5.1 Government procurement and Corruption Control: GPA requirements, current developments and approaches

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Background:

Global Recognition of Importance of Corruption Control and Contract Oversight
Perspectives on Corruption Costs, Results & Risk

**Government:**
- Reduced Confidence in Government & Spending Taxpayer Dollars
- Wasted resources
- Improper/defective goods or services
- *Inability to achieve government missions*

**Contractors (weigh fear/risk against opportunity):**
- Jail/incarceration
- Criminal penalties and fines
- Blacklisting, Suspension & Debarment
- Loss of reputation ("goodwill"), public trust and business for a company and its products.
The Parties to this Agreement ... 

recognize the importance of ... 
carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption....
A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

a) is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering;

b) avoids conflicts of interest; and

c) prevents corrupt practices.
Corruption Control

• Governments cannot “afford” the costs of corruption
  • Scarce resources (money) spent that does not return value

• Critical to credible governance
  • High expectations regarding (and scrutiny of) public expenditures

• Critical to good procurement
  • Concerns arise at all stages of the procurement process

• *Constant, Never-ending Effort***!!
How Historical Approaches Failed

- **Conventional approach** driven by risk aversion - attempted to regulate at-risk government officials – key features:
  - Transparency
  - Objectivity – minimum standards and low purchase price
  - Uniformity and Simplicity

- **Government buyers disappointed with procurement results**
  - Did not achieve value for money
  - False economy of low price (painful lesson learned)

- **Exit**: Best firms/talent sought profits elsewhere, in more lucrative (profitable) markets (with more sophisticated, flexible customers)

- **Unintended consequence**: Prequalification, transparency, and objectivity permitted cartel optimization and self-policing

- **Failure to reconcile policing (avoiding, punishing improper acts) with aspirations (good procurement outcomes, value for money)**
Concerns and Risk Areas (1):
- Bribery and Gratuities
- Conflicts of Interest
  - Personal
  - Organizational
- Collusion
- Fraud
- Improper disclosure of
  - Proprietary information
  - Source-selection information
- Post-Employment Restrictions
  - The “revolving door” – a double-edged sword
- Quality Control and “product substitution”
  - Product integrity
  - False (fraudulent) testing
- General Regulatory Compliance
Concerns and Risk Areas (2)

(Again: examples, NOT an Inclusive List)

• Limited or restricted access to information;
• Abuse of exceptions to open public bidding;
• Limited or ineffective control and monitoring, particularly during the contract implementation [performance] phase;
• Deficiencies and lack of transparency during the budget phase (or later phases);
• Urgent purchases [end of a fiscal year, haste makes waste];
• “Emergency” Procurement: Responses to Natural Disasters, War, Contingencies
  – Coronavirus Pandemic – Excellent, painful case study
  – Human Rights, Human Trafficking;
• Participation of Official-Owned Companies; and
• Participation of Front/Shell Companies.
Corruption Control Predicates

• Solid (*transparent*) procurement *principles*

• Clear (and *transparent*) procurement *laws, regulations, rules, and guidance*

• **Oversight** and Law Enforcement
  – Includes **Managing the Contractual Relationship** (or contract performance)
  – **Credible Governmental Institutions**
  – Disincentives and Penalties
    • Criminal, Civil, Administrative
    • Increased **Sanctions (Remedies)** — *quick, superficial approach*
Addressing the Problem(s)

Trends and Common Approaches to Increase Accountability, Reduce Corruption, and Ensure Contractual Compliance
Global Responses or Trends

- Raising Standards (primarily for **Government Personnel**)
  - Professionalism, Ethics or “standards of conduct”
- Engagement With the Private Sector
  - Contractor screening/qualification & compliance
  - Open Dialogue
  - Open Data – Contract Reporting
  - Contractor Personnel/Private Industry
    - Codes of Conduct
    - **Compliance Regimes**, including “Integrity Pacts”
      - Allowable cost (e.g., cost of doing business)
    - Information Sharing (e.g., DII & IFBEC examples)
    - Voluntary Disclosure Regimes
- Increased **External Oversight**
  - Third-party Oversight (Whistle-Blowers)
  - Open Media
Focus on Government Officials

• **Qualifications** – professionalization matters
  – More on this (Thursday)

• **Standards of Conduct**
  – Codes of Conduct

• **Avoidance of Conflicts of Interest**
  – Public Disclosures of assets, holdings

• **Training**

• **Incentives** (and Disincentives)
Choosing Appropriate Business Partners & Managing Relationships

• Qualification (or Responsibility), *prequalification*

• Administrative (contractual) and Judicial (criminal) penalties/sanctions

• **Exclusion** - Blacklisting, Suspension, Debarment, Sanctions (World Bank)
  – Mandatory (Specific failures, convictions)
  – Discretionary (Gov't Best Interest)

• Mandated **Contractor/Corporate Compliance Regimes** – Integrity Pacts
Evolving Attention on Post-Award Contract Management

- Problem: Global discussion of “public procurement” ends with contract award
  - Contract management is not addressed in international instruments
  - Corruption risk continues throughout performance
- Enforcing/policing the agreement is challenging; critical to obtaining value for money
  - Must understand the procurement and contracting lifecycle – “cradle to grave”
- Pressure to “move contracts forward” causes resource shift away from post-award contract management
- Function must be properly staffed:
  - Most procurement staff are overworked and undertrained
- Better results derive from:
  - Certainty (typically as a matter of regulation, transparency)
  - Reasonable (shared) expectations regarding contract interpretation
  - Accessible, consistent fora for dispute resolution
The U.S. Model: Reliance on Standard “Remedy Granting” Contract Clauses

• Risk allocation/contingency management:
  – Changes
  – Differing Site Conditions
  – Delays (Default Termination)
  – Inspection/Quality Control
  – Termination: for default, for convenience
  – Disputes

• Alternative: commercial items – reliance on common contractor terms & conditions
Whistle-Blower Regimes

Two Key Elements

- **Incentives**
  - Typically monetary
  - Must be significant, attractive, attainable

- **Protections**
  - Far More Complicated
  - *Must inspire confidence!*
  - Rules *plus enforcement, oversight*

- **Both Are Important, Interdependent**
Additional Resource: Open Media

• Investigative reporting serves an *independent* “third-party” oversight role

• Risk (and expectation) that:
  • Mostly (only) bad news will be reported
  • Errors will occur (facts reported incorrectly)
    – Benefits outweigh risks

• Exceptions (and procurement-specific concerns/risks)
  – Contractor confidential (business sensitive) information
  – Proprietary information, trade secrets
Meaningful Oversight Requires Data

• Basic Transparency
  – Where did the money go?

• Current Trend
  – The OpenData movement - [https://standard.open-contracting.org/](https://standard.open-contracting.org/)
  – All procurement data, in consistent, accessible form

• Ultimate goal
  – Sophisticated data correlated to outcomes
  – Good data drives informed, rational analysis and decision-making
  – Recognize and include:
    • Life cycle cost/total cost of ownership
    • Customer satisfaction
    • Externalities (sustainability)
    • Costs/investment in compliance/integrity
Both Sides of the Bargain: Building Corporate Compliance

Effective *contractor compliance* systems:

• Reduce the likelihood of government prosecution, debarment, etc.

• Reduce the likelihood of contractor wrongdoing

• Encourage employee integrity

• *Cost money (overhead, allocated to prices paid) – cost of doing (compliant) business (e.g., drives up transaction costs)*
Compliance Program Elements

• A code of ethics and training;
• Periodic reviews to ensure compliance;
• A mechanism for reporting improper conduct; instructions that encourage employees to report;
• Internal and/or external audits, as appropriate;
• Disciplinary action for improper conduct;
• Timely reporting to the Government (e.g., voluntary disclosure); and
• Full cooperation with any investigations or corrective actions.
Conclusion

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