.<sup>19</sup>

#### IV. A procurement “system” – essential elements

12. In order to achieve the procurement goals and objectives prescribed by UNCAC, a procurement system must incorporate both structural elements (specified rules, procedures and their objective application) and key qualitative principles of transparency, integrity, competition and accountability.

13. The following items are commonly regarded as the essential structural elements of a procurement system:

(a) An adequate legislative framework, supported by regulations to address procedural issues not normally the subject of primary legislation (which in many systems can also accommodate changes in procedures and business methods more easily than primary legislation);<sup>20</sup>

(b) Adequate institutional, administrative and legal infrastructure, including

(i) Rules to govern government contracting, including electronic contracting;

(ii) Integrated systems to link budgeting and planning, selection procedures and contract implementation, both among themselves and with oversight institutions; and

(iii) Institutional promotion of best practice, ethics and integrity.

(c) An effective review and oversight regime, with sufficient resources and institutional will to implement its recommendations;

(d) An effective sanctions regime; and

(e) Adequate resources to support all elements of the system.

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<sup>19</sup> The 1994 text of the UNCITRAL Model Law did not, however, address the question of conflicts of interest, but UNCITRAL is revising it to do so at the time of writing. See, further, paragraph 30 below.

<sup>20</sup> The UNCITRAL Model Law, for example, is published with a Guide to Enactment that explains the interaction between the elements of a procurement system as follows: “[The Model Law is] a framework law, to be supplemented by procurement regulations to fill in the procedural details for the procedures authorized by the Model Law ... [it addresses] the procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract, and consequently it does not address the supporting administrative structure, or other legal questions that might be found in other bodies of law (administrative, contract and judicial-procedure law).” The text “assumes that the enacting State has in place, or will put into place, the proper institutional and bureaucratic structures and human resources necessary to operate the type of procurement procedures provided for in the Model Law,” noting later in the text the importance of adequate training of personnel (Guide to Enactment, *A framework law to be supplemented by procurement regulations*, paragraph 12).



## V. Legislative framework for a procurement system

### A. Essential elements of procurement legislation

#### 1. Chapeau to article 9 (1)

*“Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption”.*

#### 2. Rules and procedures in the selection of suppliers

14. Thus the introductory provision requires the rules and procedures to select suppliers<sup>21</sup> to be based on key qualitative elements:

- (a) Transparency;
- (b) Competition; and
- (c) Objective criteria in decision-making.

The presence of these qualitative elements in the procurement system should enhance integrity, so that the system is effective in avoiding corruption, and the measures in the second part of article 9 provide (among other things) for accountability.

15. Translated into steps in the selection of suppliers, the above principles require that the system should:

- (a) Require pre-determination and publication of all rules and procedures, and the items to be procured;
- (b) Specify how the items to be procured are to be described;
- (c) Determine which suppliers can participate and how they are to be qualified;
- (d) Require open (fully competitive) procedures unless there is justification otherwise;
- (e) Set out procedures for each procurement method;
- (f) Require pre-determined and pre-disclosed evaluation and award procedures; and
- (g) Provide for an effective review (or challenge) procedure if rules or procedures are breached.

#### (a) General requirement for competition – open and non-open procurement methods

16. The general requirement for competition means that procurement procedures should be as competitive as possible. Strong competition is generally considered to reduce risks of collusion and to make hiding other forms of corruption more difficult to achieve. In practical terms, this means that legislation should provide that procurement should be fully open and competitive, unless restriction can be

<sup>21</sup> For convenience, this note will refer to potential contractors and suppliers as simply “suppliers”.

justified. Many systems operate on this principle, permitting other procurement methods in the case of urgency or disaster, very low value procurement or complex or technical procurement for which it may not be possible for the procuring entity to provide adequate specifications at the outset.<sup>22</sup>

17. Where procurement other than through fully open competition is permitted, it is important that the system both regulates and monitors the use of other methods, and gives adequate guidance as to their use.<sup>23</sup>

**(b) Appropriate level of regulation**

18. The above procedural steps are reflected in the sub-paragraphs of article 9 (1), and are addressed in more detail below. In most jurisdictions, the main principles and procedures will be set out in primary legislation, and more detailed aspects will be included in supporting regulations. The overall level of detail will reflect the administrative legal tradition in the State party concerned, but it is important that all major steps in the procurement process be addressed.

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<sup>22</sup> The UNCITRAL Model Law, for example, mandates open tendering as the rule for normal circumstances in the procurement of goods or construction. It requires unrestricted solicitation of participation by suppliers or contractors; comprehensive description and specification in solicitation documents of the procurement, full disclosure to suppliers or contractors of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender; strict prohibition against negotiations between the procuring entity and suppliers or contractors; public opening of tenders at the deadline for submission of tenders; and disclosure of any formalities required for entry into force of the procurement contract. A services equivalent allows for greater weight for the qualifications and expertise of the service providers but is otherwise essentially the same. The circumstances justifying the use of alternative procurement methods include difficulties in formulating specifications to the required degree, urgent needs due to catastrophic events, technically complex or specialized goods, construction or services available from only a limited number of suppliers and procurement of such low value that open proceedings are not cost-effective. Directives 2004/17/EC and 2004/18/EC, for example, restrict the use of negotiated procedures and competitive dialogue, and allow the procuring entity to choose freely between open and restricted procedures for reasons of efficiency. It should be noted that a “restricted procedure” in this sense is open in that there is an open solicitation of expressions of interest, but subsequently only those participants invited by the procuring entity (using published criteria) may submit tenders. The WTO operates a similar procedure, termed selective tendering, under the GPA.

<sup>23</sup> The Guide to Enactment accompanying the Model Law notes, in paragraph 14, that “The Model Law presents several procurement methods to enable the procuring entity to deal with the varying circumstances that it might encounter, as well as to take account of the multiplicity of methods that are used in practice in different States. This enables an enacting State to aim for as broad an application of the Model Law as possible. As the rule for normal circumstances in procurement of goods or construction, the Model Law mandates the use of tendering, the method of procurement widely recognized as generally most effective in promoting competition, economy and efficiency in procurement, as well as the other objectives set forth in the Preamble. For normal circumstances in the procurement of services, the Model Law prescribes the use of the “principal method for procurement of services” (chapter IV), which is designed to give due weight in the evaluation process to the qualifications and expertise of the service providers. For the exceptional circumstances in which tendering is not appropriate or feasible for procurement of goods or construction, the Model Law offers alternative methods of procurement; it also does so for the circumstances in which resort to the principal method for procurement of services is not appropriate or feasible.”

19. Procurement systems should build in appropriate levels of prescription and flexibility in their rules. For example, as the chapeau to article 9 notes, they may include thresholds below which (for example) simpler procedures may operate. Many systems include such thresholds,<sup>24</sup> generally on the basis that the costs of detailed procedures for small value procurement exceed their benefit.

20. Insufficient flexibility in a system can lead to new opportunities for corruption, and, as the Legislative Guide notes, can be counterproductive.<sup>25</sup> This approach tends to result in excessive regulation, and consequently in practice there are frequent requests for exceptions, the approval or refusal of which can be non-transparent and difficult to monitor. In addition, excessive complexity in regulation can lead to costly errors and omissions, which can also pose integrity risks as procurement officials try to correct or hide them. However, introducing flexibility into a procurement system also involves the use of discretion – an element that is considered to be beneficial in terms of potential to increase value for money but raises the risks of subjectivity, lack of transparency and as a consequence, integrity risks. The balancing of these elements is considered further in section IX below.

**(c) Public procurement at all levels to be regulated**

21. The Legislative Guide further notes that experience has demonstrated the vulnerability of local authorities to corruption, particularly regarding real property transactions and construction projects, as well as in town planning.<sup>26</sup> Thus, subject to any applicable thresholds, all levels of public procurement should be addressed by the system.<sup>27</sup>

**3. Various objectives of a procurement system**

22. Common objectives of procurement systems in addition to promoting integrity and achieving value for money include encouraging participation in procurement proceedings by suppliers and contractors, promoting public confidence in the procurement process, ensuring equality of opportunity to compete for state contracts (“non-discrimination”), and accountability.<sup>28</sup> These first two of these additional objectives are inherent in the notions of transparency, competition and objective decision-making. “Non-discrimination” in the international context involves trade

<sup>24</sup> Such as EC Directives 2004/17/EC and 2004/18/EC, the United States Federal Acquisition Regulations for some procurement methods, and the UNCITRAL Model Law regarding its Request for Quotations procedure.

<sup>25</sup> Legislative Guide, paragraph 79.

<sup>26</sup> See, for example, the Service Central de la Prévention de la Corruption in France, at <http://www.justice.gouv.fr/minister/minscpc.htm>.

<sup>27</sup> The scope of “public procurement” is also a matter for regulation. For example, the UNCITRAL Model Law notes that one definition could be “*all governmental departments, agencies, organs and other units within the State party, pertaining to the central Government as well as to provincial, local or other governmental subdivisions of the enacting State*”, and notes that the State party might extend application of the Model Law to entities or enterprises that are not considered part of the Government, if it has an interest in requiring those entities to conduct procurement in accordance with the Model Law (Guide to Enactment, “Article 2 Definitions”, paragraph 2).

<sup>28</sup> For a more detailed discussion of procurement objectives, see “Desiderata: Objectives for a System of Government Contract Law”, Schooner, Public Procurement Law Review, Vol. 11, p. 103, 2002, also available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=304620](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304620).

considerations, and permitting overseas competition may be required by membership of regional trade groupings. Most procurement systems are based on the notion of allowing at least some foreign competition, through balancing the need to protect domestic industries in transitional economies and the benefits of increased competition.<sup>29</sup> Accountability is also considered a vital element (together with transparency) of ensuring integrity in procurement.<sup>30</sup>

## **B. How UNCAC-based legislation would reflect the principles of transparency, competition and objectivity in decision-making**

### **1. Article 9 (1)(a) requirements**

*“The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders”.*

23. This requirement means that legislation should provide for all procurement-related texts to be made promptly and publicly accessible to the public (using the Internet is recognized as a cost-effective way of so doing in many States), invitations to participate and conditions of participation to be widely publicized, the deadline for submission of tenders to be published, tenders to be opened in a public forum, and contract award notices to be published. (It is generally considered best practice that this information should be provided free of charge.) Legislation can either set a minimum time to be given for the submission of tenders, or set out a principle that the time given must be adequate, depending on their legal tradition.<sup>31</sup>

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<sup>29</sup> For example, the UNCITRAL Model Law provides the use a “margin of preference” in favour of local suppliers and contractors, to balance the objectives of international participation in procurement proceedings and fostering national industrial capacity, without resorting to purely domestic procurement. The margin of preference permits the procuring entity to select the lowest-priced offer when the difference in price between that tender or proposal and the overall lowest-priced tender or proposal falls within the range of the margin of preference. It allows the procuring entity to favour local suppliers and contractors that are capable of approaching internationally competitive prices, and it does so without simply excluding foreign competition. The Guide to Enactment adds that: *“It is important not to allow total insulation from foreign competition so as not to perpetuate lower levels of economy, efficiency and competitiveness of the concerned sectors of national industry. Accordingly, the margin of preference could be a preferable means of fostering the competitiveness of local suppliers and contractors, not only as effective and economic providers for the procurement needs of the procuring entity, but also as a source of competitive exports.”* (Guide to Enactment, para. 26).

<sup>30</sup> OECD, Integrity in Public Procurement, op. cit., footnote 1.

<sup>31</sup> For example, the UNCITRAL Model Law requires that all procurement-related texts be made promptly and publicly accessible (Article 5), the publication of contract award notices (Article 14), the wide publication of invitations to participate (Article 24) and conditions of participation (Articles 6, 7, 25 and 27, among others) and the publication of the deadline for submission of tenders (Article 30). Further, limited information regarding a particular procurement must be made publicly available, but participants are entitled to broader information ex post facto (Article 11 (2)).

## 2. Article 9 (1)(b) requirements

*“The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication”.*

24. This requirement means that all the legislation should require all conditions for participation, including specifications and evaluation or award criteria, and tendering rules to be both determined and published in advance. This information includes all pertinent information that suppliers would need to participate in the procedure, recommended to be provided when their participation is first solicited,<sup>32</sup> and includes any supplier qualification and pre-qualification requirements. These items include any requirements regarding form and means of communication and submission of tenders or other offers, the language of documents for the procurement, and the manner of entry into force of the ultimate procurement contract.<sup>33</sup>

25. Most procurement legislation provides for several procurement methods. Where it does so, rules to govern the selection of the appropriate procurement method must also be prescribed, along with the precise procedures each method involves (normally as part of procurement legislation). Permitted procurement methods may not be fully open, and the law should ensure that all participants are advised of the conditions for participation.<sup>34</sup>

## 3. Article 9 (1)(c) requirements

*“The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures”.*

<sup>32</sup> For example, the UNCITRAL Model Law requires solicitation documents in open tendering proceedings to contain at a minimum the following information: instructions for submitting tenders (including language, submission deadline and length of validity); details of the items to be procured (including quality characteristics and technical specifications), the time frame for supply; evaluation and qualification criteria; whether alternatives to the characteristics of the items will be permitted; whether suppliers can submit tenders for part only of the procurement; how to express and formulate the tender price including currency; whether tender securities will be required and whether withdrawal of tenders without forfeiture of tender security is permitted; how further information of clarification can be obtained (with details of the procuring entity’s contact point) and whether meetings of suppliers are envisaged; procedures for tender opening, details of governing law, the fact of the right to challenge procurement decisions, any reservation of a right to reject all tenders and other formalities and requirements.

<sup>33</sup> For example, the UNCITRAL Model Law applies these notions to qualification and pre-qualification of suppliers (Articles 6 and 7), sets out requirements for non-discriminatory methods of communication (Article 9), requires the express prior reservation of the right to reject all tenders or other bids (Article 12), regulates the manner of entry into force of the procurement contract (Articles 13 and 36), regulates the language of documents for the procurement (Article 17). As regards its open procedures, the Model Law requires the publication of all pertinent information that suppliers would need to participate in the invitation to participate or solicitation documents or their equivalent, including evaluation and award criteria (Articles 25, 27 and 38, and parts of Chapter V regarding open procedures), and provides for the disclosure to all participants of significant further information provided during the procurement at the request of one participant (article 28).

<sup>34</sup> As regards restricted procedures, the UNCITRAL Model Law contains similar requirements operate to ensure that the participants are fully apprised of the conditions for participation.

26. The practical application of this requirement is that the choice of procurement method referred to above, and the procedures that will follow, must be based on established, objective criteria set out in the procurement legislation and publicised as set out above. As all these criteria must be pre-determined, the legislation should state that they may not be changed during the procedure itself.<sup>35</sup>

27. Technical specifications are critical. They should be required to be objective, based on technical and quality characteristics (without reference to trade marks or other proprietary terms, and normally process or outcome-based). Many systems stress the utility of criteria that can be expressed in monetary terms, which are more transparent and easier to monitor than purely qualitative criteria.<sup>36</sup>

28. Records of each procurement should also be required, so as to facilitate oversight and review or challenge (see, further, paragraph 48 below). Many systems prescribe the extent of information to be recorded.<sup>37</sup>

#### 4. Article 9 (1)(d) requirements

*“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”.*

29. Legislation for an effective system of domestic review should address the following basic elements. First, the scope of the system must be defined (which could include any purportedly wrong exclusion from the process or proposed award, and in some systems also the choice of procurement method); the provisions should set out the parties that can seek redress through the review procedures (such as any potential participant or any actual participant) and the type of relief that can be awarded, the stages of the procurement cycle at which a review can be initiated, and the period during which the review must be completed (during which the

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<sup>35</sup> The UNCITRAL Model Law requires the use of open procedures, with limited exceptions for other methods (Articles 18-22, each of which must be justified), and the minimum information required for the solicitation documents or their equivalent includes detailed characteristics of the procurement, evaluation and award criteria (Articles 27 and 38, and Chapter V). Chapters III-V of the Model Law set out detailed procedural requirements for each procurement procedure, and emphasis is given to the notion that criteria must be pre-determined and cannot be changed during the procedure itself.

<sup>36</sup> The UNCITRAL Model Law requires specifications to be objective, based on technical and quality characteristics (without reference to trademarks or other proprietary terms) and set out in the solicitation documents (Articles 16 and 27).

<sup>37</sup> The Guide to Enactment accompanying the UNCITRAL Model Law notes as follows: “One of the principal mechanisms for promoting adherence to the procedures set forth in the Model Law and for facilitating the accountability of the procuring entity to supervisory bodies in Government, to suppliers and contractors, and to the public at large is the requirement set forth in article 11 that the procuring entity maintain a record of the key decisions and actions taken by the procuring entity during the course of the procurement proceedings. Article 11 provides rules as to which specific actions and decisions are to be reflected in the record. It also establishes rules as to which portions of the record are, at least under the Model Law, to be made available to the general public, and which portions of the record are to be disclosed only to suppliers and contractors” (para. 34).

procurement may be stalled).<sup>38</sup> Other issues that the provisions should address include the structure and independence of the review body, and how to balance the benefit of comprehensive review procedures and their impact and cost on procurement.<sup>39</sup>

#### 5. Article 9 (1)(e) requirements

*“Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements”.*

30. The requirements of this sub-article, together with those of Article 8 (“Codes of Conduct for Public Officials”, which require each State Party to promote (inter alia) “integrity, honesty and responsibility” among its public officials, and to endeavour to apply codes or standards of conduct) mean that legislation should require all interests, assets, hospitality and gifts to be declared and registered. The other aspects of this sub-article are of a non-legislative nature, but guidance can address that past standards of conduct are relevant when considering candidates for procurement posts, and mandate specialist training in procurement and ethical conduct.<sup>40</sup> Designing appropriate terms and conditions of service, procedural controls (such as benchmarking performance, or the rotation of staff, to avoid the perceived risk of inducements lengthy incumbency), regular appraisals, and confidential reporting will be important elements in ensuring effective procurement personnel management.

### C. Procurement beyond the selection of suppliers

31. There are three main phases of the procurement cycle: (1) planning and budgeting prior to commencing a procurement procedure, (2) the selection of suppliers and (3) contract administration. Indeed, one view is that procurement is an even longer cycle: “the whole process of acquisition from third parties (including logistical aspects) and covers goods, services and construction projects. This process spans the whole life cycle from initial concept and definition of business

<sup>38</sup> The UNCITRAL Model Law (Chapter VI of the text), for example, sets out optional, administrative, and limited provisions addressing review procedures. The text does not address the question of the independence of the administrative review body or the form of the relief to be given, and there are no provisions or recommendations for a judicial or quasi-judicial proceeding (though the text does allow enacting States that operate judicial review to include procurement review within the relevant courts’ jurisdiction). UNCITRAL’s Working Group that is drafting revisions to the text of the Model Law will be revising this Chapter to incorporate the UNCAC requirements.

<sup>39</sup> For a comprehensive discussion of the issues in designing review systems, see “Constructing a bid protest process: the choices that every procurement challenge system must make”, Gordon, D., *American Bar Association*, 35 *Pub. Cont. L.J.* 427.

<sup>40</sup> The UNCITRAL Model Law text does not address issues relating to procurement personnel, but as these measures are institutional rather than legislative, the Guide to Enactment notes that an enacting State may wish to provide, inter alia, for training of personnel. See, further, Guide to Enactment, *Proper administrative structure for implementation of the Model Law*, paragraph 37.

needs through to the end of the useful life of an asset or the end of a services contract”.<sup>41</sup>

32. Typically, procurement systems, at least so far as legislation and to a lesser extent procurement regulation are concerned, focus on the second phase, the selection process that leads to the award of a procurement contract to a supplier.<sup>42</sup> As recently noted by Transparency International and others, the other two phases are “increasingly exposed to corruption”,<sup>43</sup> and UNCAC article 9 (2), provides that a procurement system must ensure adequate internal control and risk management.<sup>44</sup> Thus the procurement system must have integrated systems to link budgeting and planning, procurement procedures and contract or project implementation.

33. The regulation of non-selection phases of procurement may thus be addressed within the general governance system in a State party: for the reasons set out below in section VIII, it is vital that they are integrated into the procurement system itself.

#### **D. Vital role of transparency – cost-benefit analysis of improving transparency**

34. The benefits of transparency in public procurement are widely-accepted.<sup>45</sup> Corruption thrives in the absence of transparency, and its presence makes it difficult to hide collusion, fraud and coercion. Improving transparency also reduces uncertainty for potential bidders (both domestic and foreign), encourages them to compete for government contracts, and lowers prices. Research shows small and medium-sized enterprises are especially responsive to reductions in uncertainty; and clearer procedures mean that firms can assess more swiftly and cheaply whether they meet the requirements of the system. Finally, greater transparency makes it easier to oversee use of discretion and to ensure accountability.

35. However, transparency does involve costs: establishing, operating, and enforcing clear rules requires resources. Many commentators consider that these costs are an investment with significant dividends in the medium- to long-term, but they can impact on administrative efficiency (effective management of public

<sup>41</sup> Review of Civil Procurement in Central Government, Peter Gershon, 1999, reproduced in “Getting value for money from procurement”, National Audit Office, United Kingdom, available at <http://www.nao.org.uk/Guidance/vfmprocurementguide.pdf>.

<sup>42</sup> The UNCITRAL Model Law, in common with many procurement regimes, notes that its provisions address the “*procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract*”. Its Guide to Enactment states that the Model Law does not address the terms of contract for a procurement, the contract performance or implementation phase (*Introduction*, paragraph 12), including resolution of contract disputes, and by implication, the procurement planning phase.

<sup>43</sup> Transparency International Handbook, “Curbing Corruption in Public Procurement”, 2007, available at [http://www.transparency.org/global\\_priorities/public\\_contracting/tools\\_public\\_contracting/curbing\\_corruption\\_in\\_pp\\_handbook](http://www.transparency.org/global_priorities/public_contracting/tools_public_contracting/curbing_corruption_in_pp_handbook).

<sup>44</sup> Article 9 (2): “2. *Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia: ... (d) Effective and efficient systems of risk management and internal control ...*”.

<sup>45</sup> See, for example, OECD, Integrity in Public Procurement, op. cit., footnote 1, supra, and Schooner, Desiderata, op. cit., footnote 29, supra.



resources) in the short-term.<sup>46</sup> Thus the challenge is to provide an adequate balance between these objectives.

## E. E-procurement and modern procurement methods

36. The benefits of introducing electronic procurement (e-procurement) are now widely recognized. *“Procurement of goods, works and services through internet-based information technologies (e-procurement) is emerging worldwide with the potential to reform processes, improve market access, and promote integrity in public procurement. E-procurement, when properly designed, can drastically reduce the cost of information while at the same time facilitate information accessibility. The strength of e-procurement in the anti-corruption agenda arises from this capacity to greatly reduce the cost and increase the accessibility of information, as well as automate practices prone to corruption.”*<sup>47</sup>

37. Other commentators have noted additional gains in terms of introducing uniformity into the procurement system through e-procurement, and that automated systems yield even greater benefits where repeated purchases of commodity-type items are concerned. The integrity benefits include the reduction of human contact in the procurement cycle, and the enhanced transparency that an e-procurement system can offer.<sup>48</sup>

38. However, the take-up of e-procurement systems requires public confidence in the security of the system, and the confidence of procuring entities that genuine offers are being received. Systems must therefore ensure that confidential information from suppliers remains confidential and is not accessible to competitors, and procuring entities must ensure that tenders or other offers cannot be accessed or altered prior to the public opening of the tenders or offers concerned. There are many commercially available systems that offer solutions to these technical issues, but their scope and the extent to which they are appropriate to the State party concerned is an issue. For example, in some cases electronic signatures on tenders are independently certified (in which case they are known as “digital signatures”), and public key encryption systems.<sup>49</sup> These solutions offer high levels

<sup>46</sup> In “Integrity in Public Procurement”, op. cit., footnote 1, supra, it is noted that *“Transparency could be considered a public good [This concept was introduced by Steven Schooner, Keynote Speaker at the 2006 OECD Symposium: Mapping out Good Practices for Integrity and Corruption: Resistance in Public Procurement] that bears an immediate cost for both government and bidders. A balance must be found between transparency and its contribution to corruption control with other considerations such as efficiency. In practice countries have adapted the level of transparency and openness of the procurement procedure according to a number of factors, including the sensitivity of the information and the specificity and value of the public procurement.”*

<sup>47</sup> “Corruption and Technology in Public Procurement”, op. cit., footnote 13, supra.

<sup>48</sup> For further detail, see Working Group papers A/CN.9/WG.I/WP.44-A/CN.9/WG.I/WP.52/Add.1, available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/1Procurement.html](http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html).

<sup>49</sup> Digital signatures involve encryption, sometimes using public key infrastructure, and require significant investment to set up. The private sector operates electronic commerce in many systems without digital signatures. For further detail, see the Final Report of the Conference on Electronic Government Procurement (E-GP) held by the multilateral development banks, Manila, 26-28 October 2004, available at <http://www.mdb-egp.org/data/international.htm>.

of security, but are expensive. The aim of these security measures is to offer comparable levels of security to those that exist in the paper environment, so as (a) to avoid burdening e-procurement with more expensive and cumbersome requirements than the traditional systems it replaces, and (b) to provide a level of security that ensures sufficient confidence that the system will operate effectively. In this manner, the maximum take-up of e-procurement is likely to be assured, and its many benefits available.

39. However, those benefits arise not just from replacing paper communications with electronic communications, but in the manner in which the procurement system and the information it yields can be stored and utilized, as discussed in section V.A.2 below. Empirical evidence suggests that most e-procurement systems that are introduced take many years to provide the benefits promised, and the most effective implementation is often undertaken in a staged manner.

## **VI. Other elements of a procurement system**

### **A. Institutional, administrative and legal infrastructure**

#### **1. Rules to govern government contracting, including electronic contracting**

40. Public procurement involves public sector contracting, which is generally regulated outside procurement legislation. Similarly, general rules on electronic commerce may or may not be found in general legislation on electronic commerce applying to the public sector, and may provide a general framework for electronic commerce and electronic transactions. In order for e-procurement (and, indeed, procurement generally) to function correctly, the appropriate legal infrastructure should be in place. The UNCITRAL Model Laws on Electronic Commerce (1996) and Electronic Signatures (2001), and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) address electronic contracting on the basis of the functional equivalence of electronic documents and signatures to their traditional, paper-based counterparts. Thus electronic documents and signatures cannot be denied validity simply on the basis that they take electronic form, provided that they fulfil the functions of those traditional, paper-based counterparts.<sup>50</sup>

#### **2. Integrated systems to link budgeting and planning, procurement procedures and contract implementation, both among themselves and with oversight institutions**

41. Commentators regularly stress the importance of oversight in procurement, and the complexity of providing for it. For example, “[t]he need for oversight of the procurement system implicates issues far broader than minimizing the frequency of collusion or incidence of fraud. ... In procurement, compliance indicates not just high standards of integrity, but also the maintenance of system transparency, the maximization of competition, and the furtherance of a host of Congressionally

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<sup>50</sup> For a general discussion of electronic contracting in the public procurement context, see “General legislative principles and policy approaches for dealing with electronic communications and technologies in the procurement process – interaction with electronic commerce and other law”, paras. 14-23, document A/CN.9/WG.I/WP.38, available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/1Procurement.html](http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html).

mandated social policies. Any one of these issues opens the door to a host of pitfalls. For example, integrity in public procurement implicates issues related to, inter alia, personal and organizational conflicts of interest, gratuities, bribes, handling and disclosure of proprietary source selection information, ...”<sup>51</sup>

42. The Legislative Guide and other guidance from UNODC encourage States parties to set up an independent agency or commission for the organization and execution of public procurement procedures, for example to address access to and monitoring of bidding and implementation procedures, and awards notably in non-open procedures; to ensure access to contract documentation and to public officials for oversight bodies; to assist in the development and identification of fraud indicators and other direction and guidance to internal audit, which might point to corrupt activity at an early stage; to maintain lists of de-barred contractors; to provide for the collation of intelligence on and receipt of complaints regarding procurement fraud and corruption and the development and use of integrity pacts; to coordinate prevention strategies through education and training initiatives; and to develop and maintain codes of conduct and asset declaration requirements for procurement staff and auditors.

43. This approach is also recommended in the Guide to Enactment to the UNCITRAL Model Law. In a section entitled “*Proper administrative structure for implementation of the Model Law*”, the Guide suggests that an enacting State may wish to provide for the overall supervision of and control over procurement through one or more authorities, to include supervising overall implementation of procurement law and regulations, rationalization and standardization of procurement and procurement practices, monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader Government policies (and training of procurement officers as described above).<sup>52</sup>

### 3. Institutional promotion of best practice, ethics and integrity

44. As noted in paragraph 2 above, effective procurement systems require more than regulation. Along with codes of conduct for procurement officials and guides to best practice, which aim to promote a culture of high ethical and practical standards in procurement, “Integrity Pacts” have become acknowledged as useful tools in the fight against corruption. They were initially developed by Transparency International, and comprise an agreement between a government or a government department (and all potential suppliers to the effect that neither side will pay, offer, demand or accept bribes; collude with competitors to obtain the contract; or engage in such abuses while carrying out the contract).<sup>53</sup> Integrity Pacts are now in frequent use, in particular in the construction and defence sectors.<sup>54</sup>

<sup>51</sup> Schooner, *Desiderata*, op. cit., footnote 29, supra.

<sup>52</sup> Guide to Enactment, *Proper administrative structure for implementation of the Model Law*, paragraph 37.

<sup>53</sup> The Integrity Pact also introduces a monitoring system that provides for independent oversight and accountability. For a detailed discussion of integrity pacts, see [http://www.transparency.org/global\\_priorities/public\\_contracting/integrity\\_pacts](http://www.transparency.org/global_priorities/public_contracting/integrity_pacts) and [http://ww2.unhabitat.org/cdrom/TRANSPARENCY/html/2c\\_5.html](http://ww2.unhabitat.org/cdrom/TRANSPARENCY/html/2c_5.html).

<sup>54</sup> See, for example, the resources regarding Integrity Management of the International Federation of Consulting Engineers (FIDIC), at <http://www1.fidic.org/resources/integrity>.

**B. An effective oversight regime, with sufficient resources and institutional will to implement its recommendations**

45. The main elements of an oversight regime are (a) a robust procurement audit function, comprising both internal and external elements, which is acknowledged to assist both in monitoring expenditure and considering whether value for money has been achieved, and also in detecting possible collusion or other fraudulent practices; (b) taking a risk-based approach; (c) the institutional will to address breaches of rules and procedures, poor practice and any abuse or misuse of public funds; and (d) a functioning review or challenge mechanism, in that losing suppliers are good watchdogs.

46. Effective procurement audit will review the tendering or other procurement processes, including the evaluation methodology, and assess the practices for regulatory compliance and outcome (whether value for money has been achieved, whether there are any indicators of malpractice).

47. Audit systems also focus on identifying and monitoring risk areas in procurement, such as those described in the Annex to this paper. The main areas of focus for audit can be summarized as follows:

- (e) Assessment of needs for procurement (planning and budgeting);
- (f) Defining of requirements for each procurement;
- (g) Choice of (sufficiently competitive) procurement method;
- (h) Selection of potential suppliers to compete in non-open procurement;
- (i) Definition of time frame for the procurement process;
- (j) Access to information regarding procurement, generally and for each procurement; and
- (k) Post-contract management, supervision and oversight.<sup>55</sup>

48. As is noted in section 2 above, monitoring these risk areas requires an effective management information system. Thus procurement records need to be integrated, so as to allow for:

(l) The provision of meaningful management information, such as total expenditure (to assess trends in pricing and to enable benchmarking against market prices), the use of each permitted procurement method, the use of evaluation methodologies and awards; and

(m) The capacity to track the actions and decisions of individuals in the procurement cycle, and decisions of procurement officials.

49. It has been noted that “Having access to robust financial and management information will help managers to spot any irregularities such as unexplained increases in volume or prices of purchases, or the ordering of unusual items.

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<sup>55</sup> For a more detailed discussion of the risk areas, see *Integrity in Public Procurement*, OECD, op. cit., supra, Chapter 1.

Keeping records on the financial interests of procurement staff and suppliers will also help to identify potential risks of collusion.”<sup>56</sup>

50. The main elements of a functioning review system are set out in section V.B.4 above.

### **C. An effective sanctions regime**

51. Although procurement legislation is essentially aimed at preventing corruption, it commonly includes provisions sanctioning abusive behaviour. The UNCITRAL Model Law article 15 (Inducements from suppliers or contractors) provides that, “a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give, directly or indirectly ... an offer of employment or any other thing of service or value, as an inducement ...” during the procurement process. This provision, together with the procedures and safeguards in the Model Law was designed to promote transparency and objectivity in the procurement proceedings and thereby to reduce corruption. However, the drafters of that text noted that “In addition, the enacting State should have in place generally an effective system of sanctions against corruption by Government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process.”

### **D. Resources**

52. The scale of procurement in States parties indicates that devotion of resources to procurement systems would be a valuable investment. However, it is a commonly-noted feature that resources are invested into a system periodically, often following a corruption scandal. The type of measures introduced generally follow a regulatory/compliance approach, which procurement audits will normally show as imposing costs and decreasing administrative efficiency. Thereafter, reforms to improve that administrative efficiency are introduced, and after a certain period, until corruption is revealed. Thus procurement reform takes a cyclical form.<sup>57</sup>

53. Nonetheless, wherever in the procurement reform cycle a State party might find itself, the trend is for increasing procurement spending not to be matched like-for-like with increased investment in the procurement system, notably in human resources. Reductions in resources for procurement systems are frequently cited as indicators for future abuse and corruption,<sup>58</sup> and can compromise effective

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<sup>56</sup> For further detail, see [www.nao.org.uk/Guidance/topic.htm/procurement](http://www.nao.org.uk/Guidance/topic.htm/procurement).

<sup>57</sup> See “Troubling Trends in Procurement and Governance, November, 2004”, Schooner, available at [http://oamp.od.nih.gov/NewsEvents/Symposium/Symposium04/RockyGap\\_Presentation/Slides/NIH-Nov10.ppt](http://oamp.od.nih.gov/NewsEvents/Symposium/Symposium04/RockyGap_Presentation/Slides/NIH-Nov10.ppt).

<sup>58</sup> Reductions leading to “lack of adequate personnel to execute contracts, lack of effective oversight, and general politicization of the government itself all create[...] ample opportunities for abuse throughout the system”, Cronyism and Corruption, May 15 2007, available at [http://www.americanprogress.org/issues/2007/05/event\\_contracting.html](http://www.americanprogress.org/issues/2007/05/event_contracting.html).

procurement.<sup>59</sup> Thus the devotion of adequate resources to a procurement system is a critical indicator of its efficacy and effectiveness.

## VII. Procurement and anti-corruption objectives – synergies and tensions

54. The principal objectives or functions of a national procurement system<sup>60</sup> (achieving value for money and promoting integrity or avoiding corruption) are generally achieved by means of competition and transparency. The requirements of UNCAC are therefore consistent with “traditional” procurement goals and objectives, and the methods used to achieve them can assist in achieving UNCAC’s objectives. However, there is also a wealth of academic comment discussing the difficulties of achieving all procurement objectives simultaneously.<sup>61</sup>

55. The primary aim of article 9 (1), as explained in its chapeau, is to prevent corruption, through transparency, competition and objective criteria in decision-making.<sup>62</sup> Thus there is a philosophical difference between the primacy of the anti-corruption objective of procurement regulation under UNCAC and those in the many national systems, which place achieving value for money as an objective on a par with anti-corruption.

56. Systems that emphasize the achievement of value for money tend to be more flexible and less prescriptive (sometimes known as the “management/performance approach” through the establishment of management principles and objectives, with fewer prescriptive rules and more discretion), and those that place the primary emphasis on integrity, and which tend to be more rigid (the “regulatory/compliance” approach).<sup>63</sup> The regulatory/compliance approach eliminates much discretion from the procurement process,<sup>64</sup> but it has been observed that its very rigidity although removing the opportunities for “traditional” corruption”, can introduce new opportunities through requests for exceptions. It has been also observed that “*the transparency goal of [the] regulatory model can also be self-defeating: the daunting volume of regulations acts to obfuscate transparency*

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<sup>59</sup> See, for example, “Strategic Workforce Planning Can Help USAID Address Current and Future Challenges”, United States Government Accountability Office, report available at <http://www.gao.gov/new.items/d03946.pdf>.

<sup>60</sup> This objective is sometimes considered to be the primacy objective of national procurement systems. See Arrowsmith, “The National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?”, in Arrowsmith and Davies (eds.), *Public Procurement: Global Revolution* (1999; Kluwer Law International).

<sup>61</sup> See, for example, Schooner, Desiderata, and OECD Integrity in Public Procurement, *op. cit.*, footnotes 29 and 1, *supra*.

<sup>62</sup> Although there is no express reference in the preamble to the UNCITRAL Model Law, there are requirements for objective decision-making based on publicised criteria are contained in its text (see the discussion of Article 9 (1)(c), below) and in the Guide to Enactment (see the discussion of the main features of the Model Law set out in the Guide, above).

<sup>63</sup> Terms from “Corruption and technology in procurement”, World Bank, *op. cit.*, footnote 13, *supra*.

<sup>64</sup> Though systems that provide for qualitative evaluation methodologies can involve hidden discretion, as qualitative characteristics can be difficult to define in purely objective terms.

*by making the processes difficult for stakeholders such as business to comprehend.*<sup>65</sup> Similarly it has been observed that: *“The impact of new rules on the challenge of corruption has regularly been overestimated. Judicial tools are insufficient unless the risk for those involved in corruption is increased.”*<sup>66, 67</sup>

57. In addition to the procurement objectives discussed in section V.A.3 above, procurement is also subject to many other socio-economic policy goals, which may operate as constraints in the procurement context. Governments seek to encourage investments, partnerships (PPP/PFIP), to protect their domestic industries, to exclude sensitive sectors such as defence from procurement regulation, and to promote small and medium-sized businesses or other sectors of the economy,<sup>68</sup> to the extent that their regional trade obligations permit. These objectives all involve costs in procurement, and are commonly cited as risk areas unless such exceptions to general procurement regulation are objectively and transparently implemented.

58. Procurement system design is therefore an exercise in balancing the various competing objectives set out in this note. It is acknowledged that discretionary decisions may enhance value for money but are at greater risk of abuse or misuse, particularly in the absence of a corruption-free culture and very high skills and integrity levels of on the part of procurement officials, and hence the regulation or reduction of discretion will need to be considered when designing or reviewing a procurement system. Consequently, the “appropriate” system prescribed by UNCAC to prevent corruption will need to be assessed against the circumstances prevailing, including the general public sector governance standards in each State Party, but need not compromise the principle of maximising value for money in procurement.

## VIII. Conclusions

59. Procurement officials and end-users seek to maximize value each procurement (maximising value for money), and the discretion to achieve it; regulators and oversight bodies seek compliance with rules and procedures (often, minimising discretion). This dichotomy is reflected in the primary objectives of a national procurement system (in which maximising value for the public purse is the primary objective) and the objectives of anti-corruption policies (in which avoiding abuse and corruption through regulation and compliance are the main aims). The main distinguishing feature between these approaches is the extent to which the use of discretion is allowed, regulated and restricted.

60. A procurement system for any State Party should provides for both objectives, and other common procurement goals, and will need to reflect the circumstances prevailing in that particular State. The OECD Development Assistance Committee

<sup>65</sup> MacManus, 1991, as cited in “Corruption and technology in procurement”, World Bank, op. cit., footnote 13, supra.

<sup>66</sup> Chapter 6, “Grey Zones and Corruption in Public Procurement: Issues for Consideration”, Søreide, OECD 2005.

<sup>67</sup> “Corruption and technology in procurement”, World Bank, op. cit., footnote 13, supra.

<sup>68</sup> Additional considerations in procurement policy in developing countries include aid and its terms, including commitments made by recipient governments with respect to expenditure policy; resource constraints and implications for implementation of certain procurement policy measures; and the relatively small scale of national procurement markets.

(DAC) Joint Venture for Procurement has engaged multilateral and bilateral donor members and partner countries to assess and strengthen the performance and quality of public procurement systems in developing countries, using a methodology and common, country-led approach. The main aim of the methodology (details of which are published on the OECD website) is to provide a tool that “developing countries and donors can use to assess the quality and effectiveness of national procurement systems. The understanding among the participants in this process is that the assessment will provide a basis upon which a country can formulate a capacity development plan to improve its procurement system.”<sup>69</sup>

61. Thus, an effective procurement system will comprise not only adequate legislation and regulation, but also supporting institutional, administrative and legal infrastructure, throughout the procurement cycle.

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<sup>69</sup> For a description of the Joint Venture and related documents, see *Methodology for Assessment of National Procurement Systems (Version 4) – English*, and other information available from the OECD at [http://www.oecd.org/department/0,3355,en\\_2649\\_33721\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,3355,en_2649_33721_1_1_1_1_1,00.html) and [http://www.oecd.org/document/40/0,3343,en\\_2649\\_19101395\\_37130152\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/40/0,3343,en_2649_19101395_37130152_1_1_1_1,00.html).



## Annex

## Risks in the procurement cycle

Stage A: Decision to contract (identification of need)	
Description	Main risks (examples)
The government decides to purchase or sell goods or services, or to outsource the management of a unit.	The decision does not follow a policy rational or an existing need but rather the desire to channel benefits to an individual or an organisation. For example, demand is created for a good no one buys simply to benefit the company's owner.
Stage B: Identification/definition of contract characteristics (technical requirements, etc.)	
Description	Main risks (examples)
The government determines <b>what</b> it needs to buy or sell or privatise (technical requirements, specific characteristics) and <b>how</b> it will go about it (contracting method, agency responsible, etc)	<p><b>Characteristics</b> (technical or not) are made to favour a special supplier or contractor and not to properly address the need identified;</p> <p><b>Exceptions</b> to an open bidding process are abused, leading to single source processes);</p> <p><b>Participation</b> of relevant stakeholders is <b>limited</b>, making it difficult to assess the need and relevance of the characteristics as they are being defined;</p> <p><b>Evaluation</b> criteria are not set from the start or are not objective, thereby making them prone to abuse</p>
Stage C: Contracting process	
Description	Main risks (examples)
A contracting process opens. It should take place according to what method the law determines be used to receive proposals (e.g. open bidding system) or evaluate contractors (e.g. single source)	<p><b>Invitation to bid</b> (an open bid) is not publicised, thereby restricting the number of bidders that participate;</p> <p><b>When short-lists</b> are used, companies <b>bribe</b> to be included or to gain access to them;</p> <p><b>Invitation to bid is publicised</b> but very little time is given to present offers, making it difficult for bidders without prior knowledge of the contract to present bids;</p> <p><b>Abuse of confidentiality</b> or lack of publicity creates unequal playing field for bidders;</p> <p>In single-source processes, lack of publicity or transparency leads to unjustifiable decisions;</p> <p><b>Bidders or contractors collude</b> to influence prices or to share the market by artificially losing bids, or not presenting offers.</p>
Stage D: Contract award	
Description	Main risks (examples)
Contract process ends and a decision is made in order to select	<b>Evaluation criteria are not clearly stated</b> in bid documents, leaving no grounds to justify the decision;

Contract process ends and a decision is made in order to select the winning bidder (in open bids) or the contractor (in single-source processes).	<p><b>Evaluation criteria are not clearly stated</b> in bid documents, leaving no grounds to justify the decision;</p> <p><b>Evaluation of bids is subjective</b> or leaves room for manipulation and biased assessments;</p> <p><b>Contract awards are not publicised</b> (nor the grounds for the decision);</p> <p><b>Subcontractors</b> and partners are chosen in a non-transparent way, are unaccountable or are used to channel bribes.</p>
<b>Stage E: Contract implementation and supervision</b>	
<b>Description</b>	<b>Main risks</b> (examples)
The contract is signed with the selected bidder or contractor	<p><b>Contract changes and renegotiations</b> after the award are of a nature that changes the substance of the contract itself;</p> <p><b>Supervising</b> agencies/individuals are unduly influenced to alter the contents of their reports so changes in quality, performance, equipment and characteristics go unnoticed;</p> <p><b>Contractor's claims</b> are false or inaccurate and are protected by those in charge of revising them.</p> <p><b>Clearances, permits, importations, etc.</b> that a contractor or supplier must pay bribes to obtain. Quarrying simple construction materials, for example, often requires environmental clearances, mayors permits, and on and on, and contractors typically pay at every stage.</p>

*Source:* Table 1, Contracting Risks, from "Corruption and Technology in Public Procurement", January 2007, by Dr. Paul R. Schapper on behalf of the World Bank, Copyright © June 2006, reproduced with permission of the World Bank.