Few activities create greater temptations or offer more opportunities for corruption than public sector procurement.[1]

The procurement of goods and services by public bodies amounts on average to between 15 and 25 percent of a country's Gross Domestic Product (GDP), and in some countries even more. In absolute terms, this means the expenditure of trillions of dollars each year. It is no surprise that there is a great temptation for many players to manipulate the processes for their own private benefit by extorting money and other favors from bidders, bribing purchasing agents and giving contracts to friends and relations. A recent court case in Lesotho has laid bare the practices of industrialized firms joining together to bribe a senior procurement official in a developing country. The result of that case was a series of convictions, large fines and the prospect of multi-national corporations being debarred from World Bank-financed projects worldwide for some time to come.[2]

Whether corruption in public contracting is really the most common form of public corruption may be questionable, but without doubt it is alarmingly widespread. It is almost certainly the most publicized and arguably the most damaging form of corruption to the public welfare. It has been the cause of countless dismissals of senior officials, and even the collapse of entire governments. It is a source of astronomical waste in public expenditure, estimated in some cases to run as high as 30 percent or more of total procurement costs. It is the engine for much corruption in political party financing. Regrettably, however, it is more talked about than acted upon.[3]

To the non-specialist, the procurement procedures appear complicated, even mystifying. They are often manipulated in a variety of ways, and without great risk of detection. On both sides of the transaction, ready and willing collaborators can be readily found. Special care is needed, as the people doing the buying (either those carrying out the procurement process or those approving the decisions) are spending government money, rather than their own funds.

Such is the importance of public procurement that South Africa accorded it special attention in its 1994 Constitution. Section 187 provides that:

1. *The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.*

2. *The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.*

3. *No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards.*

4. *All decisions of any tender board shall be recorded.*

Corruption in procurement is sometimes thought to be a phenomenon found only in countries with weak governments and poorly paid staff. Yet highly developed countries with a long tradition of democracy have amply demonstrated in recent years that corrupt procurement practices can become an integral part of they way in which they do business, too. Nor is procurement corruption the exclusive domain of the buyer who controls the purse strings. It can just as easily be initiated by the supplier or contractor who makes an unsolicited offer.

PRINCIPLES OF FAIR AND EFFICIENT PROCUREMENT

Procurement should be economical. It should result in the best quality of goods and services for the price paid. Both price and quality should be evaluated when making procurement decisions; neither factor should drive the final decision alone.

The price of a good or service should be interpreted as its "evaluated price," meaning that additional factors such as operating costs, the availability of spare and replacement parts and servicing facilities are all taken into account.

Contract award decisions should be fair and impartial. Public funds should not be used to provide

favors. Standards and specifications must be non-discriminatory. Suppliers and contractors should be selected on the basis of their qualifications and the merit of their offers. There should be equal treatment of all prospective suppliers in terms of deadlines and confidentiality.

There are several requirements to keep in mind:

- *The procurement process should be transparent. Procurement requirements, rules and decision-making criteria should be readily accessible to all potential suppliers and contractors, and preferably announced as part of the invitation to bid. The opening of bids should be public, and all decisions should be fully recorded in writing.*

- *The procurement process should be efficient. The procurement rules should reflect the value and complexity of the items to be procured. Procedures for small value purchases should be simple and fast, but as purchase values and complexity increase, more time and more complex rules will be required to ensure that principles are observed. Procurement decisions for larger contracts may require review by a committee; bureaucratic interventions, however, should be kept to a minimum.*

- *Accountability is essential. Procedures should be systematic and dependable, and records that explain and justify all decisions and actions should be maintained.*

- *Competence and integrity should be encouraged. This prompts suppliers and contractors to make their best offers, which, in turn, lead to even better procurement performance. Purchasers who fail to meet high standards of accountability and fairness are quickly identified as poor partners with whom to do business.*

When a project is funded by an international financial institution, additional requirements usually apply:

- *A fair chance must be given for suppliers, contractors, and consultants from multiple countries to take part in the bidding process, particularly those from member countries of the donor institution.*

- *Suppliers/bidders or contractors from the host country may sometimes be entitled to a preference expressed as a percentage of the contract value (For example, the World Bank places this as 15 percent for goods contracts, 7.5 percent for works contracts.) This preference is usually announced in the bid invitation.*

- *For contractors, there is often a requirement of pre-qualification. (Explained further below)*

- *For consultants, there is usually a short list of those invited to bid. The list should be prepared by the purchaser, not the funding institution. This avoids expensive preparatory efforts by too many consultants when only one can get the contract. The short list must have geographic variety (usually no more than two contractors from one country)*

- *There may be encouragement for foreign consultants to include consultants from the host country for at least part of the job, and there may also be encouragement of joint ventures involving foreign and local consultancy firms.*

When the United Nations funds a project, the purchaser is, in most cases, the UN itself. Although the UN basically applies similar procurement standards as those described above, it makes special efforts to make procurements from countries which are donor countries, but which have received a disproportionately small share of UN procurement in the past. It also tries to make procurements from countries in which the UN holds large amounts of non-convertible funds.

Clearly, bribery and corruption need not be a necessary part of doing business. Experience shows that much can be done to curb corrupt procurement practices if there is a desire and a will to do so. In order to understand how best to deal with corruption in procurement, it helps to understand first how it takes place.

HOW CORRUPTION AFFECTS PROCUREMENT

Contracts involve a purchaser and a seller. Each participant has many ways of corrupting the

procurement process, and at any stage of the process.

Before contracts are awarded, the purchaser can:

- *Tailor specifications to favor particular suppliers*
- *Restrict information about contracting opportunities*
- *Claim urgency as an excuse to award a contract to a single contractor without competition*
- *Breach the confidentiality of suppliers' offers*
- *Disqualify potential suppliers through improper pre-qualification requirements*
- *Take bribes*

At the same time, suppliers can:

- *Collude to fix bid prices*
- *Promote discriminatory technical standards*
- *Interfere improperly in the work of evaluators*
- *Offer bribes*

The most direct approach for corrupting a procurement process is to contrive to have the contract awarded to the desired party through direct negotiations without competition. Even in procurement systems that are based on competitive procedures, there are usually exceptions where direct negotiations are permitted. For example:

- *In cases of extreme urgency because of disasters*
- *In cases where national security is at risk*
- *Where additional needs arise and there is already an existing contract*
- *Where there is only a single supplier in a position to meet a particular need*

Of course, not all single-sourced contracts are corrupt. In some instances, direct contract negotiations may well be the most appropriate course of action. However, if justifying circumstances are claimed that do not really exist, the motivation for this deception is often to facilitate corruption.

Even if there is competition, it is still possible to tilt the outcome in the direction of a favored supplier. If only a few know of the bidding opportunity, competition is reduced and the odds improve for the favored party to win. One ploy is to publish notification about the bid in a small, obscure circulation source, which satisfies the advertising requirements, but which may not be seen by potential bidders. Bidders who co-operate in the scam, of course, get firsthand information.

Bidder competition can be further restricted by establishing improper or unnecessary pre-qualification requirements, and then allowing only selected firms to bid. Again, pre-qualification, if carried out correctly, is a perfectly appropriate procedure for ensuring that bidders have the right experience and capabilities to carry out a contract's requirements. However, if the standards and criteria for qualification are arbitrary or incorrect, they can become a mechanism for excluding competent but unwanted bidders.

Persistent but unwanted parties who manage to get past these hurdles can still be effectively eliminated by tailoring specifications to fit a particular supplier. Using the brand name and model number of the equipment from the preferred supplier is a bit too obvious, but the same results can be achieved by including specific dimensions, capacities and trivial design features that only the favored supplier can meet. The failure of competitors to be able to meet these features, which usually have no bearing on critical performance needs, are used as a ploy to reject their bids as "non-responsive."

Competitive bidding for contracts can only work if the bids are kept confidential up until the scheduled time for determining the results. A simple way to pre-determine the outcome is for the purchaser to breach the confidentiality of the bids, and give the prices to the preferred supplier so that it can submit a lower figure. The mechanics are not difficult, especially if the bidders are not permitted to be present when the bids are opened.

This process may become more transparent if an NGO watchdog is present at the opening of the bid documents.

The final opportunity to distort the outcome of competitive bidding occurs at the stage of bid evaluation and comparison. Carried out responsibly, this is an objective analysis of how each bid responds to the requirements of the bidding documents and a determination of which one is the best offer. If the intention is to steer the award to a favored bidder, the evaluation process offers almost unlimited opportunities. If necessary, and unless prevented from doing so, evaluators can invent entirely new criteria for deciding what is "best", and then apply them subjectively to get the "right" results. They are often aided in this process by issuing bidding documents that are deliberately vague and obscure about what requirements must be met and how selection decisions will be made.

These techniques are only a brief outline of some of the ways in which a purchaser is able to corrupt the procurement process.

It would be a mistake to think that the buyers are always the guilty parties. Just as often, they are the ones being corrupted by the sellers, although perhaps without undue resistance.

Through bribes and other incentives, sellers can encourage buyers to take any of the actions described above. In addition, they may collude with other suppliers to decide which party will win a contract and then fix their prices accordingly – known as "bid rigging" – with an agreed payoff for the losers. This may be done without the buyer's knowledge, and, if done cleverly, may never raise suspicions unless it occurs repeatedly. Even then, it may be hard to prove, let alone to punish.

Nor does the story end with the award of the contract, even though that is the stage when most people think that corruption of the procurement process is discussed. Indeed, the most serious and costly forms of corruption may take place after the contract has been awarded, during the performance phase. It is then that the purchaser of the goods or services may:

- *fail to enforce quality standards, quantities or other performance standards of the contract*
- *divert delivered goods for resale or for private use*
- *demand other private benefits (trips, school tuition fees for children, gifts)*

For their part, the unscrupulous contractor or supplier may:

- *falsify qualities or standards certificates*
- *over or under-invoice*
- *pay bribes to contract supervisors*

If the sellers have paid bribes or have offered unrealistically low bid prices in order to win the contract, their opportunities to recover these costs arise during contract performance. Once again, the initiative may come from either side, but, in order for it to succeed, corruption requires the other party's either active co-operation or negligence in the performance of duties.

Finally, unscrupulous suppliers may substitute lower quality products than were originally required or offered in their bid. They may falsify the quantities of goods or services delivered when they submit claims for payment, and pay more bribes to contract supervisors to induce them to overlook discrepancies. In addition to accepting bribes and failing to enforce quality and performance standards, buyers may divert delivered goods and services for their private use or for resale.

ACCEPTANCE OF GIFTS

Some gifts to public officials are acceptable; others, which can create a sense of obligation are not. Gifts meant as bribes can take many forms – a lunch, a ticket to a sports event, a Rolex watch, shares in a company, a holiday abroad, school fees for a child.

Evaluations of such practices as "corporate entertainment" may depend on whether or not supervisors are in a position to monitor the consequences

of their purchasing officers' behavior. Also relevant is whether a particular purchasing officer disqualifies him or herself in future situations that involve the firm in question. Likewise, it will matter whether all the companies likely to get the business are acting in similar ways, so that no obligation to prefer one bidder over another is created. Furthermore, levels of hospitality which are expected and usual, and do not give rise to a sense of obligation, can vary considerably from one society to another.

What is clearly unacceptable is when given hospitality is grossly excessive, such as all-expenses-paid holidays for a purchasing officer and spouse. More debatable gifts are such things as lunches or festive presents; though even here, the acceptance of seemingly trivial gifts and hospitality can, over time, lead to situations where an official has unwittingly become ensnared by the giver.

The dividing line usually rests at the point where the gift places the recipient under some obligation to the gift-giver. This point will differ from one society to another, but it is usually defined in terms of cash (or hospitality) which must be reported as being in excess of a given figure. Attempts to make distinctions between private and public hospitality generally give rise to controversy, and so are best avoided.

The point is that purchasing officers are always at risk and need to be monitored carefully. Any sign that they may be living beyond their means is an obvious red flag.

A government should have clear rules about official conduct that establish that:

- *Officials (and their family members) may not accept anything of value from any individual or company in contractual dealings with the ministry or department for which that official works.*
- *Public disclosure rules regarding the assets, liabilities and income of senior officials should be introduced and enforced; unexplained wealth of officials should lead to an inquiry.*
- *Any suspicion of wrongdoing by another official must be reported, and officials will be protected in carrying out that duty.*
- *Officials in posts involved with procurement and other contracting activities should be asked to sign a pledge that they will not demand or accept anything of value that in fact or perception could influence the exercise of governmental discretion.*
- *Officials will be informed and trained about how to apply the rules for official conduct.*

EMPLOYMENT AFTER HOLDING PUBLIC OFFICE

A crucial area of corruption – and one of growing concern – is the practice of corporations offering post-official employment to public servants with whom they have had official dealings. Clearly, regulations governing the post-public sector employment of officials are important. It is neither practical nor sensible to insist that former public officials not engage in commercial activity after leaving office. However, whole networks of corruption can be constructed by outside suppliers, not only through cash bribes and expensive overseas holidays, but also through the promise to officials of lucrative employment when they retire.

It is tempting for a public official, blessed with rich work experience but a less than satisfactory pension, to accept employment with former suppliers. Often, there will be nothing wrong with such an arrangement. Indeed, it may be a constructive and useful way to ensure that valuable experience is not altogether lost to the community.

But it is susceptible to abuse. For example, an official who leaves the public service may take with him detailed knowledge of the government's impending contract bargaining strategy and the confidential discussions that may have been held with competitors of the official's new employer. In such an instance, neither the public interest nor the private sector is well served.

The promise of post-retirement employment can be used, too, by unscrupulous businesses, as a "sweetener" to gain contracts and is one that will not show in any monitoring of assets or income. Although it is neither fair nor desirable to place an absolute ban on re-employment after retirement from public service, some kinds of employment are clearly contrary to

the public interest. For example, a minister or highly placed official may leave government service while negotiations for a large public works project are pending. Obviously, it would be improper for such a person to immediately take up employment with one of the companies tendering or actively negotiating with the government. (Post-employment restrictions are discussed in Chapter 3)

WHAT CAN BE DONE TO COMBAT CORRUPTION IN PROCUREMENT?

Transparency has two roles to play in countering corruption in public procurement. First, there is the possibility of making the process as open as possible. This includes publishing all calls for tender (both in newspapers and trade papers which possible participants in a tender are likely to read) and on the Internet, and doing both in a timely fashion.

Second, there is public exposure, a most powerful tool. The media can play a critical role in creating public awareness of corruption in procurement processes and generating support for corrective actions. If the public is provided with the unpleasant and illegal details of corruption – who was involved, how much was paid, the cost to taxpayers – and if it continues to hear about more and more cases, it is hard to imagine that the people will not come to demand reform. Indeed, public perceptions of "sleaze" have led to governments being voted out of office in long-established democracies. In the new democracies, it is by no means uncommon for opposition candidates to succeed to power when the outgoing administration has been tainted by corruption. This most frequently occurs frequently in the field of government contracting.

Government officials around the world are discovering that taxpayers still think of public funds as their money and do not like to see it wasted. The public, of course, is particularly unhappy when it sees its money going into the pockets of others as a reward for corrupt practices. Once support is developed for the reform of procurement practices, the problem can be attacked from all sides. Usually the starting point will be the strengthening of the legal framework, beginning with an anti-corruption law that has real authority and effective sanctions.

One of the greatest anomalies in anti-corruption laws regarding public procurement is that most countries clearly prohibit bribery at home, but many are silent when their exporters bribe officials abroad, or even reward it through tax write-offs.

At best, this is justified by a misguided notion of what is necessary for successful international business; at worst, it reflects a cynical and paternalistic view of what is good for others. The United States has had a Foreign Corrupt Practices Act since 1977[3] that specifically makes it a crime under its domestic laws to bribe foreign officials to gain or maintain business[4], even when these events take place abroad. More recently, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[5] directed at outlawing international business corruption involving public officials, aims essentially to internationalize the US approach.

The next legal requirement is a sound and consistent framework establishing the basic principles and practices to be observed in public procurement.

This can take many forms, but there is increasing awareness of the advantages of having a unified procurement code, setting out clearly the basic principles, and supplementing this with more detailed rules and regulations within the implementing agencies. A number of countries are consolidating existing laws, which have often developed haphazardly over many years, into such a code.

In recent years, some of the largest multilateral development agencies have given support to the development of national procurement codes in the countries to which they are lending, and have fostered organizations to implement them. For years, each of these lending institutions has had its own procurement guidelines, which borrowers are required to follow when awarding contracts financed from their loans. These guidelines have, in fact, played a significant role in shaping what are now widely accepted as standards of good international procurement practice.

Unfortunately, the rules applied by the multilateral development agencies do not directly impact on corruption in procurement for projects financed through

other sources. However, more recently, the development banks have recognized that it is in their member countries' best interests to have national policies and procedures, which apply these standards to other forms of procurement. Support from the banks includes both financial and technical assistance to countries that are willing to undertake procurement reforms, and associated institutional development.

TRANSPARENT PROCEDURES

Beyond the legal framework, the next defense against corruption is a set of open, transparent procedures and practices for conducting the procurement process itself. No one has yet found a better answer than supplier or contractor selection procedures based on real competition.

The complexity or simplicity of the procedures will depend on the value and nature of the goods or services being procured, but the guidelines are similar for all cases:

- *Describe clearly and fairly what is to be purchased.*
- *Publicize the opportunity to make offers.*
- *Establish fair criteria for selection of suppliers and/or contractors.*
- *Receive offers (bids) from responsible suppliers.*
- *Compare the offers and determine which is best, according to the predetermined rules for selection.*
- *Award the contract to the selected bidder without requiring price reductions or other changes to the winning offer.*

For small contracts, suppliers can be selected with very simple procedures that follow these principles. However, major contracts should be awarded following a formal competitive bidding process involving carefully prepared specifications, instructions to bidders and proposed contracting conditions, all incorporated in the sets of bidding documents that are usually sold to interested parties.

Such documents may take months to prepare, and many more months may be needed for suppliers to prepare their bids and for the purchaser to evaluate them and choose the winner. These steps commonly take six months or more from start to finish. Procurement planning must be sure to take these time requirements into account, and start early enough to ensure that the goods and services will be ready when needed. Any pressures for "emergency" decisions should be avoided.

OPENING OF BIDS

One key to transparency and fairness is for the purchaser to open the bids at a designated time and place in the presence of all bidders or their representatives who wish to attend. A practice of public bid openings, where everyone hears who has submitted bids and what their prices are, reduces the risk that confidential bids will be leaked to others, overlooked, changed or manipulated.

Some authorities resist this form of public bid, arguing that the same results can be achieved by having bids opened by an official committee of the purchaser without bidders being present. Clearly, this does not have the same advantages of perceived openness and fairness, especially since it is widely believed, and it is often the case, that a purchaser is a participant in corrupt practices.

BID EVALUATION

Bid evaluation is one of the most difficult steps in the procurement process to carry out correctly and fairly. At the same time, it is one of the easiest steps to manipulate if someone wants to tilt an award in the direction of a favored supplier.

Evaluators can reject unwanted bids for trivial procedural matters – an erasure, failure to initial a page – or for deviations from specifications that they decide are significant. After bids are examined, if no one prevents them, evaluators may discover entirely new considerations that should be taken into account in choosing the winner. Or the bid evaluation criteria may be so subjective and so lacking in objective measures that the evaluators can produce any result they wish.

All of this argues for requiring bid evaluation criteria to be spelled out clearly in bid documents and for an impartial review authority to check the reasonableness of the evaluators' actions. The former allows bidders to raise objections in advance if they consider that the criteria are not appropriate, and the latter provides additional assurance that an evaluation has been conducted properly.

DELEGATING AUTHORITY

The principle of independent checks and audits is widely accepted as a way in which to detect and correct errors or deliberate manipulation, and it has an important place in public procurement. Unfortunately, it has also been used by some to create more opportunities for corruption. In particular, the delegation of authority for contract approvals is an area that warrants some discussion.

At face value, the rationale for delegation is convincing. Low-level authorities can make decisions about very small purchases, but more senior officials should review and approve these decisions for larger contracts. The larger the contract value, the higher should be the approving authority. The purchasing agent must approve a desk purchase; a director must approve a computer purchase; a minister must approve procurement decisions related to road construction; and a president may need to approve decisions related to construction of a dam.

In some countries and organizations, this system works without any problems. In others, where contract awards are the main path to riches, it means a graduated payoff can be required at each step of the way: the higher the path leads, the larger the percentages demanded. Coincidentally, it also means that the larger the contract, the longer the delays in reaching any decision. All this points to a further essential element for reducing corruption: a well-trained, competent and honest body of civil servants to carry out procurement.

Establishing such a group requires a long-term effort, one that is never completely finished. It requires regular training and re-training programs; security in the knowledge that one's job will not be lost if the winning contractor is not the one favored by the minister; and at least a level of pay that does not make it tempting to accept bribes to meet the bare necessities of a family. If a competent procurement cadre is developed, and there are a number of places where this has been achieved, the chain of approving authorities, with its accompanying delays, and other hazards can be reduced to a minimum.

INDEPENDENT CHECKS AND AUDITS

None of this is to suggest that all independent checks and audits should be eliminated; they have an important role. However, there are some countries where so many review and approval stages have been built into the process that the system is virtually paralyzed. In some, it is impossible to award a major contract in less than two years from the time the bids are received.

OPEN HEARINGS

The experience of a growing number of countries demonstrates that a series of well-publicized open hearings is a particularly effective means to spread information and to obtain public contributions and support for a large project. For the construction of a new subway line in Buenos Aires, for example, three large public hearings were held at which the mayor of Buenos Aires himself laid out the plans and invited comments and suggestions on such topics as the location of the line, the location and design of the stations and the process for selecting construction companies. The hearings were judged a great success; they were broadcast live on local TV and were video-recorded for later reference.

INTEGRITY PACTS

"Integrity pacts" are agreements between prospective bidders and the contracting authority in which all agree to the rules of the particular exercise and agree not to bribe.[6] They are negotiated with interested bidders for a particular government contract. The process is explained to all interested bidders once the bidding process is opened and a meeting is held at which all bidders are invited to discuss the possible pact. The contracting body is present at

the meeting unless its presence is likely to inhibit the bidders from talking freely.

Integrity pacts provide for the appointment of an independent arbitrator to resolve any complaints made against parties involved in the process. The arbitrator is given a free hand in deciding if sanctions should be imposed in instances of alleged malpractice (the function of the arbitrator and sanctions are set out in the pact).

If the process receives sufficient support from likely bidders, the text of the integrity pact is signed by the highest-ranking official in the contracting body and the highest-ranking representatives of the respective bidding companies.

MONITORING BY CIVIL SOCIETY

In a number of countries, civil society has been able to play an active role in monitoring major public procurement exercises and in giving public assurance that all has gone well.

In such cases, the following criteria should apply:

- *Monitors should be highly respected people of unquestioned integrity.*
- *Monitors should possess (or have easy access to) the required professional expertise.*
- *When local civil society representatives do not possess the required expertise, they should promptly contract such expertise from outside, including, when necessary, from overseas. Without expertise, problems may not be discovered, professional corrective proposals cannot be submitted, and the monitors will not gain the respect of officials.*
- *Individual monitors should not be subject to a veto by government.*
- *Monitors should have free and unlimited access to all relevant government documents, to all relevant meetings and to all relevant officials.*
- *Monitors should raise issues and complaints first with the authorities, and only go public when no corrective action is taken within a reasonable period of time.*
- *Monitors should be prepared to offer a limited confidentiality pledge regarding certain types of proprietary business information.*
- *Monitors should review and have full access to the tender documents, the evaluation reports, the award selection decision and the implementation supervision reports, technical as well as financial. They should participate in meetings and have the right to ask questions.*

However, it has to be noted that civil society is not always able to attract the high degree of expertise that is occasionally needed, and arrangements may be needed to ensure that this can be provided from an independent source.

It should also be noted that civil society generally lacks the capacity to monitor events subsequent to a contract being let, when variations to price and to specifications frequently occur, effectively to undermine the apparent integrity of the letting of the contract in the first place.

USE OF THE INTERNET

Another powerful instrument against malpractice is the Internet. Several countries (Mexico, Chile, Colombia and, more recently, Austria) and a number of major municipalities (e.g. Seoul, Korea) have placed their entire procurement information systems on the web and allowed free access to that information. The argument has been made, however, that providing such access to certain pieces of information about government procurement can undermine quality and endanger entire projects.

The Seoul city system, the Online Procedures Enhancement for Civil Applications (OPEN) was developed to achieve transparency in the city's administration by preventing unnecessary delays or abuses of civil affairs by civil servants. The web-based system allows citizens to monitor applications for permits or approvals where corruption is

most likely to occur and to raise questions in the event of any irregularities being detected. The site receives over 2,000 visitors daily.[7]

Increasingly, all interactions between the city administration and companies doing business with it, or wishing to obtain contracts, and citizens in general, will be handled through this medium. If everybody can check on a real-time basis which contracts are offered by the city at a given time, under what conditions, and identify competitors by name and bidding price, the opportunities to manipulate the process – and, thus, the temptation to bribe – are greatly reduced.

BLACKLISTING

The sanction of blacklisting (or "debarment") should be available to the government when its contracting partners breach ethical and performance standards. Those found to have bribed, committed price-fixing or bid-rigging, or to have provided sub-standard or sub-specification goods or services, whether or not in collusion with any official, should be debarred from future contracts with the government. This should either be indefinitely or for an appropriate period of time. They should also be subject to:

- *loss or denial of contractual rights*
- *forfeiture of the bid or provision of a guarantee from a solvent institution that the work will be carried out or that the goods will be delivered (***performance security***)*
- *liability for damages, both to the government principal and to competing bidders for the losses they have incurred through an unsuccessful bid*

Firms that have been debarred could be re-admitted to the bidding process after complying with certain requirements, such as paying damages, terminating the employment of the staff who bribed public officials, introducing an effective no-bribery policy in the firm, and systematically implementing that new policy through a compliance program.

Debarment is widely practiced in the United States, at both federal and state level, for such causes as:

- *conviction of, or civil judgment for, fraud violation of antitrust laws, embezzlement, theft, forgery, bribery, false statements, or other offences indicating a lack of business integrity*
- *violation of the terms of a government contract, such as a willful failure to perform in accordance with its terms or a history of failure to perform*
- *any other action of such serious and compelling nature, affecting responsibility as a contractor as may warrant suspension or debarment*

Contractors which fall under these categories are excluded from receiving contracts. Agencies are not permitted to solicit offers from, award contracts to, renew or otherwise extend the duration of current contracts, or consent to sub-contracts with such contractors. Exceptions occur only if the acquiring agency's head or a designee determines that there is a compelling reason for such action. Debarments are for a specified term as determined by the debarring agency and as indicated in the listing above.[8]

In South Africa, a slightly different approach has been taken. A bill presently before the South African parliament[9] provides that the blacklist be a public document. This will enable others, both within government and in the private sector, to know who has been sanctioned in this way, and why.

Similar blacklisting (or debarment) is practiced by the World Bank and in countries such as Singapore. The process is discussed in detail in South Africa's Public Service Commission: Report on Blacklisting (2002).[10]

COMMISSIONS AS A COVER FOR CORRUPTION

The greatest single cover for corruption in international procurement is the commission paid to a local agent. It is the agent's task to secure the government contract. He or she is given sufficient funds to do this without the company in the exporting developed country knowing more than absolutely necessary about the details. This creates a comfortable wall of distance between the company and the act of corruption, and enables expressions of surprise, dismay and denial to be feigned should the

unsavory act come to the surface. The process also enables local agents to keep for themselves whatever is left of the handsome commissions after the bribes have been paid. Much of it may have been originally intended for bribing decision-makers but, there is no accounting, of course, for any of it. This gives rise to kick-backs all along the line, with company sales staff effectively helping themselves to their employer's money.

Obviously, if commissions can be rendered transparent it would have a major impact on this source of corruption.

Without a doubt, the work of some international lending agencies has achieved much over the years, including the persuasion of reluctant governments to commit to public tender bid openings. Clearly, too, they could contribute even more significantly to anti-corruption reforms if they were to join in the push for transparency in commissions.

USING CONTRACTS TO COUNTER CORRUPTION – A NEW YORK CITY CASE HISTORY

For generations, New York City suffered from endemic corruption and racketeering in its construction industry. A series of successful criminal prosecutions against the mafia during the 1980'sre-vealed that the mafia was profiteering from the city's construction industry through extortion, bribery, bid rigging, labor racketeering, fraud and illegal cartels. Yet, despite the success of these prosecutions and the imprisonment of dozens of mafia bosses, the corruption seemed to continue unabated.

The problem was so severe that the New York State Legislature refused to provide billions of dollars in funding to the New York City Board of Education for capital improvements to city's crumbling school infrastructure, the country's largest, with more than 1,100 schools serving more than one million school children. State officials were convinced that a major portion of any moneys allocated to the Board of Education would end up in the hands of the mafia or be wasted on bribes and fraud. In order to overcome this impasse, the city agreed in 1988 to the creation of a new agency, the School Construction Authority (SCA), with a very active and well-funded Office of Inspector General to ward off mafia influence and to protect critical investment in the school system. In 1989, the SCA was given $5 billion for new construction and major repairs; the budget of the Inspector General was just over $2 million annually (i.e. less than 0.05 per cent of the total SCA budget).

The SCA's Inspector General set about tackling the corruption and racketeering endemic in school construction. Significantly, this was accomplished without new legislation and without spending millions of taxpayer dollars on costly preventive measures. The Inspector General used existing state law and the concept of civil contract to accomplish its goals, together with simple monitoring and oversight measures to insure compliance. This effort succeeded beyond anyone's expectations.

For example, the Inspector General redrafted the standard bidding and contract forms to include requirements for:

- *full disclosure of ownership and performance history by each bidder (sub-contractors as well as contractors)*
- *disclosure of details of previous arrests and convictions, and of the payment of any bribes, participation in any frauds or bid rigging, and association with any organized crime figures*
- *commitment to a code of business ethics by each bidder*
- *certification that all provided information was true and correct, as well as an acknowledgement that it was submitted for the express purpose of inducing the SCA to award a contract.*

The SCA's standard contract included a rescission clause making the contract subject to termination on severe terms if the contractor provided false information in its bidding documents. In practice, if a contractor was found to have lied in the bidding documents, or to have engaged in bribery or fraud during the execution of the contract, the contractor faced not only the termination of the contract, but also a legally enforceable requirement that any and all moneys received be forfeited. In addition, both the contractor and the contractor's company would

be disqualified from receiving any SCA contracts in future.

The information supplied by each contractor was subject to careful scrutiny by the Inspector General's Office, which also performed extensive background checks. Whenever concerns arose, a bidder or contractor was summoned to the Inspector General's Office to answer questions under oath. Any contractor who refused to cooperate was subject to the termination of his contracts and disqualification from future work. Any contractor who lied under oath was, of course, liable to prosecution for perjury under the existing criminal law.

Contractors were required to make and maintain records regarding the work performed for the SCA for a period of three years after the completion of any contract. Such records were subject to audit and inspection by the SCA. If an audit disclosed over-pricing or overcharging of any nature and this exceeded one half of one-percent of the contract billings, then, in addition to repaying the overcharges, the contractor had also to pay the reasonable costs of the audit.

Within the first five years of the SCA's existence, several hundred contractors were barred from bidding for SCA contracts. Several dozen contracts were terminated, and contractors forfeited many millions of dollars as a result. All of this was achieved through the ordinary civil law process with very few court challenges. In addition, more than a dozen contractors were convicted of perjury as a result of false information supplied to the Inspector General.

More importantly, law enforcement officials intercepted conversations among mafia members complaining that the process was effectively denying them access to SCA contracts. Best of all, the pool of available construction firms increased substantially with the addition of law-abiding and competent contractors who had previously declined to bid on school construction work because of the prevalence of corruption and racketeering. This increased competition resulted in further reduced costs and even higher quality work overall.

Finally, in suitable cases, where a contractor was found to be unqualified to bid on SCA work or was liable to have his contracts terminated for reasons of integrity or character, the contractor was given two options. He could drop out of competition for SCA work, or he could agree to continue bidding on and performing SCA work, subject to close monitoring and oversight by an Independent Private Sector Inspector General (IPSIG). The IPSIG, one of a number of qualified specialist firms with expertise in forensic accounting, law and investigation, would be selected by and report to the SCA's Inspector General. However, all of the IPSIG's fees and costs would be paid by the contractor.

The advantages in this approach are considerable, and the fact that the reforms have been shown to be effective is reason enough for others to look very closely at this "contract model" approach, and to consider adapting it to their own circumstances.

QUESTIONS OF TIMING — AND OF THE INVOLVEMENT OF OUTSIDERS

The effects of normal anti-corruption legislation can usually be strengthened by adding two elements: the timing of actions and the involvement of outsiders.

Timing is crucial. Most public servants cannot say "yes," but they can say "no," "perhaps," or nothing at all. Unreasonable postponement of important decisions is usually the most visible indicator that a corrupt deal is in the making. Procedures, therefore, should have strict calendars (which, although strict, still recognize that procurement is often subject to frequent, but legitimate delays). If the calendar is not respected, procedures should provide for an alternative decision-making process to make "blackmail by procrastination" unrewarding.

Since law does not protect the partners to a corrupt deal, such deals can take longer to put together than regular business transactions. Dummy companies or money-laundering channels require time to set up. The arrangements must be both invisible and deniable. Delivery of the bribe and the promised treatment have to be closely linked, because mutual trust is usually absent. In some cases, officials want to build in elements of profits sharing. Sometimes two or three layers of "mediators" are built in to

diminish the risk of exposure of the parties to the deal. Negotiations are delicate because, at any given moment, one of the parties may bail out and expose the whole scheme. All this takes time – time that an effective regulatory framework will not allow.

The role of outsiders is basically to hamper the creation of insider relationships during the decision-making and implementation processes. Procedures should focus on not allowing outsiders to be drawn into internal processes. Like external auditors, the outsiders should provide expertise combined with integrity.

Several measures are worthy of mention here:

- *Outsiders can assist in preparing bidding documentation (especially independent consultants with public reputations to defend).*
- *Outsiders can participate in evaluation (adding an independent note of concurrence or otherwise).*
- *The contract-awarding committee should include persons of known integrity, not necessarily experts. Participation on the committees should be considered a public honor. The committee members' own wealth should be subjected to public scrutiny.*
- *The contract-awarding committee should not have advance knowledge of particular projects for which their services may be needed. There should be more people on the list than will be needed at any one time. During the decision-making process, the committee should be placed in a position where they cannot physically contact bidders individually (which may involve their remaining within a controlled environment, such as a hotel). If the committee cannot make a decision within a given time, a new session should be held, with a fresh committee.*
- *The authority executing the works should not have a vote on the bid evaluation committee, but rather be available to the committee to answer questions. The same goes for any international consultant who prepares the bidding documentation.*
- *Project implementation should be supervised by a consultant other than the one responsible for preparing the bid documentation.*
- *Special procedures must close loopholes whereby artificially created "cost overruns" are met through the national budget, and not from a foreign loan.*
- *"Cost over-runs" should only be accepted where supervision reports exist which identify the reasons for the higher costs at the time that these became evident. No ex post facto supervision reports should be accepted. This procedure makes the contractor responsible for timely reporting of the difficulties encountered.*

ADDITIONAL ACTIONS

Public information programs about procurement must address all parties – the officials who have responsibilities for procurement, the suppliers and contractors who are interested in competing for contracts, and the public at large. The messages should be:

- *that the particular jurisdiction, whether a nation or one of its organizations, possesses clearly stated rules for procurement which it intends to enforce rigorously.*
- *that violators of the rules will be prosecuted under the law.*
- *that officials who indulge in corrupt practices will be dismissed.*
- *that bidders who break the rules will be fined, possibly jailed, and excluded from consideration for any future contracts, by being "blacklisted."*

It is, of course, essential that those "blacklisted" have a right of appeal to an independent and competent tribunal. This is a precaution against corrupt officials abusing any powers they may have to impose by "blacklisting" through an administrative process. Such a right generally exists in all countries where courts have the jurisdiction to review the legality of administrative actions.

It should be clear that none of the actions suggested here is sufficient by itself to curb corruption completely in procurement, let alone overnight; However, a co-ordinated effort on all fronts can have a dramatic effect. If anti-corruption laws are strengthened and publicized, if sound and proven procedures are adopted, if procurement competence is increased by training and career development, and, if everyone knows that the government is serious about enforcing honest and fair practices, change will come.

ENDNOTES

1 Several inter-governmental organizations have worked on the procurement issue for a number of years. The UN Commission on International Trade Law has a Model Law on Procurement of Goods, Construction and Service: http://www.undp.org.fj/gold/docs/UNICITRA.PDF; for the European Union's Procurement Guidelines and Legislation: www.bisinfonet.ac.uk/InfoKits/contract-negotiation/InfoKits/infokit-related-files/ec-procurement-issues; for guidance on the policy framework etc. see http://www.ogc.gov.uk/index.asp?id=1000084; for a "procurement excellence model" see http://www.ogc.gov.uk/index.asp?id=417; For the OECD recommendation of anti-corruption proposals for aid-funded procurement, see http://www.oecd.org/document/30/0,2340,en_2649_201185_2394526_119672_1_1_1,00.html; For preventing corruption in World Bank projects, see http://www1.worldbank.org/publicsector/anticorrupt/preventing.htm; For the World Bank's Panel of Procurement Experts: Fiduciary Risk Management, Capacity Building and Anti Corruption see http://www.worldbank.org/html/extdr/business/dfid.htm; For the OECD Anti-Corruption Instruments and the OECD Guidelines for Multinational Enterprises, see http://www.greco.coe.int/web/Default-orgE.htm.

2 Southern African Documentation and Cooperation Centre, "Heavy Fine in Lesotho Corruption Trial," October 30, 2002: http://www.sadocc.at/news2002/2002-323.shtml

3 Many of the decision-making points addressed in this chapter are covered in part by various procurement rules. They include the General Procurement Agreement of the World Trade Organization, the UNCITRAL Model Law on Procurement of Goods, Construction and Services issued by the UN Commission on International Trade Law (UNCITRAL), the World Bank Guidelines for the Selection of Consultants and the Procurement of Goods and Services, and the Manual of Procedural Rules (SCR) of the European Commission. All of these rules make an effort to address the issue of corruption prevention. But none of them offers or requires a sufficiently broad structure of transparency and accountability. What is needed is full transparency and reliable assurance of implementation of the rules through efficient inspection, and intensive internal and public monitoring and auditing.

4 Foreign Corrupt Practices Act: http://www.usdoj.gov/criminal/fraud/fcpa.html

5 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: http://www.imf.org/external/np/gov/2001/eng/091801.htm

6 Transparency International, The Corruption Fighters' Toolkit: http://www.transparency.org/toolkits/2001/ccinp_ip-columbia.html

7 Online Procedures Enhancement for Civil Applications: http://open.metro.seoul.kr/

8 The names of those debarred are placed on the Internet. EPLS is the electronic version of the Lists of Parties Excluded from Federal Procurement and Non-Procurement Programs, which identifies those parties excluded throughout the U.S. government (unless otherwise noted) from receiving federal contracts or certain sub-contracts and from certain types of federal financial and non-financial assistance and benefits. See Excluded Parties List System: http://epls.arnet.gov/

9 The bill was before South Africa's parliament in November 2003.

10 Public Service Commission Report on Blacklisting (April 2002): http://www.polity.org.za/pdf/blacklisting.pdf