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Integrity Risk Assessment in Public Procurement in Thailand

**A PRIORITY FRAMEWORK FOR PUBLIC
PROCUREMENT INTEGRITY REFORM**

May 2015

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Disclaimer

The views expressed in this publication are those of the author and do not necessarily represent those of the United Nations, including UNDP, or their Member States. The views in this report are the author's own opinion. This report is an independent publication under the Project on Advancing Anti-Corruption Efforts in Thailand: A Multi-disciplinary Approach (AAA) with financial support from UNDP's Global Anti-Corruption Initiative (GAIN).

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Acronyms and Abbreviations

ACT	Anti- Corruption Organisation of Thailand
CGD	Comptroller General’s Department of the Ministry of Finance
GPA	Government Procurement Agreement of the World Trade Organisation (WTO)
NACC	Office of the National Anti- corruption Commission
OAG	Office of the Auditor General
OECD	Organisation for Economic Co-operation and Development
OPDC	Office of the Public Sector Development Commission
OPPM	Office of Public Procurement Management
PACC	Office of the Public Sector Anti-Corruption Commission
SEPO	State Enterprise Policy Office
SIGMA	Support for Improvement in Governance and Management- Joint initiative of the OECD and the European Union
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme

Executive Summary

The objective of the project is to conduct an integrity risk assessment of public procurement in Thailand, based on a methodology tailored to its political, regulatory, institutional and procedural contexts, while also in line with international standards and experiences of other countries. The work has been conducted in close co-operation with the responsible Office of the Public Sector Development Commission (OPDC) and United Nations Development Programme (UNDP). Other key partners involved are the Comptroller General's Department (CGD) of the Ministry of Finance, the State Enterprise Policy Office (SEPO) and the private sector led Anti-Corruption Organisation of Thailand (ACT).

The assessment is based on:

I. A review of the four main pillars of the public procurement system, namely

1. Legal and Regulatory Framework;
2. Institutional Framework and Capacity;
3. Operational Capacity and Market Functionality; and
4. Control Structure and Integrity Mechanisms.

This analytical approach has been developed by the OECD and the World Bank as an assessment methodology as to determining the standard and performance of national public procurement systems. The report adapts the methodology to place the focus of the assessment on integrity risks in the public procurement system based on UNDP's experience with corruption risk assessments in sectors.

II. A focus on integrity and corruption-related risks in the procurement system

1. Mapping of integrity risk areas according to the stakeholders' responses to the survey;
2. The elaboration of a risk indicator system - red flags;
3. Integrity Risks Mitigation Measures; and
4. A Priority Framework for Mitigating Integrity Risks in Public Procurement – an Agenda for a Public Procurement Integrity Reform.

A Guideline for mitigating specific integrity risks in the public procurement process has also been developed – see Annex 1.

The methodology has included a series of meetings and interviews as well as a survey with key stakeholders of the public procurement system (policy makers, purchasers, private sector representatives, controlling bodies, international organisations, academics, state-owned enterprises, local governments, and NGOs) in addition to a review and analysis of relevant public procurement regulations, reports and statistics. A validation seminar with a panel debate¹ was arranged in Bangkok on 7 January 2015.

¹The panel consisted of Ms. Chunhajit Sangmai, Deputy Director-General of the Comptroller General's Department, Dr. Sirilaksana Khoman, Advisor to the National Anti-Corruption Commission, Dr. Bandid Nijathaworn, President and CEO, Thai Institute of Directors, Dr. Deunden Nikomborirak, Research Director, Thailand Development Research Institute (TDRI), Ms. Elodie Beth, Regional Advisor on Anti-Corruption, UNDP Asia and the Pacific Regional Centre and Mr. Peder Blomberg, senior adviser in public procurement.

Corruption in connection with public procurement constitutes a significant risk factor and represents, besides its demoralising implications, excess costs, inefficiency and distortion of the competitive environment with severe consequences for the fundamental functions of a society. The Corruption Perceptions Index (CPI) of Transparency International 2013 shows that Thailand holds the 102th position among 177 countries. Other international governance and risk indicators demonstrate a similar gloomy picture on the integrity status despite the fact that the global competitiveness score is comparably good. A survey from 2010 indicates that the presence of irregularities in public procurement is high and actually has deteriorated over time. Risks to integrity in the procurement process are rife in procurement in Thailand because of the large amounts at stake and the interface between the government and the private sector.

Main Findings and Key Issues

Legal and Regulatory Framework

Thailand is not in the possession of a coherent public procurement law but a regulatory system based on government regulations. With such a regulatory approach there are risks of fragmentation instead of coherence, weak enforceability and coverage, lack of legal certainty for the bidders, insufficient protection for procurement staff, and opportunities for unjustified exemptions and discretion. The regulatory framework does not reflect international legislative models, such as the UNCITRAL Model Law on Public Procurement, the Government Procurement Agreement (GPA) under the WTO and the European Directives on public procurement.

Institutional Framework and Capacity

The main central regulatory, development and support functions are in place within the Comptroller General Department (CGD) of the Ministry of Finance. However, the institutional structure within the government in whole is characterised by unclear policy-making and co-ordination functions. Further, CGD lacks sufficient resources and capacity to support effectively the legal implementation and capacity building. The role and mandate of NACC in public procurement is unclear from a policy perspective. The Committee in Charge of Procurement (CCP) and the e-Auction Procurement Committee (e-PC) of the Ministry of Finance have overlapping responsibilities and there is a lack of an efficient consultation mechanism within the government structure.

Operational Capacity and Market Functionality

Main features of the procurement system are the mandatory use of e-auctions for goods and works contracts above certain thresholds in combination with the application of a reference price system which in practice acts as ceiling price system. Strong question marks can be raised concerning the efficiency of such a system as well as to what extent it affects integrity risks positively. There is further a strong lowest price focus which in turn implies high risks of sacrificing quality and "value for money" and efficiency and in large the market attractiveness. Another important observation is the lack of recognition of the procurement profession and the unsatisfactory support provided to procurement officials. Interestingly, there is a no competition law or competition authority despite the fact that the Thai market is exposed to monopolistic behaviours and collusive practices in general and in particular within the field of public procurement.

Control Structure and Integrity Mechanisms

The analysis covered some basic functions of the Thai control structure, in particular the budget process, external audit and financial control, and the specific anti-corruption mechanisms. The complaint review procedure is also discussed. The external audit tends to focus on compliance rather than on the performance of the procurement operations and a high number of procedural

deficiencies are identified. A complaint mechanism is available but comparably few complaints are handled by the Complaints Review Committee. The anti-corruption strategies are given high priority and key integrity risks preventive policies and structures are in place, but enforcement is insufficient. Rules on conflict of interests as well as a whistle-blower function are available but protection can be improved. It should also be underlined that some good private sector integrity initiatives have been accomplished, such as the integrity certification system and the integrity pact agreement. There are two main anti-corruption organisations, namely the Office of the National Anti-Corruption Commission (NACC) and the Office of the Public Sector Anti-Corruption Commission (PACC). Those are well-resourced to investigate but lack enforcement power. The anti-corruption bodies operate with overlapping responsibilities which may result in fragmentation and sub-optimisation of the efforts 60-70% of all cases (10,000/year) are procurement-related but only 5% leads to action (mainly disciplinary) and a few legal actions. The responsibilities and mandate of NACC in relation to the reference price system need attention from a policy co-ordination angle. The OPDC contributes to a preventive function in the public sector, together with the anti-corruption operation centres.

Meetings and the survey conducted among the main stakeholders of the public procurement system, in particular the purchasers, and private sector entities and organisations confirm largely the findings in the report, namely the need of legal and institutional reform of the public procurement system.

Vulnerability and Risk Indicators

The most prevalent integrity problems in public procurement have been identified as being bid collusion, kick-backs and systemic corruption of which the most important cause seems to be patron-client networks. From that perspective, the main integrity risk areas within the Thai procurement system are mapped and discussed in the report. A number of observable integrity risks stem from the lack of a coherent legal framework, the design of the e-auction and reference price systems, insufficient operational capacity and professionalism, weak competition in certain sectors, deficiencies in the procurement process and problems with enforcement of administrative decisions. The lack of a competition law and competition authority constitutes a major gap in the institutional framework to prevent collusion.

Indicators (red flags) may be used to detect irregularities in the procurement process. The information provided by indicators may give reason for investigating deeper. A sample list of red flag indicators are presented and discussed.

A guideline for mitigating integrity risks in the procurement processes has also been elaborated – see Annex 1.

Recommendations for a Public Procurement Integrity Reform

Any national strategy and action plan set up to mitigate integrity risks to public procurement needs to be discussed in the overall context of the public procurement system. As underlined in the report, corruption and fraud in public procurement cannot be isolated from the other parts of the society, but acts usually as a mirror of the overall situation in a country. There is a need of a joint mobilisation for a zero-tolerance stance from all the key stakeholders in the society to reform the political, administrative and business culture and practice in a country.

Enhancing integrity in public procurement needs a systematic and coherent approach and any national integrity enhancement strategy needs to ensure that the action plan is consistent with and does not contradict the policy goals on efficiency and “value for money” in public procurement. The overarching goal should be “value for money with integrity”.

A number of main general policy and integrity specific actions should be considered in a future reform of the Thai public procurement system of which the most important are seen to be:

- Develop and adopt a coherent, sound and modern **public procurement law**
- Develop the central **institutional capacity of the OPPM of the CGD** under a new public procurement law;
- Continue the development of the **e-procurement system**;
- **Reconsider** the mandatory use of **e-auctions**;
- **Redesign the reference price system** and redirect today's focus on lowest price;
- Consider the introduction of **centralised purchasing arrangements and framework agreements**;
- Consider the adoption of a **competition law** and the establishment of a competition authority;
- Consider to establish a special **Procurement Consultation Forum**;
- Support and invest in the **professionalization of the procurement function** by developing a national training and career development strategy in public procurement;
- Establish a specialised **complaints review and remedies mechanism** under a future public procurement law;
- Complete and adopt a **Guideline on how to mitigate integrity risks**;
- Strengthen the **rules on conflict of interest** and **code of conduct** both in public and private sectors;
- Implement more widely an **Integrity Pact Mechanism**;
- Increase transparency and **accessibility to public records** and documents;
- Form a special **Integrity Forum on Public Procurement** with the key stakeholders;
- Develop a **risk indicator system with red-flags** which could signal potential problems in the procurement process; and
- Consider introducing a **specific ex-ante control mechanism**, such as the UK Gateway Review procedure and engagement of external independent reviewers or observers in the procurement processes.

1. Introduction

The UNDP has agreed with the Office of Public Sector Development Commission (OPDC) and in close liaison with the Office of Public Procurement Management Department (OPPM) of Comptroller General's Department (CGD), the Ministry of Finance, the private sector-led Anti-Corruption Organisation of Thailand, the State Enterprise Policy Office and other key stakeholders, to undertake a project titled Mitigating Risks to Integrity in Public Procurement. Public procurement is seen as one of the most exposed risk areas to corruption and fraudulent practices in any country. The extensive volume of business transactions that take place, involving private and public sector bodies, potentially offers great opportunities for irregularities and private gains. International statistics indicate that public procurement may represent more than 10-20% of GDP² (variations normally depend on the size of the public budget and the nature/size of the public sector) and, maybe, as much as 30% of the national budget is allocated for the acquisition of goods, services and works. It is absolutely vital to the credibility and efficiency of a public procurement system that it is free from corrupt and fraudulent practices. Regrettably, the presence of corruption is seen to be a real problem in many countries, although to varying degrees. Corruption in connection with public procurement constitutes a significant risk factor and represents, besides its demoralising implications, excess costs, inefficiency and distortion of the competitive environment with severe consequences for the fundamental functions of a society. Undoubtedly, corruption has negative political, economic and social consequences³. Politically, it lowers the quality of democracy and governmental performance and creates negative social capital. Economically, corruption impedes development and discourages investment. Socially, it promotes economic and psychological inequality and spreads parochial and particularised, exclusive trust.

The perception index of Transparency International (TI) Index 2013 shows that Thailand holds the 102th position among 177 countries. However, in the TI 2014 index the position of Thailand has improved to 85th, but the score has only improved from 35 to 38 out of 100. Other international governance and risk indicators demonstrate a similar gloomy picture on the integrity status despite the fact that the global competitiveness score is comparably good. A survey from 2010 indicates that the presence of irregularities in public procurement is high and actually has deteriorated over time⁴. Risks to integrity in the procurement process can range from simple administrative mistakes to corruption, collusion or abuse of public resources. These risks are rife in procurement in Thailand because of the large amounts at stake and the interface between the government and the private sector.

Weak integrity in public contracts also has a negative impact on essential public services for human development, such as health, water and education. Despite the graduation of Thailand from Middle Income to Upper Middle Income Country, a 2012 report from the World Bank highlights that improvements in the quality of public services have been concentrated in Bangkok and the central region, leaving significant deficiencies in other parts of the country and contributing to unequal human development outcomes⁵.

To address this problem a number of measures, legally and institutionally, have been introduced by the Royal Thai Government. The most recent action is the establishment of an e-procurement system

² Integrity in Public Procurement. Good Practice from A to Z. OECD 2007

³ Conflict-of-Interest Policies and Practices in Nine EU Members States: A Comparative Review; SIGMA Paper No. 36, 2006.

⁴ Combating procurement conspiracies: some lessons from Thailand. Sirilaksana Khoman, 2011.

⁵ See <http://www.worldbank.org/en/news/feature/2012/05/10/thailand-public-finance-management-review-report>

in order to improve the transparency of bids and contract awards. Also the private sector has introduced integrity certification systems and due diligence tools to mitigate integrity risks in relation to public procurement.

Despite these reform efforts, common problems remain, such as irregularities in public contracting for publicly-owned lands or collusion among companies to obtain public contracts. Integrity risks can happen at any stage of the procurement process, from the time when needs are assessed, through the bidding and contract award, until the final payment of the contract.

Notwithstanding, if the society tends to be corrupt, that tendency will also be evident in the case of public procurement. Corruption in the context of public procurement is very much a reflection of corruption within a given society more generally. Therefore, fighting corruption in public procurement can never be isolated from the overall effort for improved integrity in a society covering all aspects of public life. This fact also sets the limitations on the possible achievements that can be expected by just focussing the work on the integrity risks mitigation in public procurement. A national approach and strategy is needed to secure success in mitigating integrity risks in public procurement.

2. Objectives and Methodology

The objective of the project has been to conduct an integrity risk assessment in public procurement, based on a methodology tailored to the political, regulatory, institutional and procedural contexts in Thailand, while also in line with international standards and experiences of other countries. The work has been conducted in close co-operation with the responsible OPDC and UNDP officials as well as with national consultants to provide technical inputs and assist in identifying and integrating relevant best practices with regard to integrity risk assessment in public procurement.

The assessment is based on a review of the four main pillars of the public procurement system, namely

1. Legal and Regulatory Framework
2. Institutional Framework and Capacity
3. Operational Capacity and Market Functionality
4. Control Structure and Integrity Mechanisms

This analytical approach has been developed by the OECD and the World Bank as an assessment methodology for determining the standard and performance of national public procurement systems. In this context, UNDP adapted the methodology to place the focus of the assessment on integrity risks in the public procurement system. UNDP has published a number of integrity risks analyses in key sectors, such as in health and education⁶.

The project has included the following main activities:

- A review of existing regulations and other relevant documentation on the position of the public procurement system;
- A review of inputs/materials from relevant stakeholders, including the OPDC, the Comptroller General's Department (CGD), the State Enterprise Policy Office (SEPO), relevant

⁶ http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/anti-corruption/fighting_corruptioninthehealthsector.html

line ministries and state enterprises, as well as representatives from the private sector, the National Anti- corruption Commission (NACC), and the academia;

- The development of a risk assessment methodology as well as a preliminary assessment of the public procurement system of Thailand;
- The design of questionnaires as a basis for a survey undertaken among the key stakeholders- public authorities, state enterprises, private sector and academia- with the data from the survey analysed and triangulated; and
- Interviews and meetings with the key stakeholders.

The main content of the report includes the following main components:

- A brief overview of how to measure corruption costs in public procurement;
- Scope and definitions of integrity risks in public procurement;
- An integrity focussed analysis of the public procurement system in Thailand using the four pillar approach;
- An analysis of the stakeholder’s responses to the survey;
- A vulnerability analysis of the main integrity risk areas in public procurement;
- The elaboration of a risk indicator system- red flags;
- Integrity Risks Mitigation Measures; and
- A Priority Framework for Mitigating Integrity Risks in Public Procurement – an Agenda for a Public Procurement Integrity Reform.

A Guideline for mitigating specific integrity risks in the public procurement process has also been elaborated – see Annex 1.

Project Team

Mr. Peder Blomberg, former senior adviser in public procurement at the OECD within the SIGMA programme, is the main author of the report. The project has been managed by Mr. Kwanpadh Suddhi-Dhamakit in the UNDP Thailand country office, with the guidance of Ms. Elodie Beth, Regional Anti-corruption Advisor in the UNDP Bangkok Regional Hub. The project benefited from a close partnership with the Deputy Secretary-General, Mr. Nakornkate Suthapreda, and Senior Advisor Mrs. Kittiya Khampee of the Office of the Public Sector Development Commission (OPDC), Ms. Passaporn Napawan, Public Sector Development Officer of OPDC, Dr. Kongkiti Phusavat, local consultant, and in close cooperation with the Deputy Comptroller-General, Mrs. Chunhachit Sungmai of the Comptroller General’s Department (CGD), the Anti-Corruption Organisation of Thailand (ACT), and the State Enterprise Policy Office (SEPO).

3. Integrity Risks Assessment in Public Procurement - An international Overview

The United Nations, together with a number of international organisations such as the OECD, the International Financing Institutions, the European Union, NGOs (i.e. Transparency International), have played leading roles in recognising the importance of good governance in public procurement over the time and in developing technical guidance for policy makers to enhance integrity in public procurement.

- The United Nations Convention against Corruption (Chapter II on Preventative measures, in particular article 9 on Public procurement and management of public finances)⁷ (see below);

⁷http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf

- The United Nations Commission on International Trade Law (UNCITRAL) Model Law;
- The 1997 OECD Convention on Bribery of Foreign Officials in International Business Transactions (see below)
- The World Trade Organisation Agreement on Government Procurement (GPA)⁸;
- The legislative package of the Directives of the European Parliament and of the Council on Procurement⁹; and
- The International Labour Organisation’s Labour Clauses (Public Contracts) Convention¹⁰.

Further, the OECD has adopted and published a number of instruments for the enhancement of integrity in public procurement. Particular references should be made to

- a) Integrity in Public Procurement “Good Practice from A to Z (2007),
- b) Enhancing Integrity in Public Procurement: A Checklist (2008) and
- c) Guidelines for fighting bid rigging in public procurement.

The United Nations Convention against Corruption (UNCAC) is the first global legally binding instrument in the fight against corruption. It was adopted by General Assembly resolution 58/4 of 31 October 2003 and entered into force on 14 December 2005. To date the Convention has acquired 122 Parties. The objectives of the Convention are to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and to promote integrity, accountability, and proper management of public affairs and property. The Convention requires the establishment of a range of offences associated with corruption and devotes a separate chapter to its prevention. It further attaches particular importance to strengthening international cooperation to combat corruption and, in a major breakthrough, includes innovative and far-reaching provisions on asset recovery, as well as on technical assistance and implementation. Thailand is a State Party to UNCAC and therefore it will be assessed against the UNCAC requirements and is currently undergoing the first UNCAC review cycle). The second review cycle, which will focus on preventive measures (including procurement) and asset recovery will start after 2015.

UNCAC requires each State Party, in accordance with the fundamental principles of its legal system, to 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:

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

⁸ http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

⁹ http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm

¹⁰ <http://www.ilo.org/global/lang-en/index.htm>

- 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;
- 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
- 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.

Each State Party shall further take appropriate measures to promote transparency and accountability in the management of public finances as well as 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.

The UNCITRAL Model Law on Public Procurement¹¹ (UML) first adopted in 2004 and later revised in 2011 serves as a model for all States for the evaluation and modernization of their procurement laws and practices, and the establishment of procurement legislation where none currently exists or where there is a need of replacing current regulatory frameworks. The second purpose is to support the harmonization of procurement regulation internationally, and so to promote international trade. The potential of the Model Law as an instrument to fulfil these purposes will be fully realized to the extent that it is used by all types of States, further highlighting the importance of the fact that the text has not been designed with any particular groups of countries or particular state of development in mind, and that it does not promote the experience in or approach of any one region. In addition, and for economies in transition, the introduction of procurement legislation is part of a process of increasing the market orientation of the economy and, in this regard, the Model Law can serve as a tool to allow for effective coordination of the relationship between the public and private sectors in such economies. The UML was widely used in the transition countries in the Eastern Europe after the break-up of the Soviet Union plus in a number of countries in other parts of the world with an interest to modernise their legal and institutional systems in public procurement.

The 1997 OECD Convention on Bribery of Foreign Officials in International Business Transactions (the Anti-Bribery Convention)¹² is the only legally binding instrument globally to focus primarily on the supply of bribes to foreign public officials in international business transactions. All Convention countries must make the bribery of foreign public officials a criminal offence. There are 41 Parties to the Convention: the 34 OECD Members, plus Argentina, Brazil, Bulgaria, Colombia, Latvia, the Russian Federation, and South Africa. Together, the 41 Working Group on Bribery members account for nearly 80 percent of world exports. They are obligated to investigate credible allegations and, where appropriate, to prosecute those who offer, promise or give bribes to foreign public officials and to subject those who bribe to effective, proportionate and dissuasive penalties. The Convention requires that Parties implement laws ensuring that individuals and companies can also be prosecuted when third parties are involved in the bribe transaction, such as when someone other than the foreign official receives the illegal benefit on his or her behalf, including a family member, business partner, or a favourite organisation of the official. Foreign bribery is a crime under the Convention even if such corruption is tolerated in the foreign country.

¹¹ http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html

¹² Annual Report of the OECD Working Group on Bribery 2014, OECD.

The background for the Convention is that a clean and competitive global economy is impossible if companies and individuals continue to bribe in their international business dealings. Bribery distorts markets and raises the cost of doing business. Today, the vast majority of the world's major exporters and investors have joined the Anti-Bribery Convention and become members of the OECD Working Group on Bribery in order to effectively combat this crime. The Working Group is working hard to convince the remaining major economies that have not yet done so to join the Working Group and accede to the Convention, so that all major exporters and their companies are playing by the same rules to the benefit of all our economies.

A further initiative adopted is the **2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation)** which provides a series of targeted measures to enhance Parties' implementation of their Convention obligations including to better prevent, detect, investigate and prosecute credible allegations of foreign bribery.

One good example, **Convention countries should establish whistle-blower reporting mechanisms and protections for public and private sector employees**, as well as their policies and approaches concerning small facilitation payments. It also recommends that members ensure that companies are held to appropriate accounting and auditing standards, encourage businesses and business organisations to adopt stringent ethics and anti-bribery compliance programmes and measures, and encourage companies to prohibit or discourage the use of small facilitation payments. The Recommendation also provides guidance on establishing effective corporate liability for foreign bribery. Importantly, the recommendation appeals to non-Member countries that are major exporters and foreign investors to adhere to and implement the OECD Anti-Bribery Convention and the Recommendation and participate in any institutional follow-up or implementation mechanism.

The Anti-Bribery Recommendation also includes important guidance for companies. The Guidance provides information to companies to prevent and detect foreign bribery in their international business dealings. It emphasizes that, first and foremost, effective internal controls, ethics and compliance programmes should be based on a risk assessment that is regularly monitored, re-assessed and adapted according to changing circumstances. It also emphasises the need for strong, explicit and visible support from senior management for the company's ethics and compliance program or measures for detecting and preventing bribery, and the adoption of a clear and visible anti-bribery policy.

Until now 333 individuals and 111 entities have been sanctioned under criminal proceedings for foreign bribery in 17 Parties between the time the Convention entered into force in 1999 and the end of 2013. At least 87 of the sanctioned individuals were sentenced to prison for foreign bribery.

From the Annual Report it can be read that Thailand maintained a close working relationship with the Working Group in 2013. Thailand attended two of the four meetings in 2013 where it was represented by the Thai Office of the National Anti-Corruption Commission (NACC). In March 2013, Thailand hosted meetings between officials of the NACC, Ministry of Foreign Affairs, Ministry of Justice, Thai Research Study Commission and the OECD Anti-Corruption Division. The meetings were to provide technical assistance to Thailand in drafting legislation that would criminalise foreign bribery. A seminar for the private-sector organised jointly by the NACC and the OECD was run concurrently. The seminar raised awareness of the risks of foreign bribery and highlighted the need for a foreign bribery offence. Thailand attended the meeting and seminar of the ADB/OECD Anti-Corruption Initiative in July 2013.

Another interesting perspective on the Anti-Bribery Convention is provided by Transparency International (TI) which publishes an Annual Progress Report on the implementation of the OECD Convention.¹³ The picture painted by TI is gloomy and fairly pessimistic on the progress in the enforcement of the convention. TI analyses the progress at four different levels, namely in terms of active, moderate, limited and little or no enforcement. The assessment in 2014 provides the following result:

Active Enforcement: 4 countries with 23.1% of world exports.

US, Germany, UK and Switzerland

Moderate Enforcement: 5 countries with 8.3% of world exports

Italy, Canada, Australia, Austria and Finland

Limited Enforcement: 8 countries with 7.6% of world exports.

France, Sweden, Norway, Hungary, South Africa, Argentina, Portugal, New Zealand

Little or no Enforcement: 22 countries with 27% of world exports.

Japan, Netherlands, Korea (South), Russia, Spain, Belgium, Mexico, Brazil, Ireland, Poland, Turkey, Denmark, Czech Republic, Luxembourg, Chile, Israel, Slovak Republic, Colombia, Greece, Slovenia, Bulgaria and Estonia.

Fifteen years after the Convention entered into force, there are still a great number of countries with a low degree of enforcement. A strong enforcer is US which has taken legal actions in more than 132 cases since 2010. TI means that there are a few improvements that can be reported, but the performance of the majority of the countries that agree to combat foreign bribery in international business transactions is far from satisfactory.

Another important anti-corruption instrument internationally is the **World Bank's sanction system**¹⁴ which is two-tier adjudicative process managed by the Bank to impose sanctions in case a firm has been found guilty of engaging in fraudulent and corrupt practices in conjunction with projects and contracts financed by the Bank. The guilty firms are debarred from participation in Bank's financed projects during a pre-determined ineligibility period. The other international financing institutions, such as the Asian Development Bank, have similar sanction systems.

4. Scope and Definitions

Corruption is a complex social, political and economic phenomenon prevalent in most countries although in varying degree. There is apparently no clear consensus on the meaning of corruption. UNDP defines corruption as "the misuse of entrusted power for private gain"¹⁵. However, it does not always cover all aspects of unacceptable behaviours in public procurement.

For the purpose of the project there is also a need of defining integrity. Integrity refers to the use of funds, resources, assets and authority, according to the intended official purposes and in a manner that is well informed, aligned with the public interest, and aligned with broader principles of good governance. It can be seen as the alignment of accountability, competence and ethics that should govern the work of public institutions and officials.

¹³ Exporting Corruption – OECD Progress Report 2014, Transparency International.

¹⁴ www.worldbank.org

¹⁵ <http://www.pogar.org/publications/finances/anticor/Corruption-and-Development-Primer-08e.pdf>

The opposite behaviour of integrity, namely corrupt and fraudulent practices, needs also to be defined and discussed. Integrity violations may 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;
- Bid collusion and bid rigging;
- Abuse and manipulation of information;
- Discriminatory treatment in the public procurement process; and
- The waste and abuse of organisational resources¹⁶.

The definitions incorporated into the procurement policies of the international financing institutions provide relevant guidance:

Corrupt practice means the offering, giving, receiving, or soliciting of anything of value to influence the action of a public official, or the threatening of injury to person, property or reputation, in connection with the procurement process or in contract execution in order to obtain or retain business or other improper advantage in the conduct of business. Thus, there can be corruption without any payment transaction executed.

Fraudulent practice means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the contracting authority, and includes collusive practices among tenderers (prior to or after tender submission) designed to establish tender prices at artificial, non-competitive levels and to deprive the public body of the benefits of free and open competition. It is normally an action taken by a firm towards a contracting authority, and is not necessarily undertaken with the knowledge of the purchaser and the involvement of payments. The fraudulent practice can either consist of misrepresentation of facts in order to influence the procurement and contract execution process or collusive practices between tenderers.

Whilst, in addressing the issue of integrity in the context of procurement the area of fraudulent and corrupt practices is prioritised, it is also important to discuss other aspects related to the topic, in particular the issue of conflict of interest. This is an area closely associated with how well some of the fundamental values in procurement can be met and with the goals of ensuring a fair and objective procurement process leading up to contracts awarded on commercial grounds, solely.

These definitions do not specifically address the issue referred to as "**facilitation money**", such as payments for customs clearance of goods and necessary licences and certificates. However, facilitation money may often play an important function in the context of corrupt practices as a means to enable corruption to take place in a specific project by for example the contractor/briber paying smaller amounts to inspectors and other controlling bodies.

Strictly speaking, "**fraud**" is a legal term used to refer to instances of deception, usually to the obtaining of some value through dishonest representations. Procurement rules generally address such fraud through processes which will allow contracting authorities to exclude from the procurement procedure tenderers who have sought to deceive them in some way, such as by submitting falsified documents or by dishonestly entering inaccurate, misleading or false information. This could occur at a number of different points in time from the submission of information or documents in respect of a tenderer's economic or financial standing, his general

¹⁶ Enhancing Integrity in Public Procurement: a Checklist, OECD

suitability, experience or technical capacity to the description and technical characteristics of the goods, works or services to be provided.

Where any such information or documentation is discovered to be false or inaccurate, it will amount, in legal terms, to a misrepresentation. Procurement rules will usually provide for the exclusion of tenderers where they are guilty of serious misrepresentation in supplying the information required by the contracting authority. Unfortunately, most procurement rules do not, at the same time, identify the authority which is entitled or empowered to make the finding that a tenderer has been guilty of serious misrepresentation. In many cases, contracting authorities, faced with the silence of the rules in this respect, believe that it is for them to make the finding. However, fraudulent misrepresentation is not a finding that a procurement officer or a contracting authority is necessarily capable of or entitled to make. It would ordinarily fall within the jurisdiction of a court which is the only body with the necessary skills and judicial discovery procedures required to make such a determination. This explains, in part at least, the natural scepticism towards blacklisting when this is determined by the contracting authority. There is no question but that corrupt practices are dishonest and this may explain why corruption is often combined with fraud when it is discussed even though it does not always involve deception in the sense discussed above.

In the context of corruption, the procurement officer acts as the agent of the government and it is this relationship that often provides opportunities for exploitation by the agent. This possibility to extract personal gain from the procurement process arises from the position he is given within the bureaucracy to exercise discretionary authority. The supplier who seeks to influence the procurement process by way of a bribe will seek to exploit the independence of the procurement officer and to induce him to place his own interests before those of the government whom he represents.

Once corruption has taken root in a country, it is difficult to eradicate. As an accepted way of doing business, it may become entrenched as a cultural necessity with the consequent desire of all participants to conform. The result is an environment in which corruption becomes accepted and regulated by a complex series of relationships between suppliers, procurement agents and their superiors leading to a complicated system of patronage and mutual dependency which is extremely difficult to unravel.

The result of corruption in procurement is serious. It is likely to affect two variables: the identity of the successful tenderer and/or the terms on which the contract is awarded. In both cases, the contracting authority will end up with the wrong provider and/or the wrong product. In terms of the operations of the contracting authority, it is likely that the result will be less than optimal and may lead to product failures, cost overruns, time overruns, higher life-cycle costs and earlier re-tendering. In addition, the contracting authority and, therefore, the taxpayer, will have paid more for the procurement than it should have. It will have paid more for less and, in simple terms, both the contracting authority and the taxpayer will have been victims of theft by the corrupt official. That is a criminal offence.

In Thailand, a survey from 2009 indicated that 50% of the respondents admitted that they had to pay up to 10% and more in kick-backs for obtaining a public contract, a figure that had increased between 2001 and 2009¹⁷. If this should be the correct picture for the public procurement market in whole, Thailand would suffer from excessive transaction costs and heavy quality losses in the delivery of public services.

¹⁷ Combating procurement conspiracies: some lessons from Thailand. Sirilaksana Khoman, 2011

The most common irregularities in public procurement in Thailand include the following categories¹⁸:

- **Bid collusion** among private-sector suppliers;
- **Kick-backs** from suppliers to government officials;
- **Systemic corruption**. The most important cause seems to be patron-client network which is based on relationships and close interaction between the private and public sectors.

However, as will be discussed below (chapter 5), the extent and cost of corruption is extremely difficult to identify and measure with any accuracy. Interestingly, the views from the stakeholders surveyed did not confirm explicitly the extent of corruption in public procurement (see chapter 7). No strong evidence of collusive practices was identified.

5. The Impact of Corruption in Public Procurement - Costs and Other Negative Effects

A sound public procurement system is based on rules, encourages competition, promotes transparency, strengthens accountability, is economic and is efficient. The underlying assumption behind these principles governing public procurement is that the process should be free from acts and behaviours that implicate negatively on the functionality of the public procurement system. Any compromise on integrity, as defined, will result in excess costs and other negative effects on the functionality of the system. Non-integrity acts in public procurement include bid collusion, kickbacks and conflict of interests. The main problem and challenge is that corrupt and fraudulent practices are a hidden phenomenon, difficult to identify and even more difficult to measure and cost calculate. The number of legal cases are normally few in any country and this is in particular the case in countries where the corruption is systemic and maybe even institutionalised. Whatever the situation, the number of evidenced cases of corrupt actions are disproportionate to the real situation in a country. The extent of irregularities is therefore generally based on perceptions and indications. This fact colours also the views of the seriousness of corruption in a country. Surveys, perception indexes and experience sharing provide much of the input to the judgement of the presence of corruption in a country.

There are few international studies and research on the impact of corrupt practices in terms of actual costs and other negative effects. However, a recent study¹⁹ prepared for the European Commission provides an interesting methodology that could be of value for the purpose of this project. The study makes an attempt to measure the direct cost of corruption in certain sectors and for specific product and service areas while omitting the indirect costs and effects, such as on public institutions, the environment, the psychological costs, and costs to the civil society. The public loss as a result of corrupt acts is analysed on the basis of two components:

Ineffectiveness which means that the project does not or not fully reach its objectives. The procurement generates lower than intended value or even negative public value (waste).

Inefficiency which means that the outputs of the project are not in line with the inputs. Goods and services are procured at excessive prices or at inferior quality at similar prices.

The econometric methodology is formed around the assumption that public procurements which are corrupt differ in characteristics from procurements that are “clean”. A set of red flag indicators

¹⁸ Combating procurement conspiracies: some lessons from Thailand. Sirilaksana Khoman, 2011, p 18

¹⁹ Identifying and Reducing Corruption in Public Procurement in the EU. 30 June 2013

(27) was produced and used in the study. The red flag indicators provide information on the chance of corruption to be present and more red flags indicate a higher chance of corruption. A number of clear and grey cases of corruption were assessed on these red flag indicators. A corrupt case was defined as a case with a final legal ruling or cases with strong indications of being a corrupt case. A grey case was defined as a case with weaker indications of being corrupt- for which no explicit evidence is presented from the opposite. Cases with no (reliable) indications of being corrupt were treated as clean cases.

The conclusion is that corrupt and grey cases turned out to be very similar in terms of characteristics and differed markedly from the clean cases. On the basis of assessment, it was determined which combination of red flags proved to be the strongest predictors for a higher probability of corruption in a procurement case. It further confirmed that corrupt/grey procurement cases are less performing than clean procurement, although also clean procurement may suffer from efficiency concerns. More than two-thirds of the performance problems in corrupt/grey cases can be attributed to corruption. The overall direct costs of corruption in the five sectors studied constituted between 2.9% to 4.4% of the overall procurement value of sectors included. The sectors with most integrity risks included construction work for motorways, railway track equipment, waste water treatment projects, airport runway construction and urban/utility construction. The study concludes that effective detection and prevention of corruption is possible if administrative data on tenders, bidders, projects and contractors are collected and stored in a structured way, accessible for controls, investigations and analyses. The lack of procurement data is a problem in most countries. Relevant and reliable procurement data and statistics are necessary for the use of red flag indicators as well as for measuring the performance of public procurement, both in a macro and micro perspective.

6. Review of the Thai Public Procurement System - the Four Pillar Approach

Defining a Public Procurement System

Public procurement is defined as the acquisition process for goods, services and works aiming at the conclusion of a public contract for pecuniary interest between a public purchaser (contracting authority) and an economic operator (firm) following a competitive process in accordance with a well- defined legally based set of rules and policies. The principal objective of an efficient and sound national public procurement system is to deliver efficiency and “value-for-money” in the use of public funds, while adhering to well-recognised governing principles, such as transparency, non-discrimination and equal treatment, further being free from corrupt and fraudulent practices. The legal and institutional frameworks set the basic conditions for the way in which procurement may be undertaken procedurally, the results that can be expected, and the potential efficiency gains that can be achieved.

In principle, a public procurement system may be defined as the totality of all those elements affecting the final outcome and effectiveness of an individual procurement operation. A complete analysis of a public procurement system would then by necessity cover a great number of aspects with a varying degree of inter-dependency and impact on the execution of public procurement.

In order to make the assessment of a public procurement system at a national level manageable, it is necessary to identify and include areas directly associated with public procurement and, deliberately, exclude areas of less direct influence on the public procurement processes. The following four key areas (Pillars) have been identified, at least in broad terms, to constitute the basic components of a national public procurement system. This analytical approach is in principle practised by the OECD/SIGMA in the assessment of countries seeking accession to the European

Union as well as the World Bank in its country procurement assessments reports. A pilot study was conducted jointly between the Royal Thai Government and the World Bank in April 2005 that was based on the same analytical approach with the use of an assessment tool Baseline Indicators System (BIS) developed within the OECD-World Bank Roundtable on Strengthening Procurement (2004).

Pillar I. The Legal and Regulatory Framework on Public Procurement

Most countries have adopted regulatory frameworks on public procurement in more or less detail. A number of international legislative models, evolved over time, are available and have been implemented either as an obligation (e.g. EU member states and GPA- signatories) or voluntary (e.g. by using the UNCITRAL Model Law on public procurement, UML). These legislative models may have slightly different policy goals or priorities but, fundamentally, they have been agreed for the purpose of securing key principles for the functionality of a national public procurement system, namely to optimise efficiency and value for money in the delivery of public services while respecting the principles of non-discrimination, equal treatment, transparency and proportionality. Subsequently, the legal framework on public procurement is not primarily designed for the elimination of corruption and fraud in procurement operations, but instead to support efficiency and accountability. However, a sound and well-designed legal framework with effective and sufficiently resourced institutional set-ups for policy-making, support, monitoring and control of public procurement constitute at the same time key preventive factors against potential irregularities in public procurement. An effective regulatory framework operates in a two-fold direction, namely to ensure efficiency as well as acting as an important prevention and deterrent against fraud and corruption. The challenge is to ensure a correct balance between the policies and rules that are aimed at promoting efficiency/value for money and those rules and measures that mainly have been put in place in order to combat potential irregularities. It is the **policy choice dilemma** which all lawmakers have to deal with and the challenge is to strike the right balance between conflicting policy goals and to avoid the risk of **a double failure**, namely to get less “value for money” while facing continuous serious integrity problems in public procurement. The policy dilemma could be seen as to make the balanced choice between performance versus conformance or differently expressed between outcome optimisation and risk minimization. This kind of prioritisation varies of course between countries depending on their national contexts.

The Thai regulatory framework

In Thailand, the regulatory framework is not specifically modelled on any of the international legal models, but rather on international “good” practice stemming from the early 1990. It seems that the procurement guidelines of the International Financing Institutions (IFIs) to a certain extent have inspired Thai regulators, e.g. regarding the procurement of consultant services. Further, the main characteristic is the fact that public procurement is not regulated by law which is common practice in most countries. The regulatory instruments used are instead government regulations.

Key features and observations of Regulation B.E. 2535 and B.E. 2549 (e-auction)

1. The regulatory base for public procurement is weak, fragmented and does not reflect international legislative practice

The **current original decree** is from 1992 (B.E. 2535), as amended, covering only government agencies. A special decree issued by the Ministry of Interior applies to local governments, which basically is the same procedurally as the government regulation. State Owned Enterprises (SOEs) may decide their own internal procurement regulations. A regulation on e-auctions from 2006 (B.E.

2549) makes it obligatory to use e-auctions for the award of goods and works contracts above 2 million Baht for government agencies, local governments and other public organisations, and 10 million Baht for state-owned enterprises. However, the Boards of SOEs have the right to decide the use of other methods than e-auctions if so deemed justifiable, such as the special case method and the special method.

Firstly, a government regulation may provide more flexibility than a public procurement law in terms of making modifications and amendments but less enforceability and legal certainty for all the concerned. The regulations are open for exemptions by Cabinet decisions which represents an important integrity risk. The Boards of the State Enterprises assume a similar role in this context. The concept of enforceability implies that the policies and rules adopted by the parliament in terms of a procurement law provides a much stronger implementing instrument than a regulation, in particular with regard to coverage (entities and people bound to follow the rules), the participation rules concerning exclusion and qualification of tenderers, the possibility to decide exemptions, and not least the power to execute budgets and other economic and social policies and measures more effectively, including the possibility to claim accountability. Legal certainty means that both procuring entities, procurement officials and the private sector operators are given protection for its actions under the rule of law. For procuring entities it has effects on undue external political and other forms of interferences and influences, the handling of conflict of interests and a better chance to manage the procurement operations professionally, objectively and with integrity. The private sector should have the same protection on the procedural side, but also by the possibility of a complaint mechanism as well as clear process for de-briefing under law.

Secondly, the regulatory approach and coverage does not reflect international legislative practice, such as the Agreement on Government Procurement (GPA) - see Art 2, Scope and Coverage, since both local authorities and utilities are governed by separate regulatory instruments. Local authorities are regulated by a similar regulation adopted by the Ministry of Interior, while the SOEs have the right to adopt their own regulations.

2. The regulatory approach is a mix of policies, rules and implementing guidelines

The 1992 regulation provides a detailed set of rules for the conduct of the entire procurement process, including contract execution, in accordance with the fundamental principles of open and fair competition. The regulation provides for both competitive and non-competitive methods and distinguishes between the various subjects of the procurement. The procurement of works and consultant services is specifically addressed in the regulation. Section 2, Purchasing and Contracting for works, includes as well supplies contracts and the procurement of services seems limited to consultancy services and design and works supervision, but not to the full scope of services that normally is demanded by the public sector.

The main methods are competitive bidding (open tendering), request for quotations, special method and special case method. These methods are governed by thresholds and/or defined justifications combined with specific approval procedures including the right by a Cabinet decision to make exemptions to the regulation. Open bidding shall be conducted above 2 million Baht. The publication of tender notices are clearly defined in the regulation and is today arranged through the e-procurement platform of the CGD.

During the first six months of the fiscal year 2014, statistics issued by CGD prove that procurement by e-auctions represent the majority of the total tender value in Thailand, namely 62%. The number of e-auctions amounted to 23,029. Request for quotations and open competitive bidding in

accordance with the 1992 regulation takes less than 20% of the tender value. Direct negotiation is low in value, but high in numbers; almost 600 000 contracts with direct negotiations were concluded. Only 580 tenders for consultants were initiated in this period. Noticeably, the number of special methods and special case methods amounts to 33,000 (more than e-auctions) but the global tender value represent only 15%. Waivers or exclusions can also be decided by the Cabinet or the Boards of the State Enterprises. It appears that special methods are often used at the end of the budget year which indicates problems in the planning of public procurement operations.

The regulatory approach is very prescriptive and rather focussed on the process and comparably less on the outcomes of procurement. Since it is dated back to the early 1990s, all new developments observed in international public procurement, such as environmental (e.g. green public procurement) and social policies and considerations, are basically missing in the regulation. The regulatory framework does neither include any provisions on framework agreements, centralised purchasing arrangement²⁰, innovation procurement and other recent procedural developments in public procurement. The whole approach is rather focussed on lowest price with much less attention to quality and life-cycle cost considerations. It may further hamper the competitive situation in the procurement market by discouraging quality suppliers from participation in the public tenders.

3. The e-auction system is technically advanced, but the strategic and efficiency dimension appears missing in the public procurement system

The e-auction system was introduced in 2006 and must be used for all contracts above 2 million Baht regarding goods and works. Interestingly, the e-auction system must also be used for all public sector entities, including SOEs (above 10 million Baht), which implies that the e-auction regulation actually provides a national coherent piece of legislation. It would be interesting to analyse the possible presence of overlaps and contradictions between the 1992 regulation and the e-auction regulation. One key observation is the establishment of two Procurement Committees under respective regulations which will be discussed in the following section.

International analyses, mainly done by the World Bank²¹, recognise both strengths and weaknesses in the e-auction system. Among the strengths identified belong improved standardisation, better competition and clearer specifications. Cost savings in the range of 6-8% were also noticed compared to the budget (reference) prices set for the tenders. Other analyses done indicate only marginal cost reductions. The weaknesses are primarily found in the lengthy and complicated processes to prepare and run the e-auctions, the inclusion of works and complex supplies contracts, and the lowest price focus. A specific feature of the e-auction process is the pre-review of the terms of reference which gives potential tenderers an opportunity to review and comment the specifications. It could be seen, in principle, as a positive measure from both an operational and integrity point of view. However, the pre-review tends to delay the process and actually could facilitate any potential collusive intentions since the pre-review provides time for preparation and planning among the firms involved. It can be questioned as to what extent the e-auction system is a guarantee for removing integrity risks, such as collusive practices. The survey conducted by UNDP (see chapter 7) confirms a widespread scepticism against the e-auction system as it is designed today.

The e-auction system in Thailand is regarded as an independent stand-alone procedure to be used for the majority of goods and works contracts. Internationally, e-auctions are commonly treated as a

²⁰ OECD/SIGMA Paper 47, Centralised Purchasing Systems in the European Union

²¹ Issue Note on E-auctions system in Thailand, the World Bank,

complementary instrument often used in conjunction with regular competitive tendering methods or under the use of framework agreements, however it can be used as a stand-alone procedure²² as well. Internationally, e-auction is seen as a repetitive process realized after an initial full technical evaluation of the tenders in accordance with the selection and award criterion/criteria set and with the weighting fixed for them. Awarding by the use of e-auctions, in some international legal frameworks²³, is not even permitted for intellectual or similar type of services or works contracts. It is regarded as an appropriate method for certain items (mainly standardized products and services), but definitely not for sophisticated equipment, intellectual services and large works contracts. Elements such as life-cost calculations and energy efficiencies risk to be ignored with the use of e-auctions.

It is understandable that the Thai government has a wish to increase transparency, improve monitoring capabilities, reduce the administrative cost, as well as remove as much as possible of manual intervention in the procurement process in order to strengthen the integrity of the procurement process. The ambition to restrict the opportunities for nepotism, favouritism and discretion at the level of the contracting entities is well motivated. However, the possibility of irregularities is still at hand and relevant question marks can be raised concerning the efficiency of the e-auction method in terms of the extent to which important policy goals on “value for money” and other key strategic priorities are met.

4. The reference price system- does it work?

A specific feature of the Thai procurement system is the mandatory use of reference prices that need to be prepared, used and published in the tendering process. These prices are not for guidance only, but tend to operate as ceiling prices not to be exceeded by the tenderers during the e-auctions. Interestingly, in case prices deviate downward with more than 15% from the reference price, the contracting authority is obligated by the auditing and controlling bodies to provide an explanation. The system has been put in place to ensure prices and costs in line with the budget and that the processes are conducted with integrity. It was actually a regulation issued by the Office of the National Anti-corruption Commission that made the use and publication of reference prices obligatory²⁴. It is a unique feature of the procurement system that rarely has its equivalences in an international context. It is in principle a contradiction to the whole purpose of competitive tendering, namely to determine the most competitive market prices at every tender occasion. Reference prices risk to becoming the “acceptable price level” to which the market will relate irrespective of whether the prices are realistically reflecting the correct market prices or not. The system underlines the emphasis on lowest price, but without providing the assurance of getting the correct market prices, or minimising irregularities, or that the competitive situation in the market is not negatively affected. If the reference prices are incorrectly determined (too low) those may discourage sound and competitive firms to participate in public tenders. If the reference price is higher than the corresponding market price for the items, the bidders may exploit the price difference and improve their profit margins. In fact, there is an apparent risk that reference prices actually operate as a “lock-in” integrity risk factor- deliberately meant or not. In the context of a European study²⁵, it was explored whether prices of standardised units could serve as a standalone tool and/or indicator to prevent or detect possible cases of corruption. A theoretical methodology to calculate standard

²² UNCITRAL Model Law on Public Procurement (2011) Chapter VI Electronic Reverse Auctions

²³ European Directive on public procurement 2014/24/EU. Art 35, Use of e-auctions

²⁴ Organic Act on Counter Corruption B.E. 2542 (1999); Art 103/7

²⁵ Identifying and Reducing Corruption in Public Procurement in the EU, Development of a methodology to estimate the direct costs of corruption and other elements for an EU-evaluation mechanism in the area of anti-corruption. 30 June 2013

prices in a sample of collected procurement cases was performed. It was concluded that from a purely theoretical point of view, the standard price approach could work, but from a practical point of view, the limitations- due to limited data availability and quality- bring discredit to the use of standard/reference prices. Moreover, a direct link between the price of the standardised unit and corruption was not demonstrated. The diversity in terms of projects and methods of implementation makes it extremely difficult to arrive at a numerical definition of a standard/reference price.

Stronger reliance on market information and research in the preparatory phases of the procurement process is advisable in order to establish good and reliable data on market prices and of the competitive situation in the market. Cost estimates of the tender are important information to the potential tenderers in order to give them an idea of the contract values and the attractiveness of the tender, and should therefore be published as guidance, where appropriate. However, it should be left to the contracting authorities to decide at what level and in what detail the cost estimates should be presented in the publication of tender invitations, taking into account the market competition and the scope and nature of the tender. Further, cost and budget estimates are necessary steps in the preparation of tenders for the purpose of determining the thresholds for the application of the procurement methods. As an alternative to ceiling prices which cannot be exceeded, the following approach could be used. Namely, if tender prices exceed the budget significantly, the contracting authority should have the possibility, as to be laid down in the tender documentation, to cancel the tender proceeding in order to reconsider the design of the terms of reference and to arrange for a re-tendering. This is a common practice internationally.

5. Ongoing Developments

The discussion above on the lack of a **public procurement law** should be seen in the light that a legal reform initiative has been launched within the government with the objective to prepare a coherent public procurement law covering all main public sector entities in accordance with international standards. **The National Reform Council** has established a sub-committee with the task to draft a new public procurement law to be presented for consultation in early 2015. A presentation of international legislative models, including the UNCITRAL Model Law on public procurement and the Government Procurement Agreement (GPA) under the WTO, was made for the staff of OPPM of the CGD in early January 2015.

Another important reform initiative is the development **a new e-procurement system** which will enable a fully electronic tendering process, including uploading and downloading of tender documents, publication of tender notices, submission of tenders, and electronic evaluation as well as e-auctions. It would also imply the establishment of market places with e-catalogues and a more realistic use of e-auctions. The new e-system is planned to be rolled out in early 2015. It has the potentials to bring in significant improvements in terms of increased transparency, lower transaction costs, strengthened monitoring capacity and reduction of integrity risks at the end.

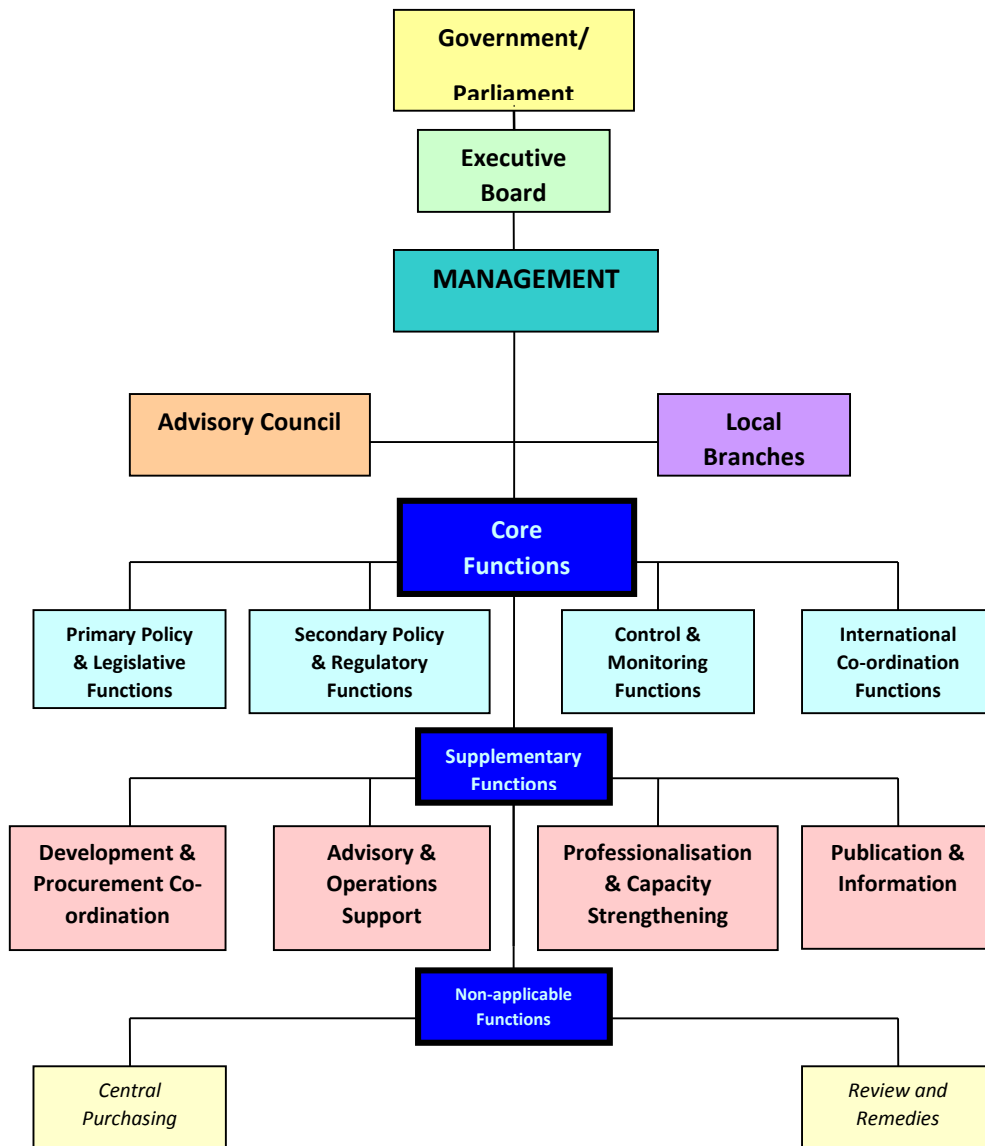
Pillar II. The Institutional Framework and Capacity

International experiences prove that a country needs a policy making and regulatory framework for public procurement which meets international good practices. Equally important, institutional structures and arrangements should be in place that will ensure an effective implementation and functioning of the regulatory system. Public procurement should be seen as an important strategic governance tool for the achievement of a number of political priorities and as such placed in the mainstream of the public expenditure management process. The strategic dimension of public procurement and its importance for the country's economic and social development imply that the political environment is capable of formulating the policies that should govern the future direction

of public procurement reform and to transform the policy goals into effective national strategies and action plans in all relevant sectors and to understand the interrelationships and potential impacts of the various reform initiatives. Successful development of a public procurement system is highly dependent on the possession of sufficient capacity and co-ordinating functions at the centre of the government to effectively develop and implement public procurement policies and regulations. It is equally fundamental to the functionality of the public procurement system that a country has an effective central institutional structure in place. The functions normally associated with central public procurement institutions²⁶ are as follows:

- Responsibility for developing primary legislation and regulation;
- Preparing and issuing secondary legislation (implementing regulation and operational guidelines);
- Oversight and monitoring of public procurement;
- Advisory and operational support to contracting entities;
- Developing integrity strengthening policies and instruments;
- Developing and managing e-procurement system, including publication and information functions;
- Professionalization and capacity building;
- Operational development and coordination; and
- International co-operation.

²⁶ SIGMA Paper 40, Central Public Procurement Structures and Capacity; 2008



The organigram above shows a **generic model of central public procurement functions** and structures that commonly is found within the member states of the European Union²⁷. The distinction between core and supplementary functions in the model relates only to the specific responsibilities the governments assume with respect to the EU membership and in no way on the degree of importance.

The institutional structure covers commonly also external audit, internal audit, competition authorities and complaints review mechanisms. The judiciary as well as designated authorities and commissions play important functions in the fight against fraud and corruption. These mechanisms will be addressed under Pillar 4.

The Thai institutional set-up

The key focal point in public procurement within the government is held by the Comptroller General's Department (CGD) within the Ministry of Finance. The Office of Public Procurement Management (OPPM) of CGD exercises a number of the functions normally associated with a central public procurement office, as discussed above. The decision making and executive responsibilities

²⁷ SIGMA Paper 40, Central Public Procurement Structures and Capacity; 2008

under the 1992 regulation is designated to a Committee in Charge of Procurement (CCP). A similar Committee (e-PC) is given more or less equivalent responsibilities under the e-auction regulation 2006. The OPPM acts as secretariat to these committees.

The main responsibilities of the CCP are (section 4):

- Interpret and make recommendations on the correct application of the regulation;
- Grant exemptions to the application of the regulation;
- Review complaints;
- Propose amendments and improvements of the regulation;
- Prepare and issue model and guidance documentation;
- Determine the price mechanism under article 16;
- Determine consultant's remuneration fees;

Some observations

- The OPPM has 76 staff members, including 25 temporary staff, of which approximately 35 staff members are organised in the regulatory section and 26 staff members are within the e-procurement section. There is also a sub-section for setting reference prices for construction works.
- The next most important challenge will be to roll out e-bidding and e-market systems which allow suppliers to upload and download tender documentation, publication of tender notices and submission of tenders in addition to the current e-GP system. It will increase both transparency, improve administrative efficiency in the tendering processes, and strengthen the possibilities to gather information and to build a database for statistics and monitoring.
- The number of waivers (exemptions) to the application of the two regulations decided by the Committees were 229 in the fiscal year of 2013. The estimated value of the exemptions is not stated.
- One significant question mark is whether the OPPM has the necessary capacity in terms of staff and capabilities to effectively lead and support the future public procurement reform work. A second question mark is linked to the duplication of procurement committees under the two regulations, respectively. Are two committees really needed?
- The Committees are dealing both with policies and regulatory issues while also being responsible for reviewing complaints. The composition of the Committees includes both government agencies and representatives of the private sector. There are certain risks of conflict of interests.
- It could be mentioned that the new draft public procurement law under preparation includes a proposal for the set-up of a National Public Procurement Committee (NPPC) with CGD as the Secretariat.

Pillar III. Operational Capacity and Market Functionality

The foundation for an efficient public procurement system is the availability of a professional procurement function within contracting entities that is able to produce "value for money" for its users by acting professionally and cost-effectively in the conduct of the procurement processes in all key aspects.

The regulatory and institutional framework specific to public procurement can only provide some of the necessary conditions for an efficient execution of procurement at the operational level. The

“value for money” outcome is eventually determined in the interaction between public purchasers and the private sector. Factors of decisive importance include a professional procurement function and an integrity-driven management of all phases in the procurement process combined with a competitive and attractive market environment for public contracts. The market should be characterised by the presence of a strong and diversified private sector and where both sides - buyers and suppliers- are respecting highest integrity standards.

The public market’s attractiveness to the private sector depends on many factors, such as potential economic gains, costs of participation, the complexity of tender and contract documentation, the fairness and relevance of qualification and award criteria, the availability of de-briefing and a complaints mechanism, etc. The market should also be free from trade barriers and other technical or commercial hindrances for participation.

One particular “attractiveness and integrity” component is the extent of transparency, fairness and accessibility of information for suppliers with strict requirements on the publication of tender and contract award notices, reasonable time limits for submission of applications and tenders, disclosed, non-changeable and proportional qualification and award criteria, a stand-still period before conclusion of contract, de-briefing with tenderers on the justification for the award decision, and the possibility for tenderers to challenge the award decisions in judicial proceedings.

The Thai operational and market context

Contracting entities

The conduct of the procurement process is well defined and clearly laid down in the two regulations. It covers both the management of the procurement process by the need to establish committees for preparing terms of reference, tender opening and evaluation and award of contracts as well as the authorisation or approval rules at different administrative levels. This organisational approach is definitely not uncommon viewed in an international context, although the level of details could be seen as too rigid and bureaucratic. It is the understanding that CGD under the e-auction regulation shall approve/appoint the composition of the project tender committee²⁸ which differs from international practice and can be considered as a questionable bureaucratic measure. For the purpose of accountability it is important to define the point of responsibility correctly within the line organisation. Dependency on committee decisions has a tendency to dilute responsibility which may undermine the possibility to claim accountability in cases of poor performance as well as could make it more difficult to act in cases of suspect irregularities in public procurement. The concept of accountability in public procurement may be understood at different levels of the public administration. One may distinguish between political accountability and management accountability. Public procurement is regarded as a core element of accountability of a government to the public of how public funds are managed²⁹. Procurement management accountability on the other hand is linked to the line responsibility and the decision-making powers designated the organisation and the management. Accountability could be defined as an assurance that an individual manager may be held responsible for procurement decisions and actions in accordance with his/her mandate and responsibilities. Transparency and effective control mechanisms need to be in place. As discussed, the establishment of tender committees is a common feature in many countries and public procurement laws, but there are also exceptions to this practice. The formation of tender committees is done with the good purpose of improving the quality and integrity (four eyes principle) of procurement decisions, but at the same time the management provides an

²⁸ E-auction regulation, 2006 clause 8 (para 2 and 3)

²⁹ Integrity in Public Procurement, Good Practice from A to Z, p 14

opportunity to hide behind a committee decision and to blame the committee if something goes wrong. There is a border line between tender committees that has the authority and obligation to make a procurement decision and those with the authority to make recommendations, only. The latter approach - as being the case in Thailand - provides better opportunities to claim accountability within a procurement process. In many countries, the organisation of the procurement process is unregulated and becomes the responsibility of the procuring entities. It would normally include the establishment of tender committees on a project-to-project basis where you involve various technical and commercial expertise, as needed.

Many contracting entities have designated procurement departments with specialised procurement staff although many other expert staff outside the procurement department are involved in all steps of the procurement process. However, it has been underlined by many from the interviews and the survey **that training and capacity building of procurement staff** and functions are insufficient and need a stronger prioritisation and support in the future. The immense integrity problems experienced in public procurement affect the overall perception and picture of the procurement profession in Thailand with an evident demoralising impact on the procurement profession and the officials. The procurement functions are exposed to an extensive internal and external control mainly in order to ensuring compliance with rules, but less on performance and outcome. Risk minimisation becomes a priority rather than result optimisation. **The profession lacks recognition**, appreciation and attractive career opportunities, which in turn makes it difficult to recruit and keep procurement staff. There is no institutionalised professional training at a university level or certification of procurement staff available or even sufficient ad-hoc training courses in public procurement.

CGD has arranged training for procurement officers and staff and there is a growing number of training activities and staff covered by the training over the past 3 years, but the needs are immense and training and professionalization should be a key priority in a future public procurement reform.

Another key priority is to raise the status and **attractiveness of the procurement profession** which should imply a combination of actions of different nature (see chapter 10).

Market functionality

The areas considered in an analysis of the public sector market would normally cover:

- The overall competitive position in the market;
- Identification of problematic sectors from a competitive point of view;
- Indication of integrity risks, in particular collusive practices;
- Any legal or technical obstacles for participation in public tenders;
- Domestic preferences of any kind;
- Use of technical standards - domestic and international;
- Participation rules and rates;
- Access to de-briefing and complaints review; and
- The quality of contract law.

Thailand has a huge and diversified private sector, including extensive international representation, thus the potentials for strong competition in public tenders are definitely at hand. The market functionality is further dependent on an open and fair competition where the fundament is about integrity.

The **average participation rate** at e-auctions³⁰ indicated by some sources would imply that public tenders could be seen as attractive to the private sector. However, views expressed by the buyers and suppliers in the survey (see next section) regarding the procurement market tend to give another less positive picture. From the surveys, it can be concluded that the participation rates vary depending on the types of contract. It appears that general supply contracts attract more competition than services and construction contracts. Interestingly, state enterprises seem to experience higher participation rates. Notably, the average overall participation rates are found in the range of 3-5 tenders but there are also both lower and higher participation rates in various sectors. The extent and variation of participation rates should trigger a further investigation since those represent an important indicator for the performance and integrity of the procurement market. The most competitive sectors are construction, ICT and security. The most problematic sectors seem to be car rental, public relations and transportation services.

The **practice of de-briefing following a procurement process** is not widely used among the procuring entities.

There are generally **no domestic price preferences** in the procurement market or any general restrictions against foreign participation in the tenders. However, there are requirements of protective nature in the regulations, such as on local production, local products, pre-registration of consultants and eligibility requirements, (Thai national registration) that in fact act as a barrier to international participation and open competition. Reference is also made to Thai technical standards in the regulations, but it is not clear to what extent those are based on international standards (ISO). These requirements in the regulations are not compatible with GPA requirements and the recommendation would be to become an observer of the WTO/GPA in order to be informed on how a possible GPA accession process will be managed.

Most countries have adopted **an anti-trust or competition law** with the establishment of competition authorities. Their responsibility is to ensure fair and sufficient competition in the market in general by identifying market dominant positions, take investigatory actions and make decisions on merger and acquisitions of sensitive nature (monopolies and oligopolies). As part of the main responsibility, the competition authority investigates and takes legal actions on collusions and similar types of unacceptable co-operation between firms in the market. Thailand has not adopted a competition law- including the establishment of a competition authority- which could be seen surprising considering the extent of market problems identified, including in the area of public procurement.

Question marks against the objectivity and impartiality of the public sector in handling the procurement processes have been raised by the private sector in different contexts, in particular during interviews and from the survey. However, this lack of confidence from the private sector varies between the various segments of the public sector.

The main challenge will be to **engage the private sector** in the reform of the public procurement system in order to strengthen the efficiency and functionality of the system as well as to ensuring its support and commitment to mitigate integrity risks in public procurement. The Anti- corruption Organisation of Thailand (ACT) is a constructive member of the Project and is firmly engaged in the on-going public procurement legal and institutional reform aimed at modernising the procurement system and to introduce measures to mitigating integrity risks in the procurement processes. Other

³⁰ Issue Note on E-auctions system in Thailand, the World Bank

important actors are the Thai Contractors' Association and the Consulting Engineering Association of Thailand.

Interesting knowledge centres are the Thailand Development Research Institute (TDRI) which undertakes research and provides technical analysis (mostly but not entirely in economic areas) to various public agencies to help formulate policies, including in public procurement, to support long-term economic and social development in Thailand and the TRIS Corporation Co (TRIS). The latter provides independent performance evaluation services in areas such as corporate governance, risk management and quality assurance review and audit, including in the area of public procurement.

Pillar IV. Control Structure and Integrity Mechanisms

Control of public procurement is exercised at different levels, with a mix of aims and objectives, and a broad spectrum of actors within the society. Within the government environment external audit, financial control, public expenditure management and budget processes constitute the main control functions. Integrity measures and fight against corruption are the responsibility of all actors, but there are also a number of specialised institutions assigned these functions, such as the Office of the National Anti-Corruption Commission (NACC) and the Office of the Public Sector Anti-Corruption Commission (PACC). The private sector with the Anti-corruption Organisation of Thailand (ACT) and the civil society with media and non-governmental organisations (e.g. Transparency International) play an important role in this context. Tenderers may exercise a control function in public procurement by access to a complaint review and remedies system.

The external audit of procurement procedures plays an important functions in order to verify both compliance with the rules and the performance of the procurement operations (value for money). Compliance criteria, against which the process is to be assessed, are based on the regulatory framework applicable in the particular context of the country. In terms of performance, the auditor needs to assess whether the procedure and the decisions taken meet the "three E" criteria – economy, efficiency and effectiveness. Economy focuses on paying the lowest price for similar goods and services, whereas efficiency is getting the maximum output of goods and services for a given input of public administrative resources (not only money) or minimizing the input of such public resources for a given output of goods or services of the procedure. Effectiveness assesses whether the performance obtained, as an output of goods or services procured, meets the objectives that were set.

Audit work is generally designed to examine whether the process for determining the need for the particular procurement is valid; and the award procedure is legal and public resources being spent in line with applicable criteria.

A crucial mechanism for protecting the legality and integrity of the procurement process is the access to justice by organisations and businesses participating in public tenders by offering a complaint review system in accordance with international standards. The procurement legislation should lay down the mechanisms and institutional set-up for handling complaints filed by aggrieved tenderers. The review and remedies system should provide speedy, effective and competent handling and resolution of complaints, including comprehensive publication of judgments and their rationale. Further, the review organisation should have the capacity and capabilities to handle complaints in accordance with the regulatory framework and to ensure their effective and competent implementation;

The capacity of the Thai system for control and integrity measures

External Audit

The Office of Auditor General (OAG) is responsible of external audit under the Audit Act covering the public budget entities in the country. The OAG has 3000 staff all over the country and the audit covers the entire procurement process and emphasis are placed on compliance with the regulations. An Annual Report is published and submitted to the parliament. The contracting entities are obliged in accordance with the regulation to submit all tender and contract documentation to the OAG above a certain value (1 million Bath).

As stated in the 2008 Annual report³¹, the objective of the audit was to ensure that the procurement process is carried out reasonably and transparently with fair price competition and cost-effectiveness. The audit process comprises 3 important aspects, i.e., the audit of the preparation of action plan for the purchasing and contracting for works, the bidding process and the audit of contract performance, including the utilization of funds. Interestingly, the audit results show that the procurement in many cases was not conducted in accordance with the rules and regulations on procurement, the resolution of the cabinet and related written instructions. The number of cases that may involve corruption or non-compliance with rules and regulations of which reports had been issued was 322 in 294 agencies of which 107 were government agencies (114 cases), 181 local administration organizations (202 cases) and 6 state enterprises (6 cases). The number of cases related to errors in purchasing and contracting for works, the prescribing of median/reference price and material management was 90 or 27.96%, errors in receiving and making payment or shortage of fund in the account was 93 cases or 28.88%, violation of rules and regulations was 114 cases or 35.40%, others was 25 cases or 7.76%. The number of procedural incompliances found by the OAG supports the need of training and capacity strengthening of the procurement professionals (see above).

Review of Complaints

An aggrieved tenderer can file a complaint with the contracting authority in case it has found that the procedure is non-compliant with the regulations. Appeals can be made to the Committee in Charge of Procurement (CCP) or the e-Auction Procurement Committee (e-PC) of the Ministry of Finance or their sub-committees. The decision is sent to the head of the contracting entity, but only as a recommendation. Legal enforcement of remedies rests only with the Administrative Court which has lengthy procedures. Considering the number of tender proceedings in the country, the number of filed complaints with the CCP are few in an international comparison. The number of complaints under the two regulations were only 31 during fiscal year 2013. The survey (see below) confirms that there is wide-spread reluctance to file complaints among the bidders due to low confidence in the system and unwillingness to disturb the business relations. The review and remedies system is not in line with international standards and should be subject for a future revision. It should be seen as an integrity strengthening priority. There are different complaint review and remedies models in place and reference can be made to the UNCITRAL Model Law³² and common practice within the European Union³³. However, the status of the review system is dependent of the legal status of the regulatory framework; a procurement law should in turn provide improved legal certainty to the tenderers.

Specific integrity control instruments

³¹ Performance Report for the Budget Year of 2008

³² UNCITRAL Model Law on Public Procurement (2011) Chapter VIII Challenge Proceedings

³³ SIGMA Paper 41, Public Procurement Review and Remedies Systems in the European Union (2007);

Control in public procurement is primarily aimed at ensuring that public funds are used for the purposes intended by controlling that procurement operations in all stages are done in compliance with applicable policies and regulations. There are also special control instruments, legally and institutionally, that are designed to minimize the risk of irregularities in public procurement, such as rules on conflict of interest, and specialized bodies and instruments assigned the responsibilities of combatting corruption and fraud.

Conflict of Interest

In the procurement context, the issue of conflict of interest occurs as a reason of specific relationships between the contracting authority and the tenderers which may affect negatively the impartiality of the process. One specific problem relates to consultant firms which may be engaged by the contracting authority to support the preparation of feasibility studies or even tender documents while being owned or part of a co-operation with tenderers that will submit tenders for the goods or works contracts. Internationally, where a firm, its affiliates or parent company, in addition to consulting, also has the capability to manufacture or supply goods or to construct works, that firm, its affiliates or parent company normally cannot be a supplier of goods or works on a project for which it provides consulting services and vice versa, unless it can be demonstrated that there is not a significant degree of common ownership, influence or control.

Procurement related conflicts of interest may occur in different capacities and at different levels and is one of the most complex issues to deal with in the context of procurement.

The procurement regulations (1992 and 2006) and the Anti-corruption Act of 1999 address the issue of conflict of interest but not in accordance with international definitions and recommendations (see below). It can further be discussed to what extent implementation and enforcement effectively are tackled. The e-auction regulation requires that the project tender committee should comprise of one member not holding a government service position or receiving regular salary, which could be seen as rule aimed at ensuring the impartiality of the tender committee.

In an international context, the issue of conflict of interest in public procurement is addressed and constitutes an important factor to ensuring the impartiality of the procurement process.

The OECD³⁴ defines conflict of interest as:

A “**conflict of interest**” involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.

OECD guidelines draws a distinction between actual, apparent and potential conflict of interest.

The UNCITRAL Model Law Art 26³⁵

A **code of conduct** for officers or employees of procuring entities shall be enacted. It shall address, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as **declarations of interest** in particular procurements, screening procedures and training requirements. The code of conduct so enacted shall be promptly made accessible to the public and systematically maintained.

³⁴ OECD Guidelines for Managing Conflict of Interest in the Public Service

³⁵ UNCITRAL Model Law on Public Procurement (2011) Art 26

EU Directives Art 24³⁶

Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators. The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

Anti-Corruption Commissions

There are two key public organisations assigned the powers and responsibilities to combat corruption and fraud within the public administration, including in the area of public procurement. The central body is the Office of the National Anti-Corruption Commission (NACC) of which operations are governed by an Organic Act on Anti-corruption (BE-2542) from 1999, as amended. The second body is the Office of the Public Sector Anti-Corruption Commission (PACC) which in addition to the Organic Act BE-2542 manages its operations based on Executive Measures in Anti-Corruption Act BE- 2551 (2008). The NACC has the powers and responsibilities to prevent and suppress corruption and fraudulent practices while the penal code regulates the judicial actions. The Act prohibits public officials from unethically receiving property or any other benefits from any person. There is also an Act on Wrongful Acts related to the submission of bids to state agencies (BE-2542) which also is managed by the NACC. PACC mandate is limited to taking actions with respect to lower ranking public officials while NACC has a national mandate, including high ranking public servants and the political system.

NACC reports to the parliament while PACC reports to the Ministry of Justice. NACC has 1500 staff and handle 10000 cases/year. 60-70% of all cases are procurement-related. Only a minor proportion, approximately 5%, leads to any action by the NACC, which can be disciplinary measures, or bringing cases to court for legal actions as criminal offences. Very few cases lead to an actual verdict. The majority of all wrong- doings are related to the design of terms of reference and the misuse of the standard/reference prices. ***Noteworthy, the NACC has imposed the publication and mandatory use of reference prices into the procurement system.***

PACC has 270 staff members and handle 3 000-4 000 cases per year of which 700-800 are procurement related. Totally around 100 cases have led to legal actions. Interviews confirm that legal enforcement is weak.

Many countries have established similar specialised anti-corruptions bodies with more or less identical responsibilities to those of the Thai institutions. They represent undoubtedly an important preventive integrity risk mechanism and knowledge centre on corruption and fraud in the country. At the same time there is a need to discuss the efficiency and costs of the two bodies considering the extent of resources allocated to this kind of operations. In particular, it is important to discuss the policy role of NACC in the procurement process as regards its power to decide on the use of reference prices. It is a policy area that, alternatively, could more naturally belong to the Ministry of Finance and the CGD. NACC exercises, in addition, a number of general controlling and investigating functions with significant impact on the procurement operations. Another aspect of importance is

³⁶ European Directive on public procurement 2014/24/EU. Art 24. Code of Conduct

the need to discuss the existence of two organisations with similar mandates and tasks. The issues of co-ordination and overlapping responsibilities and functions deserve strong attention.

Whistle Blower Protection

A whistle blower protection act is in place, which is good, but it is the understanding from the interviews and survey that the act does not seem to give sufficient protection to the actors. Subsequently, the procedure is not commonly used.

Integrity Pacts Initiatives

The government has recently decided to request, as a pilot, the inclusion of integrity pacts in a number of large projects of national interest which is a welcomed initiative. The Integrity Pact (IP) mechanism has been developed by Transparency International³⁷ as tool to help governments, businesses and civil society fight corruption in public contracting. It consists of a process that includes an agreement between a government or government agency ('the authority') and all bidders for a public sector contract, setting out rights and obligations to the effect that neither side will pay, offer, demand or accept bribes; nor will bidders collude with competitors to obtain the contract, or bribe representatives of the authority while carrying it out. The conditions and commitments shall be part of the tendering process and should be laid down in the tender documentation and the declaration of integrity commitment to be signed by the public officials. The tender submission form with the commitment shall be signed by the authorised person of the tendering firm and he/she is made responsible for the integrity pact.

Private Sector Integrity Initiatives

There are some very interesting private sector initiatives to strengthen integrity in public procurement, such as the IOD (Institute of Directors) which has created a system for Integrity Quality Assurance. The system is built on a zero-tolerance against corrupt actions by the certified firms. It is built on a self-assessment procedure where the companies need to comply and fulfil a number of pre-determined criteria and commit themselves to act ethically in public procurement. Almost 54 of the large companies (domestic and international) in Thailand have completed the certification procedure. There are other examples of private sector initiatives, such as the introduction of Integrity Pacts (see above) and specific initiatives to enhance transparency in the construction sector.

7. The Thai Stakeholder Perspective - Observations and Conclusions

The review of a public procurement system, amongst other, has been carried out by a series of interviews with the main stakeholders covering public authorities, state enterprises, public sector entities and the academia. However, in order to get a more comprehensive and trustworthy picture of how the public procurement system is perceived, UNDP and OPDC decided to conduct a survey among these stakeholder groups. For this purpose a set of questionnaires was prepared and adapted to the specific conditions of the various stakeholder groups and disseminated in advance to a large number of entities. As to support the preparation of the responses, a special seminar was organised in September 2014 by the UNDP and the OPDC to present the background of the project and to clarify the intent behind the questions.

The questions covered the main aspects of the public procurement system with emphasis on integrity risks, but as well functionality issues were addressed. The sections covered regarding the public sector entities were:

³⁷http://www.transparency.org/whatwedo/publication/integrity_pacts_in_public_procurement_an_implementation_guide

- The regulatory framework (on its effectiveness)
- External institutional framework (OPPM and CGD)
- Internal procurement organisation and processes
- Market functionality
- Control and complaint mechanisms
- Integrity risks in public procurement
- Current integrity risk prevention

The questionnaire for the private sector was slightly different in order to reflect their participation in public tenders. There were both open-ended and non-open ended questions.

The number of respondents:

Public agencies: 55

State enterprises: 17

Private sector: 10

a) Views on the regulatory framework

The main points discussed were the issue of reforming the regulatory framework with the adoption of a public procurement law and to what extent e-auctions and the reference price system generate efficiency as well as mitigating integrity risks.

A majority in favour of a public procurement law

As a general view, the current regulations promote the principles of transparency and equal treatment, but at the same time places too much emphasis on the lowest price, thus significantly ignoring quality. It is seen as outdated, too detailed and difficult to interpret correctly. A majority of the respondents is in favour of replacing current regulations with the adoption of a nation-wide public procurement law. Public authorities express stronger preferences on this matter than state enterprises. Such a step would increase enforceability, provide better protection to public officials and align public procurement with new developments. On the other hand, there is also a group that appreciates the advantages of current regulation.

Diverse opinions on the general usefulness of e-auctions and to the extent this instrument prevents bid collusion

The appreciation of e-auctions lies mainly in the systemisation of the process and that e-auctions may contribute to increased transparency. No convincing evidence of positive effects on competition and prices. The criticism voiced points at the lengthy procedures, the way the e-auction is managed (bidders meet face-to face), difficult to apply for many contracts, and the obvious risks of bid collusion.

There is a need of streamlining and simplifying the procedure.

Neutral or positive opinions on reference prices and to the extent this mechanism prevents bid collusion

There seems to a fairly clear view that the use and publication of reference prices may prevent bid collusion, but the responses to the open-ended questions express a more criticising attitude. The

concerns relate to the lowest price focus where quality is neglected, lengthy and complicated procedures to determine the reference prices, competition discouragement and that the system does not really prevent price collusion.

b) Views on external institutional framework

The questions under this section addressed the operations of the Office of Public Procurement Management (OPPM) under the CGD of the Ministry of Finance and the two Public Procurement Committees formed under the 1992 and 2006 regulations.

The majority of the respondents agrees that the organisational location of OPPM under CGD is appropriate and its level of independence is sufficient, but lacks sufficient staff capacity and implementation support capacity. In more detail, there is lack of interpretive and consistent guidance from the OPPM.

The recommendation is to develop the guidance and training capacity of OPPM. Concerning the procurement committees, the recommendation is to change the composition and reduce the number of members in order to improve efficiency.

c) Internal procurement organisation and processes

The questions covered the organisation of the procurement function, decision-making structure, how the tender processes were organised, training availability and policies and procedures for dealing with conflict of interests.

The information and views expressed are in summary:

- All public agencies and state enterprises have a specialised public procurement unit;
- A clear majority of the public agencies and state enterprises believe that they have sufficient discretionary power or authorisation in order to make procurement decisions;
- The most difficult tasks constitute the preparation of ToR, the determination of the reference prices and the selection of appropriate procurement method, as ranked in this order;
- There are some differences on the length in months to prepare e-auctions, but interestingly state enterprises seem to experience more lengthy procedures than public agencies. In average, it seems that the preparatory time could be found in the time span of 2-4 months;
- The rules and procedures to determine conflict of interests are generally satisfactory; and
- A clear majority of the procuring entities request more training, in particular on the regulatory framework, the new e-procurement system, and on integrity risks.

d) Market functionality

The questions covered the competitive position in the market for public contracts in general but also in different segments. Information was also asked about participation rates, actions to increase competition, and the extent of perceived collusive practices.

The information and views expressed are in summary:

- The participation rates in public tenders vary depending on the type of contract, but it appears that general supply contracts attract more competition than services and construction contracts. Interestingly, state enterprises seem to experience higher participation rates;
- Notably, the average overall participation rates in Thailand don't look too impressive (3-5/tender) and should trigger a further investigation;

- The most competitive sectors with acceptable tender participation rates are construction, ICT and security. The most problematic sectors with less tender participation are car rental, public relations and transportation services;
- The practice of de-briefing is not widely spread among the procuring entities;
- ***Noticeable, there is a limited awareness and experiences of actual bid collusive practices among the procuring entities, which would deserve further attention and research.***

e) Control and complaint mechanisms

The questions covered the regulatory frameworks and institutional mechanisms for control of public procurement in terms of external audit, financial control as well as the measures in place to fight corruption and irregularities. An important aspect of this section dealt with the standard of the complaint review system.

The information and views expressed are in summary:

- Full appreciation of the importance and usefulness of a strong and independent control structure in public procurement both with respect to financial control and integrity;
- Concerns are raised regarding the risk of overlaps, lengthy investigations and lack of sufficient knowledge in public procurement among the controlling institutions;
- Too much focus on procurement staff while the “big fishes” go free;
- There is mix of views on the standard of the complaint review system. The public sector entities are more positive than the private sector. The private sector is reluctant to use the complaint instrument since it is time consuming, may affect negatively future business with the procuring entity and weak enforcement of complaint decisions.
- The recommendations are to speed up the processes and pay more attention to all dimensions of procurement.

f) Identification and prevention of integrity risks

These sections used both open and non-opened questions. The questions covered both the institutional capacity and capability to identify, prevent and investigate integrity risks in public procurement as well as the perceived integrity risks within the various steps of the procurement process. Some of the views coincide with answers given under the control section above.

The information and views expressed are in summary:

The Office of the National Anti-corruption Commission (NACC) is considered a powerful institution with a clear legal foundation for its operations. The question marks raised relate to insufficient knowledge about the regulatory frameworks, lengthy procedures and insufficient information about the progress of the investigatory work. The recommendations include a need to clarify the roles between NACC and the Office of the Auditor General and not least with the Department of Comptroller General, better disclosure of the status of the investigations, and full publication of the NACC decisions.

The main integrity risks in the procurement process as expressed by the survey are:

a) Pre-tendering

- Political and external interference;
- Lack of proper and timely planning, budgeting and needs analyses; and

- Definition of the terms of reference.

b) During tendering

- Lack of competition and risk of collusive tendering;
- Conflict of interests; and
- Lack of accessibility to tender announcements and tender evaluation records.

c) Post- tendering

- Abuse of and non-performing contractors or sub-contractors; and
- Deficient supervision by public officials or even collusion between supervisors and contractors.

g) Risk mitigation policy measures

A majority of the respondents express as a priority the need of streamlining the institutional structure of relevant bodies in order to remove overlaps and uncertainty in responsibilities and tasks. There is also a strong conviction that transparency is an important factor to mitigate integrity risks and that transparency requirements generally are sufficiently met, but can be further improved.

The other policy measures recommended are generally well reflected under the other sections.

8. Integrity Risks Mapping - a Vulnerability Analysis of the Thai Public Procurement System

The purpose of this section is to identify and discuss the most prevalent integrity risks within the Thai public procurement system. Applying a systematic methodology of risk mapping should be a good way for stressing the most risky phases and to indicate the measures for reducing these risks. The main objectives of a methodology used for mapping the risks are:

- Identifying the risks in order to put in place efficient means to reduce fraud and corruption,
- Identifying risks to render investigations more efficiently by concentrating the efforts on sensitive processes, methods or persons³⁸.

As discussed above, the most frequent irregularities in public procurement have been identified to be the following:

1. Bid collusion among private-sector suppliers;
2. Kick-backs (bribes) from suppliers to government officials; and
3. Systemic corruption. The most important cause seems to be patron-client network which is based on relationships and close interaction between the private and public sectors.

Integrity risks in public procurement need therefore to be analysed at different levels in a society and in different aspects. For example, bid collusion and systemic corruption are areas which, in addition, need to be tackled by other measures outside the direct sphere of public procurement. Bid collusion has a market practice dimension that needs intervention under a competition law and by responsible authorities in addition to initiating public procurement measures, exclusively. A number of questions needs to be addressed, such as:

- What are the most common collusive bid rigging schemes and how to prevent them?
- How to spot bid rigging in the pre-contract stage?
- What are the most common bid suppression schemes?

³⁸ UNDP has published a number of sector analyses of integrity risk management, as in health and education

- How to create profound indicators that will help to identify collusive behaviour?
- How to counteract bid rotation schemes?
- What are the best practices and prevention techniques to avoid big rigging?
- How to determine whether a form of subcontracting fulfils the criteria of bid rigging?
- Why it is essential to have a deep knowledge of the market and price level?

A more in-depth presentation of bid collusion and bid rigging is done in the Guideline on mitigating integrity risks in the procurement process – see Annex 1. Particular attention needs to be placed on collusive practices in conjunction with e-auctions since this is the most common method in Thailand.

Bribery and kick-backs operate commonly in tandem with bid collusion since the bid collusion often becomes a pre-requisite for the bribery act. The extent of corruption is difficult to measure, but a common opinion is that irregularities are widespread in public procurement and that the costs are excessive and may even reach significant levels. If true, it would impact the whole economy negatively.

Systemic corruption, as discussed in the Thai context, is probably the most challenging task since it is more a consequence of a dysfunctional society in these specific aspects than clear weaknesses in the legal and institutional set ups.

The legal and institutional frameworks on public procurement constitute the **“the basic integrity preventive infrastructure”** against all types of irregularities. The procurement- related rules, policies and institutions have fundamentally the aim to promote efficiency and cost effectiveness in the use of public funds, while as a more secondary goal to ensuring the integrity and fairness in the procurement processes. It has proven difficult to combat corruption and fraudulent practices by just focussing on the design of the procedural and institutional frameworks, only. As an example, countries with more or less identical legal frameworks and institutional set-ups, such as being the case between the 28 member states in the European Union, demonstrate a strong variation in terms of the perceived existence of corruption with reference to Transparency International Perception Index. Obviously, there are other explaining factors to these existing differences than the basic quality of the legal and institutional frameworks.

The overriding challenge will then be to answer the question, how to change an existing “non-integrity culture” with extensive credibility problems in the view of the general public and other important stakeholders?

A vulnerability integrity risks mapping of the Thai procurement system is done below covering the following main components:

- Regulatory framework;
- E-auction system and reference prices;
- Institutional coordination and capacity;
- Operational capacity and professionalization;
- Market functionality risks;
- Risks in the procurement process; and
- Control and monitoring.

Important Integrity Risks

a) The absence of a solid and modern regulatory framework

The absence of a sound and modern public procurement law that covers all public sectors in the country, including utilities companies (entities operating in the water, energy and transport sectors) compatible with the GPA requirements constitutes an overriding integrity risk. The current situation

is characterised by low enforceability, insufficient legal protection and certainty and considerable easiness under the current regulations to decide exclusions and exemptions.

A Sub- committee chaired by the CGD is currently working on the drafting of a new public procurement law which is very positive initiative. A first draft law is planned to be presented in early 2015 and will be subject to public consultation.

The surrounding regulatory framework, so called non-core regulations, plays in addition an important role in preventing integrity risks in public procurement. In particular, the law on conflict of interest, the law on whistle-blower protection, the competition law, budget and external audit laws, civil and administrative laws are important influencing factors for the functionality and soundness of the public procurement system.

b) The mandatory application of the e-auction system and reference prices

The e-auction system mandatory for all contracts above 2 million Baht has been discussed critically from an efficiency point of view in this report and the main recommendation will be to modify it in the future. However, it can also be discussed to what extent the design of the e-auction system prevents effectively procurement integrity risks, in particular the risks of bid collusion, in line with the goals.

There are a number of observable integrity risks in the e-auction system:

- The pre-review of the terms of reference gives potential tenderers an opportunity to review and comment the specifications. To allow for a pre-review of the tender documentation is generally a positive measure in a context when the procurement system is considered clean, but, regrettably, constitutes a definite integrity risk in a situation where the intentions among the bidders are to collude. A preview provides an opportunity for collusive planning.
- The e-auction is run in one physical place where there is a risk of face-to-face meetings between bidders and awareness of the competitors.
- The reference price system has been discussed from an efficiency point of view (see above) but may likewise be reviewed from an integrity perspective. The role of the reference price as a ceiling price and made public in advance is debatable.

Standard economic theory and concrete cartel stories uncovered by antitrust authorities provide guidance on the risks³⁹. When the contract is awarded by using the lowest-price criterion a cartel will select among its members the winner of the contract which is supposed to bid a price very close to but lower than the reference price. All other fellow conspirators will bid exactly the reference price or will refrain from bidding altogether. Thus, when the buyer adopts a reference price and makes it public, as is the situation in Thailand, a cartel may use it as a focal point for determining how much the selected winner gains which in turn will affect how much other members should be expecting in return. Now adopting a reference price is instrumental to determine the highest possible expenditure of the buyer, however, making the reference price public could favour collusion. Reference prices should be used as cost estimates as part of the budget process and design of the contracting strategies, but not as a price control mechanism. Whether to publish the budget estimations or not should preferably rest with the procuring entities. The issue of publication of budget figures has both a tactical aspect as well as a practical dimension. In long term framework agreements, as an example, is it extremely difficult to estimate the costs correctly.

c) Inadequate central institutional co-ordination and capacity

³⁹ The Law and Economics of Framework Agreements - Designing Flexible Public Procurement Solutions," G.L. Albano and C. Nicholas, Cambridge University Press, 2015

The main institutional actors within the public procurement system have been discussed in some depth (see above). The integrity risks as regards the institutional framework could be summarised as being:

- CGD as the central procurement policy body operates under a **fairly weak legal framework**. The central policy coordination body should base its operations under a public procurement law. The issue of independence and certain weakness in the mandate could imply a problem when it comes to co-ordination and legal implementation which in turn could have integrity implications.
- The **NACC has been designated a strong policy mandate in public procurement** with its responsibility for the reference price system. The appropriateness of this order should be discussed from both an efficiency point of view and in terms of integrity risks (see section above).
- Centralised support to the procurement community in terms of guidance and training is essential for the enhancement of integrity-governing management and operations within procuring entities and the private sector, as well. **The capacity of CGD to provide training and operational support is regarded insufficient.**
- The **complaint review mechanism** should be based on the public procurement law and be separated from the policy and regulatory functions.
- The **anti-corruption institutional structure has an overlapping and costly design** with a weak enforcement capability and should therefore be subject to a major review and reform.

d) Insufficient operational capacity and lack of professionalization

Authorisation, approvals and decision-making rules are well prescribed in the regulations. The main question is to what extent the discretionary power is optimally allocated to the contracting entities and whether accountability and management control is effectively exercised. The extensive use of committees in the procurement process may risk to dilute accountability since the point of management responsibility may become unclear with system.

The procurement function and profession need to be professionalised in the future. There appears to be insufficient confidence in the procurement function and profession which is a serious integrity risk. Training and increased recognition are needed (see above).

e) Specific market functionality risks

The main integrity risks are linked to the competitive position in the overall market and in individual market segments where the tender participation rates are insufficient. The prevalence of collusive practices and other unacceptable behaviours as well as any legal or technical obstacles for participation in public tenders affect strongly the attractiveness of the public sector market to the private sector. Domestic preferences are further a negative factor to the functionality of the market. Foreign companies would generally improve the competition and it should be noted that those are also bound by strong international commitments to act with integrity (OECD Convention). Those will also take strong risks if acting corruptly.

- The competitive situation in the market based on participation rates data vary considerably between sectors and type of contracting entities. Sectors with insufficient competition (less than an average of 3-5 tenders) constitute an integrity risk that should trigger a further analysis.
- The absence of a competition authority operating under a competition law may lead to insufficient market control and provide room for collusive behaviours.
- Certain elements of domestic preferences and standards may affect competition and facilitate unacceptable behaviours.

f) Integrity risks in the procurement process

A number of opportunities is available in case someone wishes to manipulate the procurement process in a desired direction. However, such measures may not necessarily be of a corrupt nature. It could simply be a matter of non-professional performance by the purchaser as a result of which he/she, without any personal benefits or gains, wishes to act in discriminatory manner in order to favour a certain tenderer. Integrity risks appear in all phases; during pre-bidding, bidding and post-bidding. The list below of integrity risk actions is reflected by the survey and the interviews, but adds a number of general observations. The specific integrity risks in e-auctions have been discussed separately (see above).

- Proposing the preparation of the procurement plan in an attempt to avoid the application of a certain procedure, normally open competitive procedures and, instead, propose other less transparent procurement methods;
- External (political and other) interference in the planning and preparation of tenders;
- Including qualification criteria which are irrelevant with respect to the nature of the contract and obviously unfair against potentially qualified suppliers;
- Preparing the short list of consultants to be invited to submit a tender in a non-objective and unfair manner;
- Designing the technical specifications/terms of reference with the intention of favouring a certain tenderer or even of excluding potentially qualified tenderers;
- Including award criteria in the tender evaluation which are irrelevant to the actual procurement and discriminatory towards certain suppliers;
- The release and leak of information about other tenderers and the evaluation process to a favoured tenderer;
- Accepting obvious conflicts of interest situations without taking any action
- Insufficient competition
- Inappropriate use of negotiated procedure and direct procurement (special method and special case method);
- Designing the contract conditions with the ambition of favouring a certain supplier;
- Accepting changes to the contract conditions after the award of contract has been made, which are neither commercially justified nor in accordance with the applicable rules;
- Accepting tenders from tenderers providing false information and misleading documentation;
- Accepting tenders from tenderers that should have been excluded due to poor previous contract performance, have not fulfilled social obligations or have been subject to legal proceedings for unlawful practices; and
- Manipulating the decision-making process through a significant lack of formal procedures and control mechanisms.

g) Insufficient legal enforcement

The regulatory and institutional structure and capacity for control is clearly sufficient. The problem rests rather in the enforcement. The main risk is that inspections and control do not make enough difference to mitigate corruption and fraud, while instead generate major obstacles to the possibilities to achieve the objectives of efficiency and “value for money”. It is important to strike the right balance. Further, there is a credibility risk involved that should not be underestimated. The few legal cases on corruption in relation to the high number investigated cases can be seen as a sign of poor legal enforcement. The risk is that the public may regard the anti-corruption bodies as toothless and lacking independence.

Strengths in the Thai public procurement system

It is also important to mention some of the key strengths in the Thai public procurement system:

- Long history of competitive public procurement;
- The basic elements of sound and effective public procurement principles and procedures follow international good practice;
- The central institutional set-up on public procurement (CGD) is well placed and experienced;
- The market is well diversified and competitive;
- The new e-procurement system to be launched represents a very positive development; and
- The preventative infrastructure in terms of audit and control is strong and well resourced.

9. Development of Integrity Risk Indicators

Indicators may be used to detect irregularities in the procurement process. The information provided by indicators may give reasons for investigating deeper. Indicators will never prove fraud, but only indicate that the number of “red lights or flags” is too high and that a further investigation might be needed. In econometric studies⁴⁰, red flags suggest a possible increased probability of corruption and provides information on the chance of corruption being present. More red flags indicate a higher chance of corruption, but says nothing on actual presence of corruption in an individual case. Procurements with lots of red flags – and thus a high chance of corruption – may be non-corrupt, while procurement with no red flags – and thus a low chance of corruption – may still turn out to be corrupt. While in individual cases, chances of corruption and actual presence of corruption may be misaligned, the chance of corruption does allow estimating the total number of corrupt cases in a large group of cases.

Below a sample list of “red flag” indicators which may give rise to suspicions of questionable practices within a contracting authority (but not necessarily irregularities):

- The tenders include multiple contact points;
- Abnormal number of contracts awarded by special and special case methods (negotiated and direct contracting);
- Elements in the terms of reference which consistently point at a preferred supplier;
- Unusual number of complaints filed by tenderers regarding tenders launched by a specific contracting authority;
- Repetitive observations of mistakes in the procurement processes within a specific contracting authority identified by audit institutions;
- Excessive number of tenders launched by a contracting entity within the same range of activity;
- Tenders are exceptionally large by volume;
- Few tenders received;
- High number of contracts signed with the same company;
- Clear geographical distribution of contracts for a certain company;
- High number of contracts signed with the same company in e-auctions;
- High number of contracts in which the same company is a sub-contractor or member of a consortium;
- Connection between tenderers (co-operation, ownership and representation);
- Existence of “links” between the company obtaining the contract and the purchaser or members of the tender committee (conflict of interest);
- Size of the company (in comparison with sub-contractors) (or with the amount of the contract)
- Substantial changes in project scope/price after award;
- Exceptional number of cases of poor contract performance at the same procuring entity with cost overruns and time delays; and
- Negative media coverage about a project.

⁴⁰ Identifying and Reducing Corruption in Public Procurement in the EU

The use of the integrity risk indicators is based on a number of basic assumptions. They need to be relevant, identifiable and measurable. Further, there is a need to develop an assessment tool to determine the “seriousness” of the individual indicator and an aggregation value of “red flag” indicators. It is important that the monitoring and controlling bodies may have in place effective systems for collection of data in the first hand and secondly, that they have resources and capacity to make correct and relevant analyses of the information material. Indicator data are only valuable as guidance tools provided it is possible to make comparisons and determine deviations from the “normalities”.

In combination with developing an integrity risk indicator system in public procurement, Thailand could develop a performance measurement system with the use of performance indicators. The purpose of such system is to determine the quality and efficiency of the public procurement system at both national and contracting levels, thereby providing information on the status of the procurement system and the need of and guidance in the reform of public procurement in the country. Negative performance at the contracting levels could serve as red flag indicators, as well.

10. Recommendations for a Public Procurement Integrity Reform in Thailand

Any national strategy and action plan set up to mitigate integrity risks to public procurement needs to be discussed in the overall context of the public procurement system. This view is supported by an on-going work by OECD⁴¹ to adopt a set of principles for a sound, transparent and efficient public procurement system which is meant to replace the 2008 Recommendation of the Council on Enhancing Integrity in Public Procurement. As underlined in this report, corruption and fraud in public procurement cannot be isolated from the other parts of the society, but acts usually as a mirror of the overall situation in a country. Much can be done to mitigate the integrity risks in public procurement by various constructive preventative measures, such as improving the policy and institutional frameworks, but there are definitely limitations to what can be achieved unless there is a firm will and commitment - **a joint mobilisation for a zero-tolerance stance** - from all the key stakeholders in the society to reform the political, administrative and business culture and practice in the country. As an example, political interference, abuse of discretionary power, client-patron networks are all phenomena that cannot be eradicated from public procurement solely by concentrating the integrity mitigation efforts on the procurement legal and institutional frameworks. Those need to be tackled at the overall political and institutional levels in the society. Further, it is important to realise that the surrounding **non-core legal and institutional framework** holds a significant function for the efficiency and integrity of the public procurement system, such as administrative law, civil service law, budget law, audit law and competition law.

Enhancing integrity in public procurement needs a systematic and coherent approach where all main components of the public procurement system are subject to analysis and change. Further, any national integrity enhancement strategy needs to ensure that the action plan is consistent with and does not contradict the policy goals on efficiency and “value for money” in public procurement. The overarching goal should be **“value for money with integrity”**. The combination of the mandatory e-auction system and the practice of the reference price system as a ceiling not to be exceeded affects likely the overall market functionality negatively and should be subject to economic impact analyses.

⁴¹ OECD, 14 November 2014, Recommendation of the Council on Public Procurement (draft Recommendation), which is set to replace the 2008 Recommendation of the Council on Enhancing Integrity in Public Procurement [C(2008)105].

The following main general policy and integrity specific actions are proposed to be considered in a future reform of the Thai public procurement system having the dual goals to improve both **efficiency and integrity in the conduct of public procurement operations**. It could be seen as a Priority Framework for Mitigating Integrity Risks in Public Procurement.

The recommendations are divided into two sections; the **first section** provides a set of recommendations of general policy nature aimed at improving the overall functionality of the public procurement system while the **second section** provides a list of actions specifically designed to mitigating integrity risks in public procurement.

General policy reform initiatives

- **Develop the policy framework** as part of a national strategy to reform and modernise the public procurement system based on a revised set of priorities, which would include economic, integrity, environmental, and social goals. Public procurement should be seen as strategic governance tool for the realisation of important public policy goals and to the improvement of the quality and efficiency of the delivery of public services.
- **Develop and adopt a coherent, sound and modern public procurement law**⁴² - with a full set of secondary legislation, guidance and model documentation- covering all public sector entities (government, regional and local authorities, including the utilities companies), compatible with GPA- requirements and international good practice where the GPA- rules don't apply. The utilities should be offered a more flexible procurement regime in accordance with international practice. Such a legal reform would provide stronger enforceability, legal certainty and protection and reduce the leeway for exclusions and exemptions. Enhanced confidence in the legal framework by the private sector would also improve the credibility and overall market attractiveness. Fulfilment of future GPA- requirements would further imply a gradual removal of existing provisions regarding domestic preferences and eligibility conditions of technical and administrative nature for tender participation. It would strengthen competition and contribute to integrity enhancement of public procurement.⁴³
- Develop the **central institutional capacity** by clarifying the responsibilities (including the issue of independence), functions and status of the OPPM of the CGD under a new public procurement law. In particular, there will be an increased need for policy development and co-ordination, advisory support, training and monitoring of public procurement operations. Monitoring and supervision is highly dependent of access to a reliable and comprehensive statistical and database system as well the possibilities to measure performance and progress over time;
- Continue the development of the **e-procurement system** which is a very positive step in the modernisation of the public procurement system. It will strengthen transparency, efficiency and create the basis for developing the statistical and monitoring system. It should be linked to the budget, expenditure and payment systems.
- Improve the **statistical and reporting systems** and include data on integrity risk indicators;
- **Reconsider the mandatory use of e-auctions** for all goods and works contracts above the thresholds. E-auctions should preferably be voluntary to use and seen as a competitive instrument to be used for the award of contracts feasible for e-auctions and where price is the dominant tender evaluation criterion.

⁴² A draft public procurement law is under preparation by a Committee chaired by the CGD and will be subject to consultation in early 2015.

⁴³ The government has decided to request integrity pact commitments in a number of pilot projects of national interest, such as the large bus tender for Bangkok Metropolitan Administration.

- Redesign as well the **reference price system** and **redirect today's focus on lowest price**. The reference price system, as practised, may negatively affect "the value for money" outcomes as well as constitute a potential integrity risk contrary to the intentions. Quality considerations in tender evaluation, understood in a wider meaning, should play a much stronger role in the Thai public procurement system;
- Consider the introduction of **centralised purchasing arrangements and framework agreements**. It would increase both efficiency, provide better integrity assurances and would contribute to a more effective procurement in sensitive sectors, such as on pharmaceuticals. Centralised purchasing and framework agreements, correctly implemented, will generate better prices due to aggregation benefits, lower transaction costs, simplification, increased legal and contracting certainty, and compatibility and standardisation gains. In addition, those instruments will also reduce the number of tenders (risk mitigation) and improve oversight which positively may affect the integrity dimension of procurement operations;
- Ensure effective **co-ordination and co-operation** between the key institutional actors. It is important that a natural and effective distribution of responsibilities, tasks and communication between the various institutional players is established, in particular between the CGD of the Ministry of Finance, the Office of Auditor General, the Budget Bureau and the Anti- Corruption Commissions (NACC and PACC);
- Reconsider the current duplication of the Procurement Committees under respective regulations and their responsibilities, as well the compositions. It is important to establish an **Advisory Committee** for policy development and co-ordination under the responsibility of the Ministry of Finance (CGD) covering all aspects of the public procurement system;
- Consider to establish a special **Procurement Consultation Forum** where the main stakeholders, such as the main purchasers, private sector organisations, budget and financial control, audit and other controlling bodies, of the procurement community can be represented for exchange of information and dialogue in important matters of mutual interest;
- Support and invest in the **professionalization** of the procurement function, management and staff, including strengthening the credibility of the procurement profession, by developing a **national training and career development strategy in public procurement and other capacity building measures** (e.g. certification), covering not only individual purchasers and the direct operational side of procurement. Equally importantly, the concept of professionalization should guide the government in all of its decisions and actions to organise and handle procurement processes, such as procedures for decision-making, control and audit, complaints review, budget planning and execution, and deliveries and payments.
- Develop in the long term a **quality assurance systems** for certification of contracting entities and private firms which have interest in public contracts;
- Establish a specialised **complaints review and remedies mechanism** under a future public procurement law;
- Consider to adopt a **competition law including the establishment of a competition authority**. Such measure would improve the market functionality in general and the public sector market attractiveness in particular, as well constitute a significant integrity preventive tool against collusive practices; and
- Develop a **performance measurement and indicator system** based on the OECD Methodology (need of an efficient data collection system).

Recommendations for Specific Integrity Risks Mitigation Initiatives

Adopt an **Action Plan** to combat all aspects of corruption and fraud in public procurement as part of the implementation of the new Anti-corruption strategy adopted by the government. The Action plan would be covering most likely the following components:

- Complete and **adopt a Guideline on how to mitigate integrity risks** in the public procurement process (see Annex 1). It should be adapted, where applicable, to the Thai context;
- Develop a **special training system and material on Mitigating Integrity Risks** in Public Procurement based on the Guideline designed for both public purchasers and suppliers;
- The issuance of **blacklists or exclusion lists** are based on well-defined justifications and managed by the competent authority (CGD);
- Strengthen the **rules on conflict of interest** by adopting a code of conduct for both the public and private sectors;
- Strengthen the **whistle blower mechanism** in order to give sufficient protection to the actors;
- Implement an **Integrity Pact** formed between the private sector and the contracting authorities of acting with integrity in the tendering processes which should be reflected in the tender form for submission of the tender (part of the tender documentation);
- Develop a **management procurement integrity risk system** - including conflict of interest - within the contracting entities covering key aspects of the procurement process, addressing the recruitment of procurement staff, the composition of tender committees, decision-making procedures, contract implementation etc.;
- Improve **accountability with a clear chain of responsibility** and decision making authority plus external and internal control;
- Increase **transparency and accessibility to public records** and documents. Engage the civil society to scrutinise public procurement
- Ensure that the **reporting and statistical system** on public procurement prepared by the various actors addresses integrity aspects specifically;
- Initiate **research on the extent and costs of corruption and fraud** in the country by engaging universities and international organisation;
- Prepare special **Guidelines on Integrity in Public Procurement** (in addition to the checklist) to be issued jointly by the CGD, AOG and NACC;
- Form a **special Integrity Forum on Public Procurement** with the key stakeholders, including the private sector and the civil society, and possibly chaired by CGD and NACC for annual or semi-annual meetings;
- An **awareness raising campaign** on integrity in public procurement should be prepared and implemented by CGD and other important actors (NACC and PACC);
- Develop a **risk indicator system with red-flags** which could signal potential problems in the procurement process;
- Consider introducing a **specific ex-ante control mechanism** to be used in large tenders and tenders of important national interest. As one example, a functional system of peer review (in UK called "Gateway Review"⁴⁴), is used. The primary objective of the gateway review is to improve the effectiveness and efficiency of larger public investment projects in the infrastructure sector, but such systems have also proven to provide increased quality and integrity assurance. It operates as an ex-ante control procedure. Other options would be to form special Observatory mechanisms where external professional observers under the

⁴⁴ <http://www.dfpni.gov.uk/gateway-review>

public procurement law have access to the procurement process during the tendering process with the right to express opinions and to request remedial actions⁴⁵.

⁴⁵ Public procurement control authority in Romania

Annex 1 – Guideline for Mitigating Risks in the Procurement Process

Introduction

The objective of this Guideline is to provide an instrument on how to mitigating integrity risks in the procurement process by focussing on risk areas and circumstances, how to detect those and how to prevent and mitigate such integrity risks. The Guideline is elaborated as part of the UNDP project titled Mitigating Risks to Integrity in Public Procurement. The UNDP has agreed with the Office of Public Sector Development Commission (OPDC) and in close liaison with the Office of Public Procurement Management Department (OPPM) of Comptroller General’s Department (CGD), the Ministry of Finance, the private sector-led Anti-Corruption Organisation of Thailand, the State Enterprise Policy Office and other key stakeholders, to undertake this project.

The Guideline is primarily meant to be used as a guidance tool for all institutions involved in the control and monitoring of public procurement in the country, in particular the CGD, the Office of Auditor General (OAG), the Office of the National Anti-Corruption Commission (NACC), the Office of the Public Sector Anti-Corruption Commission (PACC), and the Budget Bureau. Secondly, the Guideline should be used as an awareness and training instrument for procurement managers and staff within the contracting entities as well as for private sector entities and organisations. At this stage, it should be seen as a model for a guidance document rather than a complete version. Once completed and fully adapted to the Thai context, it should preferably be adopted by the Ministry of Finance as a guidance document in accordance with the regulations.

The Guideline is based on international research and guidelines on corruption and fraud, in particular the OECD⁴⁶, the World Bank⁴⁷ and the European Commission⁴⁸, but also other sources⁴⁹. There is also an attempt to reflect, to the extent possible, the Thai context and make references to the relevant legal provisions, where applicable. However, since a public procurement law is under preparation, the recommendation would be to use the future law as the basis for the Guideline. Further, a large proportion of the tendering processes is today carried out with the use of e-auctions which complicates the design of the Guideline. There is comparably little research and documentation available on the specific integrity risks in e-auctions. Some of the research on e-auctions has been discussed in the main report. As underlined, the main risks linked to the e-auction system in Thailand seem to be tied to the way in which the procedural framework has been designed for operating the e-auction processes. In particular the use and publication of reference prices could represent a significant integrity risk as well as in the way e-auctions are organised. However, the integrity risks in e-auctions need to be analysed more in-depth as well be placed in the overall context of a future reform of the public procurement system. This Guideline will, therefore, focus on the integrity risks occurring in traditional procurement processes, but those are substantially the same as for a tendering procedure with an e-auction, at least during the phases prior and post the e-auction exercises.

In agreement with UNDP and OPDC, the guideline should focus on important risk areas which are:

1. Bid collusion and bribery (kickbacks);
2. Conflict of interest;
3. Political interference; and
4. Abuse of discretionary power.

⁴⁶ OECD Guidelines for fighting bid rigging in public procurement, OECD; OECD Enhancing Integrity in Public Procurement: A checklist

⁴⁷ Fraud and Corruption Awareness Handbook, World Bank

⁴⁸ Identifying and Reducing Corruption in Public Procurement in the EU

⁴⁹ Guidelines for Procedures – How to Recognise and Deter Bid Rigging, Commerce Commission, New Zealand, 2010

While the Guideline attempts to address all of the four risk areas identified, it treats the political interference and abuse of discretionary power as issues which need to be handled and addressed at the policy level within the Thai government, rather than within the context of a practical guideline. This is due to the fact that **possible political interference in the procurement process reflects a much bigger problem within the society and cannot easily be discussed and resolved within the framework of the Guideline.** The issue of discretion provides also a principle dimension of importance as being determined by administrative and civil service laws in addition to the regulatory framework in public procurement. One of the fundamental objectives of any legal framework in public procurement is to determine when and how decisions in the procurement process should be made, i.e. the degree of discretionary powers that should be granted public officials assuming responsibilities for procurement operations and procedures. **Discretion as such is not the problem, since such is needed, but instead the misuse or abuse of discretion.**

Bid Rigging and Bribery

Scope and definitions

A corruption scheme often involves more than one type of misconduct. A corrupt scheme in procurement often begins with a demand for, or offer of payment, followed by bid rigging and finally fraud to cover up the scheme.

Demand for payment. A government official demands a bribe or kickback from a firm or individual, or a firm or individual offers a bribe, in exchange for a contract award. In most cases, the corrupt official will permit the bribe payer to inflate the price to cover the bribe and preserve its profits.

Bid rigging. To ensure that the contract will be awarded to the bribe-paying firm (whose prices are now inflated to cover the cost of the bribe), the actors manipulate the bidding process to exclude other (presumably cheaper) competitors.

Fraud. To recover the cost of the bribe, and to exploit the corrupt relationship, the firm, usually with the knowledge and complicity of government officials, inflates prices, bills for work not performed, fails to meet contract specifications or delivers substandard product during implementation. This often requires further corrupt facilitation payments to inspectors or auditors.

Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers. Bid-rigging conspiracies can take many forms, all of which impede the efforts to obtain goods and services at the lowest possible price.

There are several different types of bid rigging agreements:

Cover bidding occurs when competitors agree to submit a bid that is higher in price than that of the cartel's designated winner, or contains terms that are unacceptable to the purchaser, in order to ensure that the bid of the designated winner is selected by the purchaser, while still giving the impression of competition.

Bid suppression occurs when competitors agree not to submit a bid, or to withdraw a previously submitted bid, so that the cartel's designated winner's bid will be selected.

Bid rotation occurs when competitors agree to take turns being the winning bidder. Contracts may be allocated equally among competitors by volume or value, or the division may correspond to the respective sizes of each company.

Bid-rigging conspiracies can last undetected for many years, resulting in higher costs for goods and services and depriving government purchasers, and consequently taxpayers, of the benefits of true competition.

Market sharing, or market allocation, occurs when competitors agree to divide up markets among themselves. This could be through the allocation of customers, products or geographic regions to particular members of the cartel. Following the making of such an agreement, cartel members will rig bids to ensure that the winning tender is that submitted by the party to whom that customer/product/region had been allocated.

Price fixing occurs when there is an agreement among competitors to raise, fix or otherwise maintain the price of a good or service.

- set a minimum price;
- eliminate or reduce discounts;
- adopt a formula for computing price;
- increase prices; or
- hold prices firm.

Type of bribes

The type and value of bribes vary widely depending on circumstances. Not all bribes are monetary, particularly in the early stages of a corrupt relationship.

Different types of corrupt payments include:

Corrupt payments for contract awards. Corrupt payments in exchange for contract awards often vary from 5–20 percent of the contract amount. The payments typically are divided among ministry, other government and project personnel, including Bid Evaluation Committee members.

Facilitation payments. These are typically 2–5 percent of the invoice value. Many contractors, as an example, have to make additional payments to project staff to approve invoices during project implementation.

Additional indirect payments. Government officials may also demand that contractors procure from certain firms or contribute to special funds.

Market characteristics that might support collusion

Although bid rigging can occur in any sector, some markets are more susceptible than others due to particular features of the product or market. The presence of the following factors, for example, may increase the need for vigilance:

- A small number of bidders – the fewer the bidders, the easier it is for bid rigging to occur. This is particularly so where you have the same bidders involved in repeated procurements;
- Little or no new entry to the bidding market – a lack of new entrants into the bidding market may facilitate existing bid-rigging efforts;
- Simple or identical products – if the goods or services being purchased are standardised, simple and do not change over time it is easier for competitors to reach an agreement on price and to make that agreement longstanding;
- Few substitutes – where there are few, if any, suitable alternative goods or services, companies and individuals wishing to rig bids have the comfort of knowing that their efforts to raise prices are more likely to be successful;
- Regular and recurring bidding – regular bidding for the same product or service allows cartel members to allocate contracts among themselves. It also allows the cartel to credibly threaten to punish a member who acts against the interests of the cartel by targeting bids originally allocated to that member, and in that way can minimise deviations from the cartel agreement; and
- Existence of trade associations or other forums (professional or social) in which competitors are given the opportunity to get together and discuss matters face to face; and constant, predictable demand – a constant flow of demand tends to increase bid-rigging arrangements, whereas significant changes in demand or supply conditions can upset existing arrangements.

Red flags

As discussed in the main report a red flag is an indicator of possible fraud or corruption. The integrity risk indicators listed in the main report (chapter 9) are primarily meant to be used for aggregation purposes, but at the level of the contracting entity, hundreds of red flags can appear in conjunction with various types of public tenders. Valuable sources for identifying “red flags” are the Annual Performance reports issued by the Office of Auditor General and the reports and cases issued and handled by the Anti-corruption Commissions (NACC and PACC).

Red flags can show up as anomalies in tenders, in financial records, or complaints about agency officials. In some cases, deviations from national procurement rules indicate not just non-compliance due to incompetence, but also a heightened probability of fraud or corruption. Some red flags are more ambiguous than others. **A red flag is usually a sign or warning that closer scrutiny is needed.** This extra scrutiny might involve asking for more documents or information from the bidder or, as is often the case, looking for other related red flags. Receiving fewer than the expected number of bids, for example, could be an indicator of rigged specifications or other measures intended to exclude qualified bidders. If detected, procurement officials should look for other indicators of such schemes, as listed in this guideline. **Procurement officials should not, however, undertake an investigation of a possible or suspected wrongdoing. If serious concerns remain after a preliminary review, the matter should be referred to the appropriate agency staff.**

Integrity risk areas and circumstances for red flags

A typical procurement cycle where corruption may take place include:

- **Pre-bidding phase** with the planning and preparation of the tender documents;
- **Bidding phase** with invitation, pre-qualification, bid submission and opening, and evaluation of tenders and award of contracts;
- **Post-bidding phase** with contract management;

For each procurement action leading up to the contract award, the red flags that can be identified as well as related fraud and corruption risk areas. The following bid rigging risk areas and factors will be discussed within the three phases:

A. Pre-bidding phase

The planning and preparation of the procurement process, including the design of tender documentation and contracting strategy, determines essentially the quality (value for money) of the outcome of the tendering process as well as the opposite, namely provides good opportunities for the involved actors to manipulate the process in certain desired directions in order to obtain personal gains. **The starting point is the preparatory phase with the annual and multiannual budget exercises, including investment and feasibility studies,** the approval of the procurement plan with the attached budget and procurement strategy (procurement method). At this stage, the integrity risks are found in possible **political interference** expressed in terms of biased project selection, investments made to satisfy a specific political interest, region, city or even a particular group of firms. Integrity risks may also occur at this stage in connection to approval of diverse financing schemes, including public- private partnerships. **Conflict of interests** is often a typical ingredient.

At the more operational side of the preparatory phase, the design and decision of the procurement plan, including the contracting strategy, represents one important integrity risk area. The

procurement plan and the contracting strategy determines the procurement method that should be used, should it be a turn-key contract or should the project be divided into lots, how to deal with sub-contractors, how to bundle the requirements, etc. The second major integrity risk area covers the preparation of the terms of reference, the design of the instructions to bidders with the setting of qualification and evaluation criteria, time limits for submission of bids, and draft contract conditions etc.

The integrity risk factors covered by the Guideline include the following circumstances during the Pre-bidding Phase which will be discussed in more detail below:

1. *The procurement plan includes unnecessary items;*
2. *Unjustified use of non-competitive methods and/or discriminatory rules for the tendering;*
3. *Contract splitting;*
4. *Inappropriate bundling;*
5. *Rigged specifications; and*
6. *Biased evaluation criteria.*

B. The Bidding Phase

The bidding phase includes a number of key activities which all provide opportunities to act improperly or even unlawful. The main purchasing activities include invitation of tenders with publication of tender notices, clarification of tenders, receipt and opening of tenders, request for clarifications, qualification and evaluation of tenders, possible negotiations, and to make award decisions. After the award decision is made and the contract concluded, information and debriefing of unsuccessful tenderers should be carried out. The Thai process include also a pre-review and possible modification of terms of reference before the e-auction procedure is initiated.

The tenderers should respond to the invitation of tenders by confirming its interest by requesting the qualification or tender documentation, and if so requested, confirm its interest to participate. The other steps include planning and organisation of the preparation of tenders, review of the tender documentation, in particular the terms of reference, instructions to tenderers, and draft contract conditions; all those actions done in order to conclude to what extent the firm has the possibility to submit a technically and contractually responsive and competitive tender. The preparation work comprises also discussion on whether the firm should act on its own or form joint ventures with other firms as well as the need for engaging sub-contractors depending on the nature and size of the tender. Other important internal tasks would imply to decide on the pricing strategy, agreeing with the bank on the tender security, collection of qualification and technical documentation and finally compile the tender and make it ready for submission at the time and place stipulated. In case an e-auction will take place, the tenderers will need to decide on the pricing tactics.

There are a number of integrity risks in the bidding phase, but the “ground work” is often done already in the pre-bidding phase. However, bid-collusion does not need to include bribery but can be done independently. The integrity risks covered in the Guideline include the following factors:

7. *Unbalanced bidding submission;*
8. *Leakage of confidential information;*

9. Exclusion of qualified bidders; and

10. Manipulated evaluation and award procedure.

C. Post- bidding Phase

The post- bidding phase comprises a number of important steps, such as notification of award to the successful tenderer, debriefing of unsuccessful tenderers, issuing of performance security, conclusion and signing of the contract covering general and special conditions including all attachments, control and inspection of deliveries, payments and finally, the closure of the file.

The integrity risks may occur in all these steps, but the main risks are found in the modification of contract conditions, in particular on price and possible substitution of products or services, non-delivery or fulfilment of contract obligations by the main contractor or the sub-contractors. Incorrect approvals and execution of payments are other important integrity risks. Falsification of reports and files are often needed in order to cover the illegal actions. Efficient external audit and financial control mechanisms are important tools to detect irregularities.

The integrity risk area during the post-bidding phase has been summarised to:

11. Poor contract management and performance.

Checklist – Bid Rigging and Bribery

The below Checklist is presented in accordance with the integrity risk areas and circumstances for red flags as described above. It is separated into the three phases of a procurement cycle – pre-bidding, bidding, and post-bidding, and begins with a general description of a risk area, followed by “red flags” or possible anomalies in tenders and suggested preventive measures.

A “yes” answer to a red flag **is usually a sign or warning that closer scrutiny is needed**. This extra scrutiny might involve asking for more documents or information from the bidder or, as is often the case, looking for other related red flags. Receiving fewer than the expected number of bids, for example, could be an indicator of rigged specifications or other measures intended to exclude qualified bidders. If detected, procurement officials should look for other indicators of such schemes, as listed in this guideline. **Procurement officials should not, however, undertake an investigation of a possible or suspected wrongdoing. If serious concerns remain after a preliminary review, the matter should be referred to the appropriate agency staff.**

Risk areas/Red flags	Yes/No	Preventive measures
Phase: Pre-Bidding		
<p>Risk area 1: The procurement plan includes unnecessary items</p> <p>The procurement plan should be in accordance with the budget and the requirements approved. The purpose of such action is to include items paid by the public budget that can be used for private gains. As an example, a tender for building material or tools includes a certain amount that can be redirected to a public official for private purpose. It can also be a matter of man/hours under a consultancy contracts that can be used for a similar purpose</p>		
<p>Red flags</p> <ul style="list-style-type: none"> The list of contracts for goods, works and services is not consistent with the budget and the project requirements 		<ul style="list-style-type: none"> A proper and well-documented technical preparatory phase within the contracting entity The approval procedure of the procurement plan should be executed in accordance with the relevant regulatory framework and that an independent professional ex-ante review of the procurement plan can be done for contracts above certain thresholds of significant value

Risk areas/Red flags	Yes/No	Preventive measures
<p>Risk area 2: Unjustified use of other methods than open tendering (special method, special case method, negotiations and direct contracting)</p> <p>Such methods may be legitimate contracting methods however subject to special approval procedures. These contracting methods may also be used to steer contracts to favoured companies by avoiding competitive bidding. The attempts to avoid the use of competitive methods belong to the main integrity risks in public procurement. The regulatory frameworks include clear rules when a derogation from the use of the open tendering should be allowed. However, the possibility for exemptions is available and efforts to make a case for exemption can be appealing if there is an interest to act improperly. Another possibility to act improperly is to set the time limits for submission of tenders so narrowly that certain suppliers are favoured</p>		
<p>Red flags</p> <ul style="list-style-type: none"> • Inadequate or misleading justification or documentation as required by the regulations. • Certain contract amendments that would benefit from competition or where the items should have been procured separately (e.g., the additional activities are not a natural continuation of the existing contract) 		<ul style="list-style-type: none"> • Ensure that the documentation and procedure for justifying another procedure than open or other acceptable competitive tendering procedure comply with the legal requirements • Issue clear instructions and definitions on when an exceptional method can be used • Be restrictive on the justifications and ensure a proper approval procedure • Consider to introduce the possibility of invalidation of contracts and sanctions against an illegal use of non-competitive procedures where a correct approval procedure has been neglected
<p>Risk area 3: Contract splitting</p> <p>The packaging of contracts is designed to attract as many qualified bidders as possible in order to secure the best price and quality. Legitimate considerations regarding decisions to package certain contracts include: capacity of potential bidders to deliver the outputs specified; risks related to the bundling or unbundling of items; and sequencing of procurement actions in line with needs. Contract splitting may be the deliberate attempt to limit or entirely avoid competition. By splitting contracts into smaller packages, the need for a greater degree of review and less competitive procurement methods are made possible.</p>		
<ul style="list-style-type: none"> • Unusual splits by issuing two or more contracts for identical items over a short period of time for no apparent reason, resulting in the application of a less competitive procurement method. 		<ul style="list-style-type: none"> • Careful review by procurement professional and technical staff of the procurement plan and terms of reference

Risk areas/Red flags	Yes/No		Preventive measures
<ul style="list-style-type: none"> Procuring items by each sub-unit that should have been procured jointly. 			<ul style="list-style-type: none"> Regular change of the composition of the tender committees for preparing the terms of reference Engagement of external experts or observers to the tender committees (at least for high value contracts)
<ul style="list-style-type: none"> Splitting items that are normally procured together in order to keep individual package values below thresholds. 			
<ul style="list-style-type: none"> Many awards just below thresholds. Awarding an unreasonably large number of contracts just below public procurement thresholds. Two or more related and simultaneous purchases from the same supplier in amounts just under the legal procurement threshold. 			
<p>Risk area 4: Inappropriate bundling</p> <p>This risk area is the opposite of contract splitting, yet yields the same result of reduced competition. The public tender bundles a wide variety of goods that have no relation with each other, into one lot (e.g., computer equipment, copper wires, and video equipment) with a particular provision stipulating that incomplete lots are not allowed and would be considered non-responsive. This makes the bidding process biased since not a single manufacturer or authorized dealer is likely to meet the requirements of the entire lot. Typically, the contract will be awarded to a favoured bidder at a price well above the estimates.</p>			
<ul style="list-style-type: none"> Complaint from one or more bidders about the bundling of goods, works and services. 			<ul style="list-style-type: none"> Careful review by procurement professional and technical staff of the procurement plan and terms of reference Regular change of the composition of the tender committees for preparing the terms of reference Engagement of external experts or observers to the tender committees (at least for high value contracts)
<ul style="list-style-type: none"> Items to be procured within a proposed bundle are not related. 			
<ul style="list-style-type: none"> There is a significant reduction in the number of potential or actual bidders resulting from the bundling. 			
<ul style="list-style-type: none"> The contracting entity cannot justify the bundling on the basis of cost savings or reduced integration. 			

Risk areas/Red flags	Yes/No	Preventive measures
<p>Risk area 5: Rigged terms of reference</p> <p>In a competitive market for goods and services, any specifications that seem to be drafted in a way that favours a particular company deserve closer scrutiny. For example, terms of reference that are too narrow can be used to exclude other qualified bidders or justify improper sole source awards. Unduly vague or broad specifications can allow an unqualified bidder to compete or justify fraudulent change orders after the contract is awarded. Sometimes, there is risk that project officials will go so far as to allow the favoured bidder to draft the specifications.</p>		
<p>Tailored specifications</p> <ul style="list-style-type: none"> • Close similarity between the specifications and the winning bidder's product or services. 		<ul style="list-style-type: none"> • Draft the terms of reference by using international standards or Thai standards • Use performance or outcome based specifications • Always ensure inclusion of the wording "or equivalent" • Careful and independent review of the terms of reference • Proper procedures for the approval of terms of reference in accordance with the regulatory framework • Regular change of composition of the Committee for tender documentation
<ul style="list-style-type: none"> • Specifications stipulate the use of a brand name without stating "or equivalent", contrary to national procurement rules. 		
<ul style="list-style-type: none"> • Complaints from other bidders that the specifications match too closely those of a single competitor, or that a bidder prepared the contract specifications. 		
<p>Poor specifications</p> <ul style="list-style-type: none"> • Vague, ambiguous or incomplete specifications. 		
<ul style="list-style-type: none"> • Specifications are significantly narrower or broader than in previous similar procurement actions. 		
<ul style="list-style-type: none"> • Few bids. 		
<ul style="list-style-type: none"> • Only a few of the companies that purchase the bidding documents submit bids, especially if more than half drop out. 		
<ul style="list-style-type: none"> • Relatively few companies submit bids, compared to prior similar tenders. 		
<ul style="list-style-type: none"> • Fewer than the normal or expected number of potential bidders apply for prequalification. 		

Risk areas/Red flags	Yes/No	Preventive measures
<p><i>Risk area 6: Biased qualification and tender evaluation criteria</i></p> <p>Instituting biased evaluation and qualifications criteria is another method used to steer contracts to a favoured bidder.</p>		
<p>Red flag</p> <ul style="list-style-type: none"> Complaints from bidders that the qualification or award criteria used are irrelevant for the purpose of the contract and meant to favour a certain firm. A very common reason for complaint in all countries. 		<ul style="list-style-type: none"> Careful review by procurement professional and technical staff of the procurement plan and terms of reference; Regular change of the composition of the tender committees for preparing the tender documentation, including the qualification and tender evaluation criteria; Ensure that qualification criteria are fair and set in a manner that naturally reflect the nature and size of the contract; If other criteria than price are used in the tender evaluation ensure that those are quantifiable, measurable and can be expressed in monetary terms; Engagement of external experts or observers to the tender committees (at least for high value contracts); Reports and documentation in accordance with the regulatory framework;
<p>Phase: Bidding</p>		

Risk areas/Red flags	Yes/No	Preventive measures
<p>Risk area 7: Unbalanced bidding</p>		
<p>Procurement officials provide a favoured bidder with inside information that is not made available to other bidders, for example, that one of several line items in a request for bids will not be called for after the contract has been awarded or that a certain low-cost solution will be acceptable. This information invariably gives the bidder an unfair advantage by allowing the company to lower its price or otherwise tailor its bid to defeat its uninformed competitors. Project officials can facilitate the scheme by drafting vague specifications to further disadvantage competitors. Unbalanced bidding is also used to describe the practice of bidders quoting prices significantly below cost for some line items and prices significantly above cost for others, in the expectation that the procuring authority will request many more items for which prices have been inflated. As a result, the lowest responsive bidder as determined at the time of contract award may not constitute the lowest-cost solution.</p>		
<ul style="list-style-type: none"> Particular line items that are unreasonably low compared to market prices are later removed from the list of requirements under the contract or that other compensation mechanisms will be used. 		<ul style="list-style-type: none"> Careful planning and approval processes during the pre-bidding phase
<ul style="list-style-type: none"> Wide and inexplicable disparity in bid prices considering the type of works, goods or services being procured. 		<ul style="list-style-type: none"> Ensure that the integrity pacts are laid down in the tender submission forms
<ul style="list-style-type: none"> Inadequate responses or clarifications by project officials to complaints from bidders about vague, ambiguous or incomplete specifications. 		<ul style="list-style-type: none"> Ensure professional and independent composition of the tender evaluation committees Signing of declaration of impartiality and integrity A solid and trustful complaint review mechanism Proper and efficient control and audit processes Tender evaluation reports in accordance with the regulatory framework Publication of award results
<p>Risk area 8: Leakage of confidential information</p>		
<p>Information about cost estimates and competing bids may be leaked by government officials to favoured bidders to give them an unfair advantage, e.g., enabling them to tailor their bid so as to secure contract award.</p>		

Risk areas/Red flags	Yes/No		Preventive measures
<p>Red flags</p> <ul style="list-style-type: none"> A bid closely tracks the preferred technical solutions, budgets, estimates, etc. 			<ul style="list-style-type: none"> Sign non-disclosure agreements with bidders Careful planning and approval processes during the pre-bidding phase; Ensure that the integrity pacts are laid down in the tender submission forms;
<ul style="list-style-type: none"> The winning bid is just under the next lowest bid. 			<ul style="list-style-type: none"> Ensure professional and independent composition of the tender evaluation committees; Signing of declaration of Integrity Commitment (impartiality and confidentiality); A solid and trustful complaint review mechanism; Proper and efficient control and audit processes; Tender evaluation reports in accordance with the regulatory framework; Publication of award results
<p>Risk area 9: Unfair exclusion of qualified bidders</p> <p>Officials can facilitate the selection of a favoured bidder by improperly excluding other qualified bidders. This can take place at any time from the drafting of the bidding documents to the receipt of bids. The exclusion of qualified bidders often triggers complaints as the potential bidders invest time and money to prepare bids.</p>			
<p>Red flags</p> <ul style="list-style-type: none"> Unreasonable qualification criteria (e.g., abnormally high annual turnover or liquidity reserves, or years of experience in the country) 			<ul style="list-style-type: none"> Ensure the availability of an effective complaint review mechanism; Ensure that the qualification criteria applied are consistent with those of the tender documents;
<ul style="list-style-type: none"> The Tender Evaluation Report provides no objective or poorly justified reasons for the rejection of certain bids (e.g., the disqualification for trivial or arbitrary reasons) 			<ul style="list-style-type: none"> Control that decisions on exclusion are based on the relevant provisions of the regulatory framework; Ensure that the decisions on exclusion are made by the authorised manager within the contracting authority following

Risk areas/Red flags	Yes/No		Preventive measures
<ul style="list-style-type: none"> Qualified contractors fail to bid indicating that the bidding may be rigged 			a proper evaluation and procedure, including records, of the tender evaluation committee;
<ul style="list-style-type: none"> Companies complain that officials refuse to make bidding documents available to potential bidders or to accept the submission of bids (e.g., companies are coerced to refrain from bidding through subtle suggestions, firm statements, or intimidation and physical threats); 			

Risk areas/Red flags	Yes/No	Preventive measures
<p>Risk area 10: Manipulated evaluation and award procedure</p> <p>Bid submission</p> <p>Bid submission is a sensitive area where late bids are accepted, bids are tampered with or unfairly excluded. Bids must be received by the agency prior to the date and time indicated in the bidding documents. Corrupt project staff may: (i) accept late bids submitted by favoured bidders with inside information about prices from other bidders; (ii) tamper with the bids received, e.g., by discarding elements of the bid in order to disqualify the bidder; or (iii) exclude bidders by denying access to drop-off points or by failing to open bids.</p> <p>Bid opening</p> <p>A key risk in the bid opening phase is the manipulation of bid prices. The bid opening must be conducted in public at the address, date and time specified in the bidding documents. The bids should be opened immediately after the bid submission time. Various tactics may be used to steer contracts to favoured bidders, e.g., the price read aloud for the favoured bidder does not match the actual bid price or a “new” price is later written into the bid.</p> <p>Bid evaluation report</p> <p>Questionable evaluation and unusual bid patterns may emerge in the bid evaluation report. After the completion of the evaluation process, the bid evaluation committee should present report with a summary of the tender evaluation, which describes the results and the process by which the committee has evaluated the bids received. The report may include a number of indicators of bid rigging, e.g., questionable disqualifications, and unusual bid patterns.</p>		
<p>Red flags – Bid submission</p>		<ul style="list-style-type: none"> • Ensure that the organisation and procedures for receipt, opening and evaluation of tenders comply with the regulatory framework, in particular in terms of composition and work of the tender evaluation committees and the tender evaluation reports
<ul style="list-style-type: none"> • Late submission of bids. 		
<ul style="list-style-type: none"> • Not all bids are brought to the bid opening ceremony. 		
<ul style="list-style-type: none"> • A bid is not in a sealed envelope. 		<ul style="list-style-type: none"> • Ensure the availability of an effective complaint review mechanism
<ul style="list-style-type: none"> • Bids are not kept in a secure location with limited access. 		<ul style="list-style-type: none"> • Ensure that the qualification and tender evaluation criteria applied are consistent with those of the tender documents

Risk areas/Red flags	Yes/No		Preventive measures
<ul style="list-style-type: none"> The bid due date has been extended after some of the bids have been submitted. 			<ul style="list-style-type: none"> Control that decisions on exclusion are based on the relevant provisions of the regulatory framework Ensure that the award decisions are made by the authorised manager within the contracting authority following a proper evaluation and procedure, including records, of the tender evaluation committee Apply a stand still period (10 days at least) after the award decision and before the conclusion of contract in order to give the unsuccessful bidders a possibility to seek clarifications or file a complaint Ensure a proper de-briefing of the unsuccessful bidders Ensure that the contract price is in line with the budget
<ul style="list-style-type: none"> All bids are voided for "errors". 			
<ul style="list-style-type: none"> Complaints from bidders that they were not allowed to submit bids. 			
<p>Red flags – Bid opening</p>			
<ul style="list-style-type: none"> Bids are not opened in public. 			
<ul style="list-style-type: none"> Pages are missing from one or more bids. 			
<ul style="list-style-type: none"> Pages with a different typeset are included in the bid. 			
<ul style="list-style-type: none"> Changes to the bid prices and bid security list are handwritten 			
<ul style="list-style-type: none"> Lack of original signatures of the company representatives supposedly present at the ceremony 			
<p>Red flags – Bid evaluation report</p>			
<ul style="list-style-type: none"> The evaluation criteria applied differ from those issued in the bidding documents 			
<ul style="list-style-type: none"> Inconsistencies exist between the evaluation report and supporting documentation 			
<ul style="list-style-type: none"> Improper or arbitrary evaluation sub-criteria or procedures are developed at the time of evaluation that differ from the issued bidding documents 			
<ul style="list-style-type: none"> The evaluation committee ignores the evaluation criteria in the issued bidding documents and develops its own method of evaluation 			
<ul style="list-style-type: none"> The lowest priced bidder is declared unresponsive (for no apparent reason) 			
<ul style="list-style-type: none"> High number of bids is unresponsive 			

Risk areas/Red flags	Yes/No		Preventive measures
• Recommendations and disqualifications are poorly justified			
• Bids are rejected because of allegedly missing components, such as catalogues and brochures for the goods offered.			
• Changes in the scoring of bids or arbitrary scoring of bids.			
• Pressure by external officials on committee members to select a certain contractor.			
• Complaints from bidders about the evaluation process			
• Winning bid is poorly justified			
• Technical specifications are copied from the bidding documents or are incomplete			
• The manufacturer's authorization is missing, outdated or inadequate			
• The bid does not match requirements (e.g., in terms of quantity, quality, and qualifications)			
• Pages of a bid are missing or not signed (when required).			
• Unusual bid patterns			
• Same or similar telephone or facsimile number or address shared by bidders			
• Unreasonably high bid prices by losing bidders for which there is no legitimate explanation and which cannot be attributed to an error.			
• Bid prices differ by a set percentage			

Risk areas/Red flags	Yes/No	Preventive measures
Phase: Post-bidding		
<i>Risk area 11: Poor contract management and performance</i>		
<p>The integrity risks involve the abuse of the contractor in performing the contract, in particular in relation to its quality, price and timing. Deficient supervision from public officials and/or collusion between contractors and supervising officials. The non-transparent choice or lack of accountability of subcontractors and partners. Lack of supervision of public officials and the deficient separation of financial duties, especially for payment.</p>		
<ul style="list-style-type: none"> Substantial change in contract conditions to allow more time and/or higher prices 		<ul style="list-style-type: none"> Ensure that contracting authorities have efficient administrative systems and routines for contract management; Ensure that contract management is handled by staff different from those responsible for preparation and award of contracts; Use international contract models, at least for larger contracts; Request contract management staff to sign a Declaration of Integrity Commitment; Ensure effective control procedures during the life- time of the contract; Any significant contract modifications should be decided by a Contract Committee; Ensure the availability of contract dispute settlement mechanism; Introduce and inform contractors that an independent performance evaluation procedure will be conducted (for large contracts and on a sample basis) Inform the bidder that poor contract performance or conduct of irregularities may or will lead will to blacklisting;
<ul style="list-style-type: none"> Substitutions of products, services or sub-standard works not meeting contract specification. 		
<ul style="list-style-type: none"> Theft of new assets before delivery or being recorded in the asset register 		
<ul style="list-style-type: none"> Sub-contractors or joint venture partners replaced without any justifiable reasons and not held accountable 		
<ul style="list-style-type: none"> Deficient supervision and poor recording 		
<ul style="list-style-type: none"> False or inaccurate invoicing and payment procedures 		
<ul style="list-style-type: none"> Extensive and unjustifiable cost overruns or time delays in the implementation of the contract 		

General measures to mitigate risks for bid rigging in public procurement

An excellent source for understanding and guidance on how to prevent and detect bid rigging in public procurement constitutes the **OECD Guidelines for fighting bid rigging in public procurement**. The guideline provides a good overview of the main steps, suspect patterns and behaviours in the procurement process.

Here follows as a sample a number of possible actions to mitigate integrity risks in procurement process. Some of the proposed actions will likely need a change of the Thai regulatory framework.

List of Mitigating Measures

The risks of anti-competitive conduct in procurement can be mitigated by designing tenders in a way that minimises the likelihood of collusion. For public buyers this includes following good procurement practice:

- Learn about the market. This will better enable a buyer to spot any warning signs of collusive conduct. Gather information about the products, suppliers and conditions in the marketplace, especially potential suppliers' prices and costs. Include information about prices in other geographic areas or for similar products. Collect information about past tenders, and, if in the public sector, seek information from other public buyers who have recently purchased similar goods or services, to improve your understanding.
- In relation to the procurement process itself, there are a number of practical steps that you can take to minimise the risk of collusion:
 - As part of the **integrity pact** include anti-collusion and conflict of interest clauses in your tender documents.
 - Warn bidders that all suspicions of collusion will be reported to the relevant authorities.
 - Require disclosure of all subcontracting arrangements that involve communications between competitors.
 - Require bidders where possible to sign a warranty that their bid has been independently developed and that there has been no communication with competitors about, and no contract, arrangement or understanding has been entered into with competitors about price, bid submission or terms of the bid, including quality and quantity of goods or services.
 - If such a warranty cannot be signed, seek disclosure of contacts with competitors with regard to the bid.
- Reserve the right not to award the contract if there are suspicions of collusion.
- Ensure the largest number of potential bidders. The probability of bid rigging increases if you have a small number of potential bidders.
- Keep tender requirements clear and easy to follow, thereby encouraging more companies to bid;
- Think carefully about unnecessary restrictions on bidders that may eliminate companies that are in fact qualified for task;
- Facilitate bidding and keep the costs of bidding down – allow adequate time for bid preparation, use of electronic portals, do not require information that is of little use, and keep amendments to the forms/processes to a minimum;
- Ensure anonymity of bidders;

- Consider allowing bids on a portion only of a large contract (dividing into lots), thereby allowing small and medium-sized companies to participate;
- Make it harder for bidders to communicate and agree on a strategy. In particular:
 - avoid unnecessarily presenting the bidders with opportunities to communicate with each other (e.g. at pre-bid face-to-face meetings or at site inspections);
 - if pre-bid meetings are necessary, mitigate the risk of collusion by, for example, reminding attendees of their obligations (see above);
 - where possible and practical keep the identity of bidders undisclosed to make it more difficult for cartel members to contact all bidders;
- Try to avoid predictable procurement patterns which facilitate bid-rigging schemes (e.g. vary the scope of successive contracts by aggregating or disaggregating contracts);
- Ensure any external consultants used have signed confidentiality agreements and are subject to a reporting requirement in respect of inappropriate competitor behaviour;
- Define terms of reference in terms of what you want the product to do rather than by reference to specific products. Use international standards.
- Provide training to staff. Training in the detection and deterrence of cartels for all procurement staff will assist staff to design a procurement process that is less susceptible to collusive conduct.

Conflict of Interest (COI) in Public Procurement

Introduction

A situation of conflict of interest at any stage in the whole procurement cycle affects the perception of fairness and impartiality in the decision-making process. The issue of conflict of interest can be discussed at different levels in the context of public administration. The first level is general and covers conflict of interest situations that may occur in the overall context of the execution of public duties, including public procurement. The other level is procurement-specific and relate to the private sector and its participation in public tenders. The first more general level is normally handled by a specific conflict of interest policy and law that regulates all types of conflict of interest situations that may happen within the fulfilment of public duties.

As discussed in the main report, in the procurement context, the issue of conflict of interest occurs as a reason of specific relationships between the contracting authority and the tenderers which may affect negatively the impartiality of the process. Such relationships may depend of personal relations by blood and marriage between staff of the contracting authority and staff of the tenderers, but more commonly through ownership and control. One specific problem relates to consultant firms which may be engaged by the contracting authority to support the preparation of feasibility studies or even tender documents while being owned or part of a co-operation with tenderers that will submit tenders for the actual goods or works contracts. Internationally, where a firm, its affiliates or parent company, in addition to consulting, also has the capability to manufacture or supply goods or to construct works, that firm, its affiliates or parent company normally cannot be a supplier of goods or works on a tender for which it provides consulting services and vice versa, unless it can be demonstrated that there is not a significant degree of common ownership, influence or control.

The regulation of procurement-related conflict of interest is internationally done in different ways. Some countries rely only on the general law on conflict of interest and may possibly include some provisions with direct bearing on public procurement while others include specific conflict of interest rules into the public procurement laws or regulations.

In Thailand, the procurement regulations (1992 and 2006) and the Anti-corruption Act of 1999 address the issue of conflict of interest. The government regulation 1992 defines clearly different situations of conflict of interests (clause 5). The e-auction regulation requires that the project tender committee should comprise of one member not holding a government service position or receiving regular salary which could be seen as rule aimed at ensuring the impartiality of the tender committee. There is also a rule that the members of the tender preparation committee cannot be members in the evaluation committee which should be regarded as an action to avoid potential conflict of interests.

The following description is mainly based on OECD Guidelines for Managing Conflict of Interest in Public Service⁵⁰ and guidelines of other international organisations, such as the World Bank and the European Commission.

Definitions

The OECD defines a “conflict of interest” as a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly

⁵⁰ Guidelines for Managing Conflict of Interest in Public Service. OECD 2003

influence the performance of their official duties and responsibilities. OECD guidelines draws a distinction between actual, apparent and potential conflict of interest.

It should also be understood that conflict of interest is not the same as corruption. Sometimes there is conflict of interest where there is no corruption and vice versa. However, there are potentially links between conflict of interest and corruption thus it would be wise to consider conflict of interest prevention as part of a broader policy to prevent and combat corruption. Situated in this context, conflict of interest policies are an important instrument for building public sector integrity.

The more procurement related definitions include, as in the UNCITRAL Model Law, a code of conduct for officers or employees of procuring entities. It shall address, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements.

In the European Union, countries shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators. The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

The World Bank and other international organisations address specifically the issue of conflict of interest in their guidelines and the need to incorporate provisions on conflict of interest in the tender documentation.

Significant Risk Areas

Conflict of interest may arise at various stages of the procurement process whenever public officials' decisions can be influenced by their private interests. Activities most exposed to conflict of interest risk are the same as concerning the risks of collusion and fraud. However, as being mentioned, the fact that there is situation of conflict does not automatically imply that there necessarily will be corruption involved. Nevertheless, the perception that the decision might have been affected by the relationships is sufficient in order to take an action to remedy the situation.

Risk area 1: Conflict of interest in the public administration

The following areas can be considered most vulnerable:

Planning and tender preparation

- Projects and budget allocations are designed and decided by public officials with specific private interests and relationships in those sectors;
- Terms of reference (technical specifications) are prepared by officials with own private interests or relationships in the product or service area;
- The committee for preparation of terms of reference is composed of members with private interests in the products and service areas;
- Qualification requirements are set to favour a certain supplier in which a public official has an interest;

Evaluation and award of contracts

The evaluation and award can be affected if the evaluation committee is composed of public officials with an economic or other types of interest in any of the bidding firms. Such interest can be shareholding, relatives or friends working in the firm, previous employment in firm in the past or being promised an employment in the future. It may also have political reasons, such as firms providing party financing support and other types of benefits to the political system.

Contract execution and management

Contract implementation can be affected by conflict of interest on the same grounds as for the planning and evaluation phases but not necessarily of the same officials. The awarded firm may be controlled and supervised by officials with private interests in the company working in the inspection or finance departments which may lead to improper acceptance of errors and other cases of poor contract performance.

Risk area 2: Conflict of interest caused by the bidding firms

Consultants involved in the tender preparation

There are also a number of main problems on the supply side. First, when consultants are engaged in the preparation of projects and tenders, such as preparing feasibility studies, project design and even drafting the terms of reference, public purchasers have to make a decision with respect to conflict of interest. Are those consultant firms eligible to take part in the following tender or does it constitute a situation of conflict of interest. Generally, the policy is that those firms are not allowed to participate in a tender on which they have had a significant prior involvement. It would affect the impartiality and would not provide for fair competition, as perceived (see e.g. the policies and rules of the international financing institutions).

The second problem is related to ownership or economic ties which may lead to a conflict of interest in the bidding process. Bidding firms or subcontractors may appear under a common ownership or financial umbrella but act as individual firms under different names. It may also be the case that manufacturing firm owns wholly or partly a consulting firm that has prepared the tender (TOR) where the manufacturing firm participate in the tender. Here are typical situations of conflict of interest.

Third, bidders may have the same possibilities as the public officials to have personnel with interests and background in the public administration which may affect the impartiality and cause reason for a conflict of interest in the procurement process.

How to mitigate risks of conflict of interest in public procurement?

The most common measures would include:

1. Ensure a strong policy and regulatory framework on how to deal with conflict of interest in public procurement;
2. Establish clear policies and rules on how to manage conflict of interest when occurred;
3. The adoption of Conflict of Interest Declaration and Confidentiality Agreement that all public officials involved in the procurement process must sign. This includes:
 - All members of the procurement team
 - All members of the evaluation team
 - Any consultant asked to advise the team
 - Anyone in making a recommendation or award decision
 - Anyone making a financial or other type of important approvals during the procurement process

4. Rotation of members in the tender committees;
5. Ensure that tender documents include rules on conflict of interest; and
6. Request that the submission of tenders include a statement by the bidders on integrity, including on conflict of interest.

Political Interference

Political interference in public procurement together with the abuse of discretionary power are seen as main integrity risks within the Thai public procurement system. These integrity problems are closely linked to the way corruption practices are spread within the public sector. The main types for procurement related corruption in Thailand have been identified as collusions, bribery and systemic corruption⁵¹. The most important cause of systemic corruption is considered to be the existence of patron-client networks built on close relationships between the political system, the public administration and the private sector. Systemic or endemic refers to corruption integrated as an essential aspect of the political, social and economic system. It is a situation in which institutions and processes of the state are used by corruptors on a continuous basis. However, politically-related corruption does not necessarily need to be an effect of systemic corruption, but can exist as individual actions by politicians and public officials with political links and occur in various types of procurement cases.

As discussed in this report, corruption occurs on many scales. It can be described as petty corruption, grand corruption and systemic corruption. Petty or administrative corruption refers to everyday corruption that takes place at the bottom of the chain where the civil servant meets the citizen. The involvement of top-level public officials and members of senior management of businesses characterize grand or political corruption. The bribes and financial benefits are often bigger, but more importantly, the spoils from the corrupt act have greater consequences. For example, political corruption might influence the decision-making process during all phases of the procurement process, but the preparatory phase has been found the most vulnerable. The groups of corrupt decision-makers limit entry into economic activities and bind the interests of economic to political actors. Most petty and grand corrupt practices involve sporadic pursuit of private economic interest through the political process.

It would go beyond the purpose of this report to discuss all relevant and key aspects of the background and measures how to tackle the existence of systemic corruption in the country. It will have impact on how the constitutional and administrative laws are designed, the formation of the democratic system in whole, and as another example, the conditions for private sector involvement and influences on the political system, such as on lobbying, party and political campaign financing. The proposed actions that can be taken within the limits of the public procurement system are addressed in the report and a number of recommendations to improve the public procurement system and to mitigate integrity risks are defined in the last chapter of the report. The eradication of corruption from today's levels will need a political will and commitment to change the existing culture, behaviours and put in place a number of legal and institutional mechanisms to control corruption and mitigate integrity risks.

Political interference and abuse of discretion in the procurement processes become necessary and natural ingredients in a system that is formed around a corrupt culture. The political system, as the main "beneficiary" of systemic corruption in a country, has the power to decide the legal and institutional frameworks as well as investments and programmes within the national and local budgets. However, a corrupt political system is also dependent on an "enabling" public administration, including the procurement organisation, which can ensure that the procurement processes "technically and procedurally" are managed within the rules, but steered in the desired direction to favour and to ensure the "right winner".

⁵¹ Combating procurement conspiracies: some lessons from Thailand. Sirilaksana Khoman

Political interference should be defined as **undue** political influence on the decision-making processes within public procurement. The dilemma is that the political system has a legitimate interest to be involved in public procurement in many key aspects, such as formulating policies for how procurement should be used as a strategic tool for the realisation of political priorities, making investment decisions in infrastructure, health, education, and environment. Subsequently, the political system has even a responsibility to ensuring that the public administration executes the policies in accordance with the political decisions in all phases of the tendering processes. Political interference should therefore not be confused with legitimate political influence. The integrity problems occur when the political together with the managerial power of the administration violate the fundamental principles of an efficient and sound state apparatus and the overriding goal of public procurement, namely to deliver public services on the basis of “value for money with integrity”.

Political influence over public procurement can be direct, with politicians interfering in the process in order to secure their personal or party interests⁵². However, influence can also be indirect. Public procurement officials are requested to prioritise the general public welfare by following the established procedures. This however does not mean that officials are inconsiderate of political interests. For example, officials might anticipate difficulties and prevent interference by immediately including the political interests in their decision-making. Officials might also be aware that bidders have strong political ties and therefore evaluate their bids favourably in order to avoid conflict. In other words, procurement officials will often take balanced decisions that include their own objectives (i.e. efficiency, value for money, competition) but also the political objectives (i.e. the economic sector specific or electoral interests). Nonetheless, the interaction between the political actors, private sector and public administrations is complex and the efforts to seek influence could balance between legality and illegality.

Corruption⁵³ exists when there is an opportunity to exploit the possession of authority and discretion and such opportunities arise as a result of the agency relationship which characterises the purchasing activities of government where procurement is conducted by civil servants acting as agents on behalf of the government. Those opportunities may be exploited because they give rise to informational asymmetries between the agent and the government as well as between the agent and the tenderers- the so called **Principal/Agent Relationship Model**. Procurement agents-purchasers, may be corrupt but also the ‘government’ itself, either for the personal gain of politicians, the financial gain of their political parties or as the result of State capture. In a systemic corruption context the political, private and administrative spheres normally form an **“alliance of mutual interest”**.

Whilst the elected members make the policy decisions of government on the basis of which they were elected, it is the bureaucracy which carries out those policies in concrete form and ensures that the whole apparatus is in a position to fulfil the routine and policy tasks assigned to it. Procurement decisions are, absent any political interference, largely made and carried out by the bureaucracy, specifically by procurement agents within the bureaucratic hierarchy⁵⁴. There is an agency relationship, the government as principal, and the bureaucrat as agent. This agency relationship raises at least two issues of relevance. In the first place, the interests of principal and agent may not be identical and are likely, over time, to diverge. In the second place, they both stand in different

⁵² Transparency and accountability as tools for promoting integrity and preventing corruption in procurement: Possibilities and limitations. Peter Trepte Working Document, OECD, 2005

⁵³ Ibis

⁵⁴ Ibis

relationships to the outside world. In terms of procurement, the agent (procurement officer) is closer to the procurement process and will consequently hold more information with regard to the market and the suppliers than his principal. This creates an informational asymmetry between principal and agent which may, where their interests diverge, allow for exploitation by the agent. This discrepancy may be further compounded by further informational asymmetries as between the government and its suppliers (through the agent) and between the agent himself and the suppliers. The agency relationship provides many opportunities for exploitation both deliberate and unconscious. Corruption and bribery are obvious examples of deliberate exploitation for personal gain. The danger is that the goal of the agent may not be to maximise social or economic welfare (the government's presumed goal) but to maximise his own personal benefit or that of his department's. Though there will be many variations. In many cases, the political cannot always be separated from the technical and there is a tendency in many economies for the hierarchically superior politicians to interfere with the procurement process. Despite, therefore, the convenience of using the agency relationship to explain how procurement officers are able to act to their own benefit, it may have the inconvenience of directing attention away from the potential corruption of the principal (the political level). This may arise in a number of ways. It may be that senior officials in the government (politicians even) are involved in the activities of the corrupt agents. The higher the rank of the official involved, the higher the pay-off and the more interactive it becomes, the greater the risk that the practice of corruption becomes entrenched. The result is an environment in which corruption becomes accepted and regulated by a complex series of relationships of patronage and mutual dependency between suppliers, procurement agents and their superiors and which is extremely difficult to unravel. Even in the absence of direct personal gain, politicians may be tempted to extract party political contributions from potential tenderers in return for the award of public contracts.

Political interference may also be exercised for the purpose of favouring domestic or even more commonly local suppliers without any interest of private gain.

The State may also be 'captured' by various industry or special interest groups whose views may be promoted where that is likely to have a positive impact on the re-election chances of those in power. This may be easiest, of course, when they are implicated in the decision-making process for authorisation of funds and in the procurement process, either as members of tender committees (or supervision committees) or as persons with the authority to approve decisions of the procurement officer or tender committee in the award of contracts and the management of contracts.

Abuse of Discretionary Power

As indicated by the surveys, interviews and independent analyses, another procurement-related integrity issue of dignity in Thailand is the abuse of discretionary power in the decision-making processes. This area is closely linked to the issue of political interference, as discussed above. One of the main purposes of public procurement regulation is to determine the level of discretion assigned the decision-makers during the course of the entire procurement process. The level of discretion is determined by the rules and procedures that have to be applied, the authorisation and decision-making rules and instruments, and the design, capacity and independence of the structure for control and legal enforcement; all those elements that constitute the public procurement system. The Thai regulatory framework specifies in detail the rules and thresholds for authorisation and procurement decisions. In the absence of natural incentives and control mechanisms as in the private sector (profit drivers), the regulatory and institutional framework in the public sector is put in place in order for the political system to assume its responsibility vis-à-vis the society and the tax payers for the proper and efficient use of public funds. It is a matter of accepting the political accountability for public sector decisions and operations. Consequently, from the political perspective, the system is in the first place designed to control the bureaucracy as to ensuring that it manages the procurement processes in accordance with the policy and investment decisions and the governing fundamental principles and goals for public procurement. Noticeably, in case a country is under an international obligation (WTO's Government Procurement Agreement or the European Union Directives), there is further an obligation for the governments to implement the international agreements into national legislation. In a politically corrupt procurement context and environment, the legal and institutional frameworks operate in the opposite direction, namely to allow for excess discretion, exemptions from competitive tendering and to minimise the impacts of the accountability instruments. Such an environment is often characterised of a weak legal and institutional framework, the management structure of the bureaucracy is politicised, politically appointed non-merit based managers are granted undue executive or influential power in the public procurement process, control structures lack the necessary corrective means, and the judiciary operates without the necessary independence and power.

The abuse of the discretionary power is not only relevant for the political system, but also with reference to the procurement organisations (the agents). Making use of the principal-agent analysis in order to understand the problem of accountability in public procurement provides several interesting insights as to how opportunities for abuse by procurement agents can be reduced⁵⁵. Two main forms of control mechanisms employed by most domestic systems in order to ensure the accountability of their procurement officials are identified. The first consists of *ex ante* measures, which will often take the form of administrative procedures integrated into the domestic public procurement regulation. The second takes the form of *ex post* oversight, which will be mostly external to the procurement regulation and consist of ministerial control, the existence of superior authorities or commissioners and judicial review. The reduction of discretion available to procurement agents and the consequential lessening of the agency problem may nevertheless have an incidental effect on economic efficiency. As discussed in this report, an excessively stringent rule-based approach deprives procurement agents the amount of flexibility needed in order to achieve the best economic results (**the policy choice dilemma**). Discretion is needed, but how much remains a standing question in all countries.

⁵⁵A Principal-Agent Analysis of Accountability in Public Procurement, *Ohad Soudry*

Further, political and administrative accountability is together with transparency key in developing strong procurement capacity⁵⁶. Elected officials delegate decision-making power to procurement officials in order to achieve professionalism. The latter has greater knowledge and experience as to what goods, services and works are required for the public and under which terms. Weak accountability in public procurement can first of all result in waste of resources, corruption, misconduct, etc. In addition, it distorts incentives of would-be providers to participate in public procurement given that weak accountability of officials renders bidders defenceless in case of arbitrariness in procurement decisions. Finally, weak accountability affects society as end-users of potential economically irrational procured goods, services and works.

Preventive measures to mitigate integrity risks with reference to political interference and abuse of discretionary power coincide fundamentally with the general and specific recommendations that are defined in the priority framework for public procurement integrity reform. There is further a need to review the legal foundation for the public administration, such as administrative and civil service legislation (which go beyond the purpose of this project).

Special attention should be paid to the following recommendations⁵⁷:

1. Institutions should establish transparent practices which include clear rules aimed at protecting the integrity of the procurement process by addressing issues such as conflict of interest, unfair advantage and the lobbying of public officials to influence contract award decisions.

Institutions should establish a clear and comprehensive set of roles and responsibilities for their procurements that include a clear division of roles between: (i) elected officials; (ii) senior management officials responsible for establishing and enforcing compliance with procurement rules; and (iii) front-line procurement professionals responsible for running specific projects.

⁵⁶ Political and other forms of corruption in the attribution of public procurement contracts and allocation of EU funds: extent of the phenomenon and overview of practices. European Commission, 2013.

⁵⁷ Political Interference in Public Procurement, Paul Emanuelli.

Annex 2 – Key Terminology⁵⁸

Award Criteria

The criteria upon which the decision for the award of the contract is based. They can be either the 'most economically advantageous tender'.

Bidder

A person, commercial company or other organisation, that offers to provide goods, services or works in response to a request from a public organisation. The emphasis on offering the goods, services or works in response to a request from a public organisation is necessary to differentiate a bidder from a supplier.

Bid rigging

Bid rigging occurs when suppliers/bidders agree among themselves to eliminate competition in the procurement process, thereby denying the public a fair price. Suppliers/bidders can eliminate competition in public procurement in many simple ways, for example: (i) a competitor agrees to submit a non-competitive bid that is too high to be accepted or contains terms that are unacceptable to the buyer; (ii) a competitor agrees not to bid or to withdraw a bid from consideration; and (iii) a competitor agrees to submit bids only in certain geographic areas or only to certain public organisations.

Framework agreement

A number of suppliers can be part of a framework under which a buyer can call upon for goods or services during a set period of time

Green public procurement

Contracting authorities and entities take environmental issues into account when tendering for goods or services. The goal is to reduce the impact of the procurement on human health and the environment.

Integrity

Integrity can be defined as the use of funds, resources, assets and authority according to the intended official purposes, to be used in line with public interest. In the context of public procurement it implies that (i) procurement procedures are transparent and promote fair and equal treatment of suppliers/bidders; (ii) procurement practitioners' behaviour is in line with the public purpose of their organisation; and (iii) systems are in place to challenge procurement decisions, ensure accountability and promote public scrutiny. 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, fraud and theft of resources, conflict of interest in the public service and post-public employment, collusion, abuse and manipulation of information, discriminatory treatment in the public procurement process and the waste and abuse of organisational resources.

Life cycle costing

Assessment of the costs of a good or service over its entire life cycle.

Procuring entity

⁵⁸ OECD Procurement Toolbox:

<http://www.oecd.org/governance/procurement/toolbox/keyterminology.htm>

The procuring entity is responsible for organising and conducting the tender. Thus, it relates to the pre-tender and tender phases of the procurement cycle. The procuring entity may be the same as the contract authority in a number of cases, for example under a system of centralised purchasing. This definition focuses solely on the procurement process and does not pay attention to other aspects of the public procurement functions, namely: the policy and legislation; internal coordination; monitoring and control; professionalisation and capacity building; etc.

Procurement cycle

The procurement cycle describes the entirety of the process through which public organisations identify, prepare and execute the acquisition of goods, services and works. The procurement cycle comprises of three main phases: pre-tendering (including needs assessment, planning and budgeting, definition of requirements and choice of procedures); tendering (including the invitation to tender, evaluation and award); and post-award or post-tendering (including contract management, order and payment).

Procurement practitioner

A procurement practitioner includes people who are involved in the different stages of the procurement cycle regardless of whether they hold a public official role or not. In this sense, the term captures a broader spectrum of professionals than the term public procurement official may refer.

Public procurement

Public procurement is the purchase of goods and services by governments and state-owned enterprises. It encompasses a sequence of related activities starting with the assessment of needs through awards to contract management and final payment.

Specification

A concise statement of a set of requirements to be satisfied by a product, material or process that indicates whenever appropriate the procedures to determine whether the requirements are satisfied. As far as practicable, it is desirable that the requirements are expressed numerically in terms of appropriate units, together with their limits. A specification may be a standard, a part of a standard, or independent of a standard.

Supplier

A person, commercial company or other organisation, that provides goods, services or works in the market. A supplier need not have responded to a request from a public organisation (see bidder).

Whistleblowing

Whistleblowing can be defined as a means to promote accountability by encouraging the disclosure of information about misconduct and possibly corruption while protecting the whistleblower against retaliation.