

3. Curbing corruption by promoting integrity of individuals involved in the procurement process

Ensuring the proper conduct of buyers and suppliers is another fundamental element of efforts to curb corruption in public procurement. Proper conduct can be fostered through preventive institutional mechanisms, clear rules on conduct, and sanctions for corrupt behavior.

a. Ensuring proper conduct through institutional mechanisms

Corruption can be further contained through institutional design and measures aimed at developing high ethical standards among the individuals involved in the procurement process.

Control and oversight mechanisms

At the institutional level, control and oversight mechanisms are among the most common means of curbing corruption. Bangladesh, P.R. China, the Cook Islands, the Kyrgyz Republic, Mongolia, the Philippines, and Singapore entrust procurement decisions to groups rather than individuals. Crucial procurement decisions, such as procurement plans and bidder disqualifications, must be approved by a body at a superior level in P.R. China; the Kyrgyz Republic; and Hong Kong, China. In Bangladesh and P.R. China, deviation from the standard procurement method in cases of emergency must be reported to a superior authority. In other countries like Vanuatu, the procurement decision itself must be approved by a superior authority; in the case of Vanuatu, such approval is required for contracts beyond a certain threshold value.

To forestall favoritism, public procurement agents are regularly rotated in the Fiji Islands; Hong Kong, China; India; Korea; Nepal; and to some extent Japan and Singapore. P.R. China also requires bid evaluation by randomly chosen experts.

For their public procurement decisions, Indonesia, Palau, the Philippines, and Samoa rely on (ideally independent) participants from civil society, and some of these countries provide training for these individuals. In Palau, the Chamber of Commerce monitors public procurement. Korea has recently included outside members in its price

review council, and involves nongovernmental organizations in important procurement decisions.

Some countries like India, Indonesia, and Pakistan use “integrity pacts” to protect procurement processes from corruption. All potential suppliers that bid for a contract have to sign such pacts with the procuring agency; both parties pledge to refrain from any form of corrupt practice and to establish an external monitoring system. The pacts may call for deposits and sanctions that apply in case of breach of the provisions. Indonesia requires the use of integrity pacts in all government procurement, while Pakistan’s national procurement framework requires the use of integrity pacts for public purchases worth more than PKR10 million (about USD170,000). India has applied such integrity pacts in defense procurement since 2005 and for major contracts and plans to extend their use further.

Integrity of procurement agency officials

The preventive measures for procurement agency staff entail the setting up, dissemination, and thorough implementation of clear codes of conduct. Proper business practices among the suppliers’ personnel can be achieved through corporate codes of conduct that clearly forbid bribery, by means of an explicit anti-corruption clause in the bidding documents, disclosure of fees and gratuities, and clear guidelines for avoiding or managing conflicts of interest.

To ensure the integrity of procurement agency personnel, a number of countries (Australia, Bangladesh, Fiji Islands, India, Indonesia, Japan, Kyrgyz Republic, Mongolia, Nepal, Palau, the Philippines, Singapore, Thailand, Vietnam) have passed extensive codes of conduct for public officials, including staff of procuring entities. Specific codes of conduct for procurement personnel, taking into consideration the genuine risks, have been passed in Australia; Hong Kong, China; Korea; and Samoa, among others. However, only some of these codes of conduct—for instance, those in Australia; Hong Kong, China; Indonesia; Japan; the Kyrgyz Republic; Mongolia; the Philippines; Singapore; and Vietnam—specifically address corruption and conflicts of interest.

Different schemes are employed to identify, avoid and manage conflicts of interest. Some rely on transparency, others on incompatibility, and still others on a combination of these two. Transparency requires the disclosure of conflicting interests: if a side activity is the source of the conflict, it may require authorization. The incompatibility principle prohibits activities that typically breed conflicts of interest. Australia, the

Cook Islands, Japan, Palau, Samoa, Vietnam, and to a limited extent Korea and Pakistan have opted for transparency to protect against inherent risks. These countries require public officials involved in procurement to avoid conflicts of interest and to disclose them when they occur. Samoa excludes from procurement proceedings officials with declared conflicts of interest.

Fewer countries support the adoption of high behavioral standards with systematic training that addresses corruption risks. Notable exceptions are Hong Kong, China; Korea; and Singapore. Korea has also set up a mechanism for regularly monitoring compliance with these codes. India analyzes repeated irregularities in procurement and issues guidelines and instructions on the basis of the findings. Nepal has begun to train procurement personnel in procurement and technical audit.

Integrity of suppliers

In addition to measures specifically aimed at ensuring the integrity of procuring entities, measures targeting *corporate* integrity are needed to reduce the risk of corrupt practice in public procurement. Measures intended to reinforce the integrity of suppliers have been developed to a limited extent in many countries in Asia-Pacific. In Indonesia, Korea, Pakistan, Palau, and Samoa, bidding documents contain an explicit prohibition against exerting undue influence on the procurement proceedings. In Pakistan, this prohibition applies only beyond a certain value limit. Australia has issued guidelines to potential suppliers highlighting the importance of ethical behavior. Furthermore, companies and subcontractors that wish to participate in public tenders in Korea must set up codes of conduct for their employees and prevent whistleblowers within the company from being disadvantaged. The codes of conduct must contain clauses that prevent undue influence on the procurement process. In Bangladesh and P.R. China, bidders have to declare that they will abstain from unduly influencing the procurement process or outcome; this declaration also binds subcontractors and other third parties.

b. Ensuring integrity through dissuasive sanctions

Effective sanctions constitute strong incentives for both bidders and public servants to maintain their integrity in the procurement process. Such sanctions are usually provided in penal or administrative law. In addition, civil liability for damages can serve as economic sanctions against dishonest acts of bidders.

Penal sanctions

Corruption, whether active or passive, is now penalized in almost every country. Different legislative models exist. Corruption in public procurement is penalized under general criminal law in Australia; Bangladesh; the Cook Islands; the Fiji Islands; Hong Kong, China; India; Japan; Kazakhstan; the Kyrgyz Republic; Mongolia; Nepal; Pakistan; and Singapore. In addition, the Philippines, Thailand, and Vietnam have passed laws for procurement-specific offenses. The Philippines' procurement law, for instance, includes penal sanctions for any form of manipulation of the procurement process. Singapore and Hong Kong, China, on the other hand, have not defined procurement-specific criminal offenses but apply particularly harsh sanctions for fraudulent practices in procurement. Indonesia has specific penal provisions for substandard delivery in construction or security-sensitive procurement. However, various corruption schemes prevalent in procurement are not fully penalized in many countries. Specifically, bribery through intermediaries is of particular concern, as it is most often not covered by the offense of bribery.

Specific detection mechanisms have been developed to enhance the effectiveness of the penal provisions in Hong Kong, China; Korea; Samoa; Singapore; and Thailand. Among these mechanisms is the legal obligation imposed on procurement agency personnel to disclose attempts by bidders to unduly influence procurement decisions. Korea, in addition, provides a channel for passing on information about corrupt practices in procurement anonymously through a special complaint-and-kickback report center.

Contract termination and liability for damages

Only Australia, Indonesia, Thailand, and—for foreign bribery only—Japan and Korea hold legal persons criminally liable for corruption; in all other countries surveyed, the deterrent effect of penal sanctions is limited to the guilty individual, who is often under pressure to secure a contract for his or her employer. Without criminal liability of legal persons, few incentives exist for companies to stay away from corrupt business practices in procurement. Economic sanctions in the form of civil liability for damages and debarment have thus been introduced to press companies to battle corrupt practices in procurement.

A contract won through corrupt practices may be terminated in Bangladesh; Hong Kong, China; Kazakhstan; Korea; the Philippines; and Singapore. The supplier loses the contract and its economic benefit. In addition—and this applies to India, Japan, and Thailand as well—it can

be held liable for damages, on the basis of legal provisions or contract clauses. How this sanction is applied varies from country to country. While Philippine legislation requires the conviction of the corrupt supplier or official on criminal charges, opening the way for the liquidation of damages, Korea and Singapore allow the procuring entity itself to terminate the contract, and in Kazakhstan, a procuring entity's decisions may be annulled at the request of a competitor.

Debarment

Debarment from eligibility for public contracts for a certain period is an even stronger economic sanction than the termination of a single contract. However, debarment is a two-edged sword: while it might deter corruption, it could also be part of a corrupt scheme of competitors or corrupt officials to extort bribes or to eliminate honest competitors, especially if the conditions for debarment are not clearly specified. Worse, under certain conditions, qualified and honest companies consider abstaining from bidding to avoid being subject to debarment.

No explicit debarment mechanism has been established in Australia; Hong Kong, China; and Samoa. But the procurement authorities may take past corrupt practices into account when awarding contracts. The possibility of debarring companies found guilty of corruption or collusion from tendering for public contracts has been integrated in different ways and to varying degrees into the legal framework of Bangladesh; P.R. China; India; Indonesia; Japan; Korea; the Kyrgyz Republic; Mongolia; Pakistan; Palau; the Philippines; Singapore; and Vietnam.

The effect of the debarment provisions depends on various factors, such as whether debarment is mandatory or optional, whether it is automatic or it requires a distinct decision, whether disqualification affects contracts with only one procuring agency or with all public procurement agencies nationwide, whether companies eliminated for corruption from a list of approved bidders may re-register. Some of the regulatory frameworks reviewed for this report do not define these elements. The debarment periods are often—but not always—defined: one year in the Philippines; two years in Korea; up to three years in P.R. China, the Kyrgyz Republic, Mongolia, and Palau; at least five years in Singapore; an indefinite period in countries like Bangladesh, Japan, Pakistan, and Vietnam.

Poorly defined and lenient conditions for debarment induces risks of corruption that can easily outweigh the potential benefits of using this mechanism. Yet, many countries set rather broad conditions for the application of this sanction, and some have not even specified the

justifications for debarment. The facts of the case must fulfill all the elements of the offence of corruption, in Hong Kong, China; the Kyrgyz Republic; Mongolia; and Nepal. And in some of these countries, as in Nepal, debarment is mandatory if the conditions for the criminal offense are met. In contrast, the Philippines imposes mandatory debarment for the provision of false information about an offer, whether done on purpose or not and regardless of the type of information given, as well as for any other act that “defeats the purpose of competitive bidding.” Palau does not state the reasons for debarment or suspension from consideration for award of contracts, and India’s regulations are fairly generally worded. Pakistan allows individual procuring agencies to decide how suppliers found to be engaging in corrupt practices should be temporarily or permanently debarred. The debarment proceedings also vary considerably: the Kyrgyz Republic and Mongolia require a court’s decision, while Singapore entrusts the decision to a special panel. In most other countries with debarment mechanisms, an administrative decision suffices.

4. Curbing corruption through verification mechanisms

Sound procedures and honest staff, while essential, are not sufficient to contain corruption in public procurement. Effective and swift review of major procurement decisions in response to complaints from aggrieved bidders is just as important in a procurement system that is well protected against corruption. Thorough control of the procurement process and its outcome by auditors, supervisory bodies, and the public must complement this review, to prevent and uncover corruption and collusion.

Complaint and review mechanisms fulfill two functions in curbing corruption. They allow involved bidders and the public to verify the conformity of individual decisions with the established rules and bolster trust in the fairness of the procedures. Sound verification procedures also have an important preventive role: the possibility that decisions can be overturned renders corrupt practices more difficult and therefore constitutes, together with credible sanctions, a strong incentive to respect the procedures.

The effectiveness and functioning of both these control mechanisms depend on the availability of complete and reliable documentation of the proceedings from procurement planning to implementation. Explicit requirements to record acts and decisions in the procurement process exist in Australia; the Cook Islands; Hong Kong, China; India; Indonesia; Japan; the Kyrgyz Republic; Mongolia; the Philippines; and Singapore. Some procurement regulations (e.g., those of the Kyrgyz Republic) provide for the precise contents of the records; others (e.g., those of the Philippines) do not regulate this matter.

Given the long duration of procurement for large projects, especially public infrastructure, and the difficulties involved in detecting fraud and corruption, these documents must be retained long enough. In some countries, records are kept for very short periods. In Hong Kong, China, for instance, procuring agencies may dispose of documents submitted by unsuccessful bidders three months from the date of execution of the contract. Mongolia, and, for certain records, Palau also have rather short record-keeping periods. Korea keeps records for five years; Japan, for at least five years, possibly longer; Thailand, for at least 10 years; and P.R. China for 15 years. India does not prescribe retention periods, and the practice varies among the procurement entities in the country.

To eliminate any possibility of manipulation or later modification of records, Kyrgyz law provides for their immediate transfer to a superior