

*INTAL/IDB ON-LINE TRAINING WORKSHOP ON GOVERNMENT
PROCUREMENT AND TRADE FOR
BRAZIL SUB-NATIONAL GOVERNMENTS*

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

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LAW

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.

Revised GPA

The Parties to this Agreement ...

recogniz[e] 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....

GPA IV (4)

General Principles: Conduct of Procurement

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/>
 - 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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