

# Part 1

## Inventory of measures for curbing corruption in public procurement in Asia-Pacific

### 1. Curbing corruption through comprehensive regulations

A clear and comprehensive regulatory framework for the conduct of public procurement is a fundamental prerequisite for curbing corruption in public contracting. It is the basis for the development and application of equal practice, for transparency and fairness, and for meaningful review and control mechanisms. In some instances, aspects of procurement regulation may be addressed in a broader framework that covers a range of related public sector activities. In the absence of a sound regulatory framework, any form of manipulation and corruption may occur and remedies for such practices may be difficult to implement. A closer analysis of procurement systems reveals that most countries that do not have a comprehensive procurement framework do not dispose of essential features required to curb corruption and to maintain sufficient control mechanisms. In these countries, a very substantial proportion of the public budget—procurement amounts to up to 20 percent of public expenditure in some countries—is at risk of being wasted or embezzled.

#### a. Existence of procurement rules and legislation

A majority of the countries in the region (Australia; Bangladesh; P.R. China; Hong Kong, China; Indonesia; Japan; Korea; the Kyrgyz Republic;

Mongolia; Pakistan; Palau; Philippines; Singapore; Vanuatu; Vietnam) have passed comprehensive and widely applicable public procurement laws or regulations. Some of these frameworks are the fruit of recent efforts to establish or substantially modernize procurement. Indonesia and Mongolia passed new procurement frameworks in 2000; Mongolia, in 2005, was preparing institutional and procedural improvements. The Philippines established new procurement rules in 2002. P.R. China did the same in 2003, as did Bangladesh, the Kyrgyz Republic, and Pakistan in 2004. A similar reform process started in Kazakhstan in 2002. In 2005 India revised its General Financial Rules, which lay down the principles for central government procurement, and passed new procedures for the defense sector. Indonesia has adjusted its procurement framework repeatedly in 2003–2006. Vietnam enacted procurement legislation in mid-2006, and supplementary decrees are expected to be passed in the second half of 2006. Papua New Guinea's procurement system was undergoing reform in 2006, following the promulgation of new legislation on finance instructions in relation to procurement. Bangladesh, the Fiji Islands, and Nepal are preparing new procurement legislation, and Thailand is modernizing its procurement regulations by revising the existing regulation.

Some of the recently adopted laws and regulations—notably those of Bangladesh, the Kyrgyz Republic, Mongolia, and Pakistan—have been strongly inspired by the model law on public procurement of the UN Commission on International Trade Law (UNCITRAL). The proposal to revise Thailand's procurement regulations is also based on the model law. However, regulations on public procurement in Cambodia, Malaysia, and Nepal are still fragmented and are spread over several legal documents.

Procurement rules need to be unambiguous and reliable over time to provide for steady and consistent practice and transparency, and to ensure that training programs in the subject are not made obsolete by constant changes in the procurement framework. Today, there is a growing consensus that the stability of the framework over time clearly benefits from the establishment of the constitutive elements of procurement rules in parliamentary law. Regulation at this level protects the framework against short-lived modifications through government decrees and confusion caused by overriding or conflicting parliamentary laws. Violations of procurement rules laid down as guidelines or in manuals may also fall out of the scope of judicial review and may thus go unsanctioned, as such rules are often not legally binding. Given the

specific legal traditions and very particular circumstances of some countries, regulation at a lower level may also achieve the goal of stability.

Many countries (such as Bangladesh; Cambodia; Hong Kong, China; India; Japan; Korea; Malaysia; Nepal; Pakistan; Samoa; Singapore; and Thailand) have passed substantial elements of their procurement regulations or even the entire framework at the level of executive orders or decrees. In Papua New Guinea, the centerpiece of procurement principles and procedures is contained in a “Good Procurement Manual and Operation Manual”. While this level of regulation is recommended for less elementary issues such as threshold values, technical requirements, or similar procedural details that may require adaptation to evolving circumstances, regulating the basic rules of public procurement at this level may undermine stability and transparency. As such a compound of parliamentary and executive regulations constitutes a significant legislative challenge, few of the countries covered by this review have for the time being achieved the balance sought.

#### b. Scope of the procurement rules

In most of the countries surveyed, the reach of the procurement framework is restricted in two dimensions. On the one hand, many frameworks do not cover the full project cycle, i.e., from procurement planning to implementation and delivery. On the other hand, some frameworks do not apply to certain state levels or to certain categories of goods or services. These limitations on the scope of application of sound procurement regulations diminish the effectiveness of these regulations in curbing corruption.

#### Regulations covering the entire procurement cycle

Experience shows that procurement planning—in particular, needs assessment and definition of technical specifications—and the delivery phase are particularly exposed to corruption. If the process is not controlled and properly regulated, a “need” or requirement can be created arbitrarily, and substandard products or services can be delivered, thus providing margins for kickbacks. Corruption risks in these project phases are particularly difficult to manage. Consequently, the scope of application of a procurement regulation must cover these phases of the project cycle and sets out clear rules for contract management and implementation control.

In the Asia-Pacific region, the scope of procurement regulations varies from country to country. The entire procurement cycle, from procurement planning to implementation control, is covered by the procurement laws of Hong Kong, China; Korea; the Philippines; and Thailand. Australian and Kyrgyz regulations also cover procurement planning, requiring, for instance, the publication of annual procurement plans. In Australia and Korea, these plans outline forthcoming key procurement projects, while Kyrgyz law does not specify their exact contents. India's Defense Procurement Procedures, which took effect in 2005, also provide for the publication of midterm and short-term procurement plans to increase transparency.

Some other countries' frameworks, in particular those inspired by the UNCITRAL model law (e.g., those of Bangladesh and Pakistan), focus mainly on the mechanism for selecting the supplier—a scope that the model law itself qualifies as incomplete. The remaining issues, such as procurement planning and approval of delivery of the procured goods and services, are to some extent covered by the countries' budget and general contract laws. Such regulations, designed for more general purposes and often dated, rarely respond to the specific risks of corruption in public procurement.

### **Regulations applying to all procurement entities**

Many general procurement frameworks cover only a part of a given country's purchases of goods, works, and services. Some regulations do not apply to certain procuring entities, or to goods, works, or services for specific uses. This limited coverage may jeopardize the effectiveness of improvements in corruption prevention achieved through reforms of the general procurement framework.

The procurement rules apply to all administrative entities at local and national levels in P.R. China; Korea; the Kyrgyz Republic; Mongolia; the Philippines and Samoa. Except for P.R. China and Korea, these countries, as well as Kazakhstan, also apply the rules to procurement by some or all state-owned or state-controlled enterprises. Recently adopted procurement rules in India, Indonesia, and Pakistan apply only at the central level; in these countries, procurement regulations at lower levels vary in extent and are sometimes significantly less developed. Central-level reforms thus affect only a limited proportion of the procurement in these countries.

Further limitations on the applicability of the regulatory framework concern certain goods and services. Many frameworks explicitly exclude a number of sectors. Goods and services for national defense and security

are procured under specific regimes in Bangladesh; P.R. China; India; Indonesia; Korea; the Kyrgyz Republic; Mongolia; and Thailand. Items that are not security-sensitive may also be exempt. Bangladesh, India, and Korea have passed special regulations in this area, but other countries have no consistent regulatory framework for this sector at all—although it makes up a significant proportion of gross public expenditure. The two procurement laws in P.R. China also do not apply to emergency and disaster relief procurement or to procurement below a certain value limit defined by the administration. Indonesia and Mongolia empower the executive to exempt other matters besides security-sensitive goods and services. Vanuatu’s procurement law does not apply to purchases below approximately USD45,000, but these purchases are governed by a separate regulation.

### c. Harmonization of procurement rules and policies

Consistency of procurement rules and policies throughout a given country is widely considered desirable. Bidders should not face different procedures when bidding on contracts in different parts of the country or dealing with procuring agencies in different ministries. Without uniform rules, the effectiveness of judicial review and the establishment of steady and predictable practice may also suffer. Federal states face particular challenges in this regard, as different procurement rules may apply to federal subjects and at the national level, as is the case, for instance, in India and Pakistan. Indonesia and Thailand also apply different procurement rules at national and subnational levels. However, the Thai procurement rules applied by local government agencies and state-owned enterprises are based on the same key principles as the rules applied at the central level.

Some countries, such as India and Pakistan, empower the individual procuring entities to define a significant range of procurement rules. In India, procurement entities are responsible for developing detailed instructions, handbooks, and model documents. In Pakistan, procurement entities may define, for instance, the mechanisms and manner of debarring companies from future tenders.

To foster the development of uniform procurement practice and policies, many countries (e.g., Bangladesh, Pakistan, Papua New Guinea, Thailand) have established a central procurement authority. Such authorities do not undertake procurement themselves but rather supervise the individual procuring entities, monitor compliance with the regulatory framework, set and harmonize policies, and recommend reforms.