

ANNEX A

OECD Recommendation on Enhancing Integrity in Public Procurement

THE COUNCIL,

Having regard to articles 1, 2a), 3 and 5b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on 21 November 1997, the Revised Recommendation of the Council on Combating Bribery in International Business Transactions adopted on 23 May 1997 and the related Recommendation on Anti-corruption Proposals for Bilateral Aid Procurement endorsed by the Development Assistance Committee on 7 May 1996;

Noting that legislation in a number of member countries also reflects other international legal instruments on public procurement and anti-corruption developed within the framework of the United Nations, the World Trade Organisation or the European Union;

Recognising that public procurement is a key economic activity of governments that is particularly vulnerable to mismanagement, fraud and corruption;

Recognising that efforts to enhance good governance and integrity in public procurement contribute to an efficient and effective management of public resources and therefore of tax payer's money;

Noting that international efforts to support public procurement reforms have in the past mainly focused on the promotion of competitive tendering with a view to ensuring a level playing field in the selection of suppliers;

Recognising that member countries share a common interest in preventing risks to integrity throughout the entire public procurement cycle, starting from needs assessment until contract management and payment;

On the proposal of the Public Governance Committee:

I. RECOMMENDS:

(1) That member countries take appropriate steps to develop and implement an adequate policy framework for enhancing integrity throughout the entire public procurement cycle, from needs assessment to contract management and payment;

(2) That, in developing policies for enhancing integrity in public procurement, member countries take into account the Principles which are contained in the Annex to this Recommendation of which it forms an integral part;

(3) That member countries also disseminate the Principles to the private sector, which plays a key role in the delivery of goods and services for the public service.

II. INVITES the Secretary General to disseminate the Principles to non-member economies and to encourage them to take the Principles into account in the promotion of public governance, aid effectiveness, the fight against international bribery and competition.

III. INSTRUCTS the Public Governance Committee to report to the Council on progress made in implementing this Recommendation within three years of its adoption and regularly thereafter, in consultation with other relevant Committees.

Appendix

Principles for Enhancing Integrity in Public Procurement

I. Objective and scope

The Recommendation provides policy makers with Principles for enhancing integrity throughout the entire public procurement cycle, taking into account international laws, as well as national laws and organisational structures of member countries.

The Recommendation is primarily directed at policy makers in governments at the national level but also offers general guidance for sub-national government and state-owned enterprises.

II. Definitions*Public procurement cycle*

In the context of the present Recommendation, the public procurement cycle is defined as a sequence of related activities, from needs assessment, to the award stage, up until the contract management and final payment.

Integrity

The Recommendation aims to address a variety of risks to integrity in the public procurement cycle. Integrity can be defined as the use of funds, resources, assets, and authority, according to the intended official purposes and in line with public interest. A negative approach to define integrity is also useful to determine an effective strategy for preventing integrity violations in the field of public procurement. Integrity violations include:

- corruption including bribery, “kickbacks”, nepotism, cronyism and clientelism;
- fraud and theft of resources, for example through product substitution in the delivery which results in lower quality materials;
- conflict of interest in the public service and in post-public employment;
- collusion;
- abuse and manipulation of information;
- discriminatory treatment in the public procurement process; and
- the waste and abuse of organisational resources.

III. Principles

The following ten Principles are based on applying good governance elements to enhance integrity in public procurement. These include elements of transparency, good management, prevention of misconduct, as well as accountability and control. An important aspect of integrity in public procurement is an overarching obligation to treat potential suppliers and contractors on an equitable basis.

A. Transparency

1. Member countries should provide an adequate degree of transparency in the entire public procurement cycle in order to promote fair and equitable treatment for potential suppliers

Governments should provide potential suppliers and contractors with clear and consistent information so that the public procurement process is well understood and applied as equitably as possible. Governments should promote transparency for potential suppliers and other relevant stakeholders, such as oversight institutions, not only regarding the formation of contracts but in the entire public procurement cycle. Governments should adapt the degree of transparency according to the recipient of information and the stage of the cycle. In particular, governments should protect confidential information to ensure a level playing field for potential suppliers and avoid collusion. They should also ensure that public procurement rules require a

degree of transparency that enhances corruption control while not creating red tape' to ensure the effectiveness of the system.

2. Member countries should maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering

To ensure sound competitive processes, governments should provide clear rules, and possibly guidance, on the choice of the procurement method and on exceptions to competitive tendering. Although the procurement method could be adapted to the type of procurement concerned, governments should, in all cases, maximise transparency in competitive tendering. Governments should consider setting up procedures to mitigate possible risks to integrity through enhanced transparency, guidance and control, in particular for exceptions to competitive tendering such as extreme urgency or national security.

B. Good management

3. Member countries should ensure that public funds are used in public procurement according to the purposes intended

Procurement planning and related expenditures are key to reflecting a long-term and strategic view of government needs. Governments should link public procurement with public financial management systems to foster transparency and accountability as well as to improve value for money. Oversight institutions such as internal control and internal audit bodies, supreme audit institutions or parliamentary committees should monitor the management of public funds to verify that needs are adequately estimated and public funds are used according to the purposes intended.

4. Member countries should ensure that procurement officials meet high professional standards of knowledge, skills and integrity

Recognising officials who work in the area of public procurement as a profession is critical to enhancing resistance to mismanagement, waste and corruption. Governments should invest in public procurement accordingly and provide adequate incentives to attract highly qualified officials. They should also update officials' knowledge and skills on a regular basis to reflect regulatory, management and technological evolutions. Public officials should be aware of integrity standards and be able to identify potential conflict between their private interests and public duties that could influence public decision making.

C. Prevention of misconduct, compliance and monitoring

5. Member countries should put mechanisms in place to prevent risks to integrity in public procurement

Governments should provide institutional or procedural frameworks that help protect officials in public procurement against undue influence from politicians or higher level officials. Governments should ensure that the selection and appointment of officials involved in public procurement are based on values and principles, in particular integrity and merit. In addition, they should identify risks to integrity for job positions, activities, or projects that are potentially vulnerable. Governments should prevent these risks through preventative mechanisms that foster a culture of integrity in the public service such as integrity training, asset declarations, as well as the disclosure and management of conflict of interest.

6. Member countries should encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management

Governments should set clear integrity standards and ensure compliance in the entire procurement cycle, particularly in contract management. Governments should record feedback on experience with individual suppliers to help public officials in making decisions in the future. Potential suppliers should also be encouraged to take voluntary steps to reinforce integrity in their relationship with the government. Governments should maintain a dialogue with suppliers' organisations to keep up-to-date with market evolutions, reduce information asymmetry and improve value for money, in particular for high-value procurements.

7. Member countries should provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly

Governments should set up mechanisms to track decisions and enable the identification of irregularities and potential corruption in public procurement. Officials in charge of control should be aware of the techniques and actors involved in corruption to facilitate the detection of misconduct in public procurement. In order to facilitate this, governments should also consider establishing procedures for reporting misconduct and for protecting officials from reprisal. Governments should not only define sanctions by law but also provide the means for them to be applied in case of breach in an effective, proportional and timely manner.

D. Accountability and control

8. Member countries should establish a clear chain of responsibility together with effective control mechanisms

Governments should establish a clear chain of responsibility by defining the authority for approval, based on an appropriate segregation of duties, as well as the obligations for internal reporting. In addition, the regularity and thoroughness of controls should be proportionate to the risks involved. Internal and external controls should complement each other and be carefully co-ordinated to avoid gaps or loopholes and ensure that the information produced by controls is as complete and useful as possible.

9. Member countries should handle complaints from potential suppliers in a fair and timely manner

Governments should ensure that potential suppliers have effective and timely access to review systems of procurement decisions and that these complaints are promptly resolved. To ensure an impartial review, a body with enforcement capacity that is independent of the respective procuring entities should rule on procurement decisions and provide adequate remedies. Governments should also consider establishing alternative dispute settlement mechanisms to reduce the time for solving complaints. Governments should analyse the use of review systems to identify patterns where individual firms could be using reviews to unduly interrupt or influence tenders. This analysis of review systems should also help identify opportunities for management improvement in key areas of public procurement.

10. Member countries should empower civil society organisations, media and the wider public to scrutinise public procurement

Governments should disclose public information on the key terms of major contracts to civil society organisations, media and the wider public. The reports of oversight institutions should also be made widely available to enhance public scrutiny. To complement these traditional accountability mechanisms, governments should consider involving representatives from civil society organisations and the wider public in monitoring high-value or complex procurements that entail significant risks of mismanagement and corruption.

ANNEX B

The Multi-disciplinary Approach of the OECD on Procurement

Following the Global Forum on Governance in 2004, the Public Governance Committee (PGC) and the Working Group on Bribery in International Business Transactions, and the Development Assistance Committee (DAC), have jointly carried forward the multi-disciplinary work on preventing corruption in public procurement:

- The Public Governance Committee mapped out good practices to enhance integrity, in particular through transparency (*e.g.* e-procurement), professionalism, corruption prevention, as well as accountability and control measures. Drawing on the experience of procurement specialists, as well as audit, competition and anti-corruption specialists, the OECD report *Integrity in Public Procurement: Good Practice from A to Z* provides a comparative overview of practices to enhance integrity in the entire procurement cycle, from needs assessment to contract management and payment.
- The Working Group on Bribery in International Business Transactions, the body responsible for monitoring the implementation of the OECD Convention on Bribery of Foreign Public Officials in International Business Transactions, developed a typology on bribery in public procurement. Based on contributions from law enforcement and procurement specialists, the report *Bribery in Public Procurement: Methods, Actors and Counter-Measures* describes how bribery is committed through the various stages of government purchasing; how it is related to other crimes, such as fraud and money laundering; and how to detect such crimes and apply sanctions accordingly.
- The Development Assistance Committee has been working with developing countries to strengthen procurement systems through the Working Party on Aid Effectiveness. It has also been working with its members to enhance their collective efforts to address corruption through the DAC Network on Governance.

- The Competition Committee has addressed competition issues arising in the context of public procurement. Recently it has developed a checklist to help public procurement officials detect bid-rigging during procurement tenders and limit the risks of collusion by careful design of the procurement process.

The Principles take into account the following legal instruments, policy instruments and tools in relation to public procurement and anti-corruption:

- The 1997 OECD Convention on Bribery of Foreign Public Officials in International Business Transactions and the revised Recommendation on Combating Bribery in International Business Transactions. The revised Recommendation states that:

i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement.¹

ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that member's national laws and, to the extent a member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.

iii) In accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.

In commentary 24 to Article 3, an explicit reference is made to the "temporary or permanent disqualification from participation in public procurement".²

Over the last decade, the 37 Parties to the OECD Anti-Bribery Convention have made commendable progress in detecting, investigating and prosecuting foreign bribery – levelling the playing field for international business. Thanks especially to the rigorous peer review monitoring mechanism, governments have passed anti-bribery laws and created special investigation and prosecution units. Businesses have started to change the way they trade and invest worldwide, in the face of increased public scrutiny. The Shared Commitment to Fight Against Foreign Bribery, adopted at the 2007 Rome Ministerial Conference, provides a clear mandate for future work. Among others commitments, Parties pledge to maintain the robust monitoring mechanism – and to remain at the forefront of the global fight against foreign bribery by ensuring relevant and effective anti-bribery standards. The Working Group on Bribery is conducting a review of the OECD anti-bribery instruments, which might impact these instruments' procurement provisions and their subsequent enforcement.

- The 1996 Development Assistance Committee (DAC) Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement. The DAC recommends

that Members introduce or require anti-corruption provisions governing bilateral aid-funded procurement. The anti-corruption provision of the Recommendation was integrated in the 1997 revised Recommendation on combating bribery in international business transactions. However, the Recommendation did not apply to procurement carried out by developing countries themselves. Therefore developing countries, bilateral and multilateral donors have in the past years worked together through a Round Table process. As a result, the Working Party on Aid Effectiveness has developed a benchmarking methodology that developing countries and donors can use to assess the quality and effectiveness of national procurement systems through the DAC Joint Venture on Procurement.³ In addition, the DAC Network on Governance has identified an agenda for collective donor action and *Principles for Donor Action in Anti-Corruption*⁴ to ensure coherent support to country-led anti-corruption efforts.

Instruments and tools in relation to corporate governance and competition have also been considered, in particular the 1998 *Recommendation of the Council on Effective Action Against Hard Core Cartels*, the 2000 *Guidelines for Multinational Enterprises and the Risk Awareness Tool for Multinational Enterprises in Weak Governance*.

Notes

1. On 1 August 2004, the WTO General Council adopted a decision, which addressed, *inter alia*, the handling of the issue of transparency in government procurement, as well as the issues of the relationship between trade and investment and the interaction between trade and competition. The Council agreed that “those issues will not form part of the Doha Work Programme and therefore no work towards negotiations [...] will take place within the WTO during the Doha Round”. Since this decision, the Working Group on Transparency in Government Procurement has been inactive.
2. Article 3 of the Convention states that criminal sanctions shall be imposed on natural persons. While countries were convinced that sanctioning legal persons for foreign bribery was particularly important when negotiating the terms of the Convention, they did not stipulate that sanctions be of criminal nature. Consequently, Article 2 asks countries to introduce the “responsibility of legal persons” while Article 3(2) states that non-criminal sanctions against a corporation are also acceptable, provided that they include sanctions that are “effective, proportionate and dissuasive”. See also *Fighting Corruption and Promoting Integrity in Public Procurement*, OECD, 2005.
3. For further information about the benchmarking and assessment methodology, please refer to: www.oecd.org/document/40/0,3343,en_2649_19101395_37130152_1_1_1_1,00.html.
4. See the Policy Paper and Principles on Anti-Corruption, Setting an Agenda for Collective Action, OECD, 2007, as well as the following web link: www.oecd.org/dac/governance/corruption.

ANNEX C

The Consultation on the Principles and Checklist with Stakeholders

An extensive consultation was carried out in 2008 on the Principles and Checklist. The consultation with representatives from OECD bodies working on related issues helped reflect the multi-disciplinary approach of the OECD. The Principles reflect the richness of the multi-disciplinary approach of the OECD that analyses public procurement from various perspectives: good governance, anti-bribery, development assistance, competition and international trade.

Furthermore, a consultation was carried out with representatives from government from non-member economies, private sector, civil society, bilateral donor agencies and international organisations – such as the United Nations, the World Trade Organisation or the European Union. The consultation with different stakeholders, in particular international and regional organisations working on public procurement issues, was an essential step to verify that the Principles provide guidance at the policy level that is in line with existing international legal instruments and usefully complements them. In addition to the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, these instruments include, notably:

- the *United Nations Convention against Corruption* (Chapter II on Preventative measures, in particular article 9 on Public procurement and management of public finances); (see Note)
- the *United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Services, Construction and Services*;
- the *World Trade Organisation Agreement on Government Procurement (GPA)*;
- the legislative package of the *Directives of the European Parliament and of the Council on Procurement*; and

- the *International Labour Organisation's Labour Clauses (Public Contracts) Convention*.

In addition, other international and regional organisations such as the multilateral development banks, as well as bilateral aid agencies, were consulted to build on their experience in procurement reform work at the country level. Their experience was also particularly useful as they have developed related guidelines, even if these guidelines are tailored to the special conditions applicable under their financing. These include guidelines for anti-corruption and fiduciary risk assessment, such as the Public Expenditure and Financial Accountability (PEFA) Program.

Note

Article 9 of the United Nations Convention Against Corruption states that:

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision making, that are effective, *inter alia*, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, *inter alia*:

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

b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed; and

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

2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, *inter alia*:

a) Procedures for the adoption of the national budget;

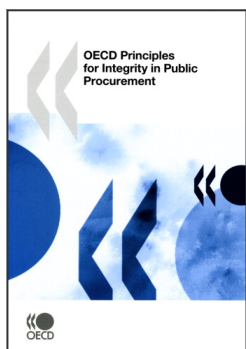
b) Timely reporting on revenue and expenditure;

c) A system of accounting and auditing standards and related oversight;

d) Effective and efficient systems of risk management and internal control; and

e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.

3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.



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