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# CORRUPTION IN PUBLIC PROCUREMENT: IMPROVING GOVERNMENTS' ABILITY TO MANAGE THE RISKS OF CORRUPTION

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## ABSTRACT

To an increasing extent, governments demand that their vendors establish sophisticated risk management systems to contain the risks of corruption. The resulting corporate compliance systems have grown more sophisticated, and remarkably uniform, around the world. Ironically, however, governments' own risk management systems have serious gaps, and too often governments fail to coordinate their own risk management systems with their contractors' parallel efforts. Drawing on examples from the United States and Europe, this paper will argue that governments should mitigate these inherent asymmetries in their management of corruption risk, in part by learning lessons from the compliance systems they require of their contractors, and more broadly by better integrating public risk management efforts with those of the private sector.

## 1. INTRODUCTION

Governments must manage a wide range of corruption risks in procurement, to ensure that public funds are spent as intended and the procurement process itself maintains its competitive integrity. As part of that public risk management, more and more public institutions are requiring that their vendors institute corporate compliance systems to mitigate corruption risk. Those corporate compliance systems are advancing rapidly around the world, and are remarkably uniform across jurisdictions. At the same time, however, governments' own risk management systems remain fragmented and immature, often ill-suited to address common corruption risks in procurement.

To address these problems, this paper proceeds in four parts. Part II discusses why governments manage corruption risk in procurement, to ensure sound performance, maintain legitimacy and bolster vendors' confidence in the integrity of the procurement process itself[2]. Part III describes how governments require their vendors to manage corruption risk, often as part of a broader effort, across the economy, to institute corporate compliance systems. Drawing on those corporate compliance models, Part IV asks whether governments could use those same corporate compliance strategies -- the strategies governments demand of their own contractors -- to reduce corruption risks. That, in turn, suggests specific steps that governments might take, drawing on corporate compliance models to address recurring corruption risks in public procurement. Part V, the conclusion, offers closing reflections on a possible way forward, recognizing that risk management in corruption is a vitally important, rapidly developing field.

[2] *See, e.g.*, Phoebe Bolton, *The Public Procurement System in South Africa: Main Characteristics*, 37 Pub. Cont. L.J. 781, 792 (2008) ("Corruption is harmful to the procurement process because it lessens the confidence that honest contractors and the public at large have in the Government. It leads to the slackening of competition for public contracts and lessens the Government's ability to obtain the best value for its money.").

## 2. WHY GOVERNMENTS MANAGE CORRUPTION RISKS IN PROCUREMENT

Governments and public institutions manage corruption risk[3] for at least three reasons[4]:

- Performance risk: Corruption almost always results in poor performance -- projects compromised or delayed because officials who select contractors, or monitor their performance, have been corrupted.

- Reputational risk: Corruption threatens the legitimacy of any government and its leaders; regardless of performance risk, therefore, governments typically work aggressively to contain the reputational risk caused by corruption in procurement.

- Fiduciary risk: When governments are entrusted with public funds for procurement, by taxpayers or others, the governments owe a fiduciary obligation

[3] *See generally* Gabriella M. Racca & Christopher R. Yukins, "Steps for Integrity in Public Contracts" *in Integrity and Efficiency in Sustainable Public Contracts* (Bruylant 2014) (Gabriella M. Racca & Christopher R. Yukins, eds.).

[4] *See, e.g.*, Christopher R. Yukins, *Cross-Debarment: A Stakeholder Analysis*, 45 Geo. Wash. Int'l L. Rev. 219, 226 (2013) (discussing types of risk); Antoinette Calleja, *Procurement Beyond Award: On the Integration of Governance Principles When Executing Public Private Partnerships*, 8 Eur. Proc. & Pub. Priv. Part. L. Rev. 294, 297-98 (2013) ("Corruption in public procurement can become manifest in various forms, for instance by giving or offering bribes, through fraud, collusion and manipulation. Corruption can for instance give way to unnecessary projects being procured, poor quality work, and unjustified requests for variation orders leading to unjustified expenses or expensive work being made. Notwithstanding the fact that corruption erodes public trust, corruption costs the public purse significant amounts. The European Commission estimates a yearly loss. The value lost to corruption in public procurement is estimated at 20-25% of the public contracts' value").

to ensure that the funds are properly spent. If corruption diverts those funds, there is a fiduciary risk, even if that diversion presents no performance or reputational risks[5].

Historically, governments have managed these risks in procurement largely through internal measures and enforcement actions against corrupt contractors. Since the 1990s, however, governments have increasingly relied on contractors to assist in mitigating corruption risks in procurement, by requiring that their vendors institute corporate compliance systems[6].

These compliance requirements largely took shape outside public procurement. Thus, for example, in 1991 criminal sentencing guidelines prepared by the U.S. Sentencing Commission became effective, which promised reduced sentences if corporations and other organizations -- in public procurement markets or otherwise -- instituted compliance systems consistent with the guidelines[7]. The U.S. Sentencing Commission guidelines helped set a benchmark for the corporate compliance requirements that were imposed on U.S. federal contractors in 2008[8], and then on corporations in general under the UK Bribery

[5] *See, e.g.*, Tina Sóreide, Linda Gröning & Rasmus Wandall, *An Efficient Anticorruption Sanctions Regime? The Case of the World Bank*, 16 Chi. J. Int'l L. 523, 529 (2016) (discussing fiduciary risk in diversion of World Bank funding from intended purposes).

[6] Harsh Pathak, *Corruption and Compliance: Preventive Legislations and Policies in International Business Projects*, 3.2 Tribuna Juridica 136 (Dec. 2013) (discussing rise in international anti-corruption efforts).

[7] *See, e.g.*, Paula J. Desio, *Introduction to Organizational Sentencing and the U.S. Sentencing Commission*, 39 Wake Forest L. Rev. 559 (2004).

[8] 73 Fed. Reg. 67064 (2008); *see, e.g.*, Joseph D. West, Diana G. Richard, Karen L. Manos, Christyne K. Brennan, Joseph A. Barsalona, Philip Koos & Richard J. Meene, *Contractor Business Ethics Compliance Program and Disclosure Requirements*, 09-5 Briefing Papers 1 (Thomson Reuters 2009).

Act of 2010[9]. In 2014, the European Union adopted these same standards -- styled "self-cleaning" standards[10] -- in its procurement directives. Under Article 57 of the current EU procurement directive 2014/24/EU[11], for example, a contractor that has been excluded from

[9] *See, e.g.,* Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 Colum. J. Transnat'l L. 365 (2011).

[10] *See, e.g.,* Roman Majtan, *The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes*, 45 Geo. Wash. Int'l L. Rev. 291 (2013).

[11] Paragraph 6 of Article 57, Directive 2014/24/EU, provides regarding self-cleaning (with emphasis added):

> 6. Any economic operator that is [excluded] in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.
>
> *For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.*
>
> The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.
>
> An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

procurement opportunities because of past corruption may "self-clean" so that it can be considered, again, for future awards[12].

Nor have the corporate compliance standards been limited to the United States and the European Union. Brazil[13] and Mexico[14] have adopted requirements for corporate compliance, for example, as part of broader anti-corruption laws. International institutions such as the UN Office of Drugs and Crime (UNODC), the World Bank[15] and the Organisation for Economic Co-operation and Development (OECD)[16], among many others,

[12] *See, e.g.,* Hans-Joachim Priess, *The Rules on Exclusion and Self-Cleaning Under the 2014 Public Procurement Directive*, 2014 Pub. Proc. L. Rev. 112; Brenda Swick, Hans-Joachim Priess & Christopher Yukins, *International Procurement Developments in 2015: Structural Reforms to International Procurement Laws*, 2016 Gov't Con. Year in Rev. Briefs 3 (Thomson Reuters 2016).

[13] *See, e.g.,* Lindsay B. Arrieta, Note, *Taking the Jeitinho Out of Brazilian Procurement: The Impact of Brazil's Anti-Bribery Law*, 44 Pub. Cont. L.J. 157, 173 (2014).

[14] Allie Showalter Robinson, *Developments in Anti-Corruption Law in Mexico: Ley Federal Anticorrupción En Contrataciones públicas*, 19 L. & Bus. Rev. Am. 81, 89 (2013) ("An additional component of the LFACP is focused on encouraging companies and individuals to create 'policies and procedures for self-regulation, internal controls, and ethics programs in order to promote and develop a compliance culture within their organizations.'").

[15] *See, e.g.,* Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 Pub. Cont. L.J. 277, 299 (2007); Stuart H. Deming, *Anti-Corruption Policies: Eligibility and Debarment Practices at the World Bank and Regional Development Banks*, 44 Int'l Law. 871, 885 (2010) ("an effective compliance program has the added benefit of enhancing an entity's ability to secure, either directly or indirectly, opportunities with multilateral lending institutions").

[16] *See, e.g.,* OECD, UNODC & World Bank, *Anti-Corruption Ethics and Compliance Handbook for Business* (2013) (setting forth standards for corporate compliance systems), *available at* http://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf.

have also endorsed very similar corporate compliance standards[17], which are discussed in greater detail below.

Before turning to the corporate compliance standards, it is important to emphasize what they are not: requiring that corporations, and most specifically contractors, institute compliance measures does not mean that a government has abdicated its own duty to fight corruption. Governments instead require compliance measures because they recognize that corporations can be effective allies in the fight against corruption, and that corporations' own compliance efforts, even if driven solely by self-interest, can be harnessed in the public interest. Put another way, governments do not require contractors to institute compliance measures because governments blindly trust contractors, but because governments recognize that thoughtful contractors may well institute anti-corruption measures anyway, as a means of reducing their own risks. In this light, governments' corporate compliance requirements are arguably simply a means of shaping and directing private contractors' own efforts to identify, and contain, corruption risks in public procurement markets.

[17] In joint guidance issued on enforcement of the Foreign Corrupt Practices Act, the U.S. Department of Justice and the U.S. Securities and Exchange Commission outlined common requirements for compliance systems, from many nations and international organizations. That guidance by the U.S. government confirms the harmonization, internationally, of standards for compliance systems, standards which are discussed in more detail below. *See* U.S. Department of Justice & U.S. Securities and Exchange Commission, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 57-65 (2012, revised 2015), *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

## 3. HOW GOVERNMENTS REQUIRE VENDORS TO MANAGE CORRUPTION RISK: COMMON CORPORATE COMPLIANCE REQUIREMENTS

As noted, the compliance systems required of contractors are remarkably uniform around the world[18], although the descriptions of those requirements may vary from jurisdiction to jurisdiction:

1. *Code of Conduct:* A corporation's compliance system will be built around a code of conduct[19], which employees are expected to review and understand. The code of conduct, which typically also includes a plain statement of the firm's values and ethics, provides the baseline for compliance efforts.

2. *Knowledgeable Leadership:* It is vitally important that the firm's leadership, including its chief executives and its governing board, understand, endorse and help implement the firm's compliance efforts[20]. As is discussed below, a firm's

[18] *See, e.g.*, U.S. Department of Justice & U.S. Securities & Exchange Commission, *supra* note 17, at 63 ("There is also an emerging international consensus on compliance best practices, and a number of inter-governmental and non-governmental organizations have issued guidance regarding best practices for compliance.").

[19] The U.S. Sentencing Commission's guidelines for organizations state that, in establishing an effective ethics and compliance system, the "organization shall establish standards and procedures to prevent and detect criminal conduct." U.S. Sentencing Commission, *Sentencing Guidelines Manual* §8B2.1 (2015), *available at* http://www.ussc.gov/guidelines-manual/2015/2015-chapter-8. Per the accompanying explanatory notes, the "formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization." *Id.*

[20] Section 8B2.1 of the U.S. Sentencing Commission guidelines, *supra* note 19, states at paragraph (b)(2):

compliance system is in many ways a formal mechanism for moving information "up" inside the company, to senior decision makers who are best positioned to assess the legal, performance and reputational risks posed. Unless senior leadership is integrally involved in compliance efforts, therefore, the compliance system will likely fail.

3. *Regular Training*: Because a compliance system is built on a body of rules, those rules must be regularly conveyed to those inside the firm, and, as appropriate, to agents and others working for the firm[21]. Training also affords an opportunity to convey the ethical principles that guide the firm; while less concrete than rules, those principles help fill gaps when employees encounter problems (new forms of corruption, for example) that are not, strictly speaking, addressed by existing rules.

(2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

[21] *See, e.g.*, U.S. Department of Justice & U.S. Securities and Exchange Commission, *supra* note 17, at 59 ("Compliance policies cannot work unless effectively communicated throughout a company.").

4. *Excluding Risky Personnel:* A firm is only as sound as its employees, and so corporate compliance requirements typically demand that firms screen for, and exclude, prospective employees that pose corruption risks for the company, based (for example) on past convictions or misconduct[22].

5. *Internal Discipline:* To ensure that its compliance system is effective, a firm must discipline those who breach the rules, and applaud those who comply[23]. This

[22] The rule governing contractor compliance systems in the U.S. federal procurement system calls for, regarding the need to exclude risky personnel: "Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct." 48 C.F.R. § 52.203-13(c)(2)(1)(B), FAR 52.203-13(c)(2)(1)(B). The U.S. Sentencing Commission guidelines state: "The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program." U.S. Sentencing Commission, *supra* note 19, §8B2.1(b)(3).

[23] The UK Ministry of Justice guidance implementing the UK Bribery Act states that senior managers should communicate the following in supporting an ethics and compliance policy:

- a commitment to carry out business fairly, honestly and openly
- a commitment to zero tolerance towards bribery
- the consequences of breaching the policy for employees and managers
- for other associated persons the consequences of breaching contractual provisions relating to bribery prevention (this could include a reference to avoiding doing business with others who do not commit to doing business without bribery as a 'best practice' objective)

UK Ministry of Justice, *The Bribery Act 2010: Guidance About Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing (Section 9 of the Bribery Act 2010)*, at 23 (2011), *available at* http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

means, in practice, disciplining employees who violate anti-corruption rules *and* their supervisors, if the supervisors' lax oversight contributed to the problem.

6. *Internal Reporting Mechanisms:* As noted, a compliance system is in many ways an information transmission system -- a means to ensure that rules and standards are understood down through the ranks, and a mechanism (such as a "hotline") so that information on corruption can be passed up through channels.

7. *Auditing and Review:* A sound compliance system requires regular review and auditing, either internally or by outsiders, to ensure that the system is identifying and addressing corruption risks that arise, and to make recommendations for improvement[24].

[24] The contract clause on contractor compliance systems in the U.S. federal government requires, 48 C.F.R. 52.203-13(c)(2)(ii)(C), FAR 52.203-13(c)(2)(ii)(C):

> (C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting, including—
>
> (1) Monitoring and auditing to detect criminal conduct;
>
> (2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and
>
> (3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

8. *Adjusting to Risk*: The compliance program should be adjusted to risks[25]. This may mean strengthening the program to address new risks if, for example, the firm is entering new markets with more acute risks of corruption.

What is probably most remarkable about these elements is that they are largely the same, the world over. As the U.S. Securities & Exchange Commission (SEC) and the U.S. Department of Justice recognized in their joint guidance under the Foreign Corrupt Practices Act, compliance system requirements are generally uniform in jurisdictions around the world[26]. This uniformity reflects ongoing communication and cooperation between jurisdictions and enforcement officials, and is driven in part by multinational firms' expressed preference for uniform standards which will allow those firms to reduce transaction costs by establishing uniform worldwide compliance systems[27].

For governments, contractors' compliance system present a dual opportunity. First, governments can benefit from compliance systems directly, because they reduce corruption risk and result in information on corrupt behavior that may be provided, on a voluntary or mandatory basis, to government enforcement officials. Second (and less obviously), corporate compliance systems provide a sort of benchmark or measure, which governments can use to assess their own anti-corruption efforts[28]. International experience

[25] The UK Ministry of Justice guidance on effective compliance systems, *supra* note 23, states, at 25: "The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented."

[26] See the discussion *supra* note 17.

[27] *See generally* Brian C. Harms, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 Cornell Int'l L.J. 159, 175 (2000) (discussing efforts by the International Chamber of Commerce to encourage business codes of conduct).

[28] *See, e.g.*, Louis de Koker & Kayne Harwood, *Supplier Integrity Due Diligence in Public Procurement: Limiting the Criminal Risk to Australia*, 37 Sydney L. Rev. 217, 218 (2015) (article compares "the customer due diligence

shows, however, that governments have not fully understood, or drawn upon, the lessons that corporate compliance systems can provide.

## 4. ASSESSING GOVERNMENTS' OWN RISK MANAGEMENT SYSTEMS

Although governments now regularly require companies to institute compliance systems, outlined above, governments too seldom draw lessons from those compliance systems. Element by element, these corporate compliance systems bear lessons -- important lessons -- for governments that are seek to reduce the risks of corruption in procurement.

### *4.A. Codes of Conduct*

Governments understand, of course, that (much like companies) they need to reduce risk in procurement by instituting codes of ethics to guide their employees' conduct; indeed, the UN Convention Against Corruption (UNCAC) explicitly calls for such guidance in its article on procurement[29]. What governments often fail to do, however, is

('CDD') measures that banks are required to implement to prevent money laundering and terrorism financing with the general supplier due diligence practices and processes of Australian government agencies").

[29] UNCAC Art. 9(e) ("Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements."); *see, e.g.*, Christopher R. Yukins, *Integrating Integrity and Procurement: The United Nations*

what corporations already do: integrate their codes of conduct with their trading partners, and (if possible) harmonize codes of conduct across borders to reduce costs and enhance enforcement.

### *4.A.I. Integrating Codes of Conduct with Trading Partners*

Governments, like their contractors, should ensure that their codes of conduct are better integrated with their trading partners' codes and compliance systems. Governments require this of their contractors: the UK Ministry of Justice, for example, specifically calls for contractors to coordinate their compliance efforts, as appropriate, with "associated" persons[30], and contractors regularly work to integrate their suppliers into their compliance systems[31].

Unlike their contractors, however, governments do relatively little to coordinate their codes of conduct -- their laws and regulations on ethical conduct -- with their suppliers. In the U.S. federal system, for example, the government does not provide its contractors with specific guidance on how to ensure that their employees comply with federal anti-corruption laws. Instead, contractors are expected to derive codes of conduct that "mirror" the federal rules. Thus, for instance, because federal ethics rules generally bar

*Convention Against Corruption and the Uncitral Model Procurement Law*, 36 Pub. Cont. L.J. 307, 310 (2007) (discussing procurement elements of UNCAC).

[30] The UK Ministry of Justice guidance, *supra* note 23, at 16, explains that liability under the UK Bribery Act could extend to a firm's subcontractors, as "associated persons," "to the extent that they are performing services for or on behalf of a commercial organisation."

[31] Training under compliance systems required by the Federal Acquisition Regulation is to be provided to "the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors." 48 C.F.R. § 52.203-13(c)(1)(ii), FAR 52.203-13(c)(1)(ii).

gifts worth over $20[32], contractors are expected to develop ethics systems that reflect that limit. The federal government's procurement rules do not say so, however; contractor codes are instead expected to incorporate and reflect the federal ethics rules. This gap in cooperation favors the large, well-established contractors which understand how to structure their compliance rules (an anti-competitive problem[33]), and it makes it less likely that contractors will implement effective compliance systems (a corruption risk).

The solution, it seems, is to integrate the government and contractor compliance codes. This is normal in the private sector, where firms in a supply chain often must compare and reconcile their compliance codes. One possible way forward would be for governments to publish proposed compliance codes for their contractors; the codes could mirror the government'' special requirements, and could serve as a starting point for contractors' own codes. In the United States federal system, the government regularly provides draft language of this type in other areas where contractors need to integrate their operations with the government's; it would not be out of the ordinary for the government to provide guiding models for ethics codes, to help integrate the public and private efforts in anti-corruption[34].

[32] 5 C.F.R. § 2635.204(a); Office of Government Ethics, *Employee Standards of Conduct*, https://www.oge.gov/web/oge.nsf/Employee%20Standards%20of%20Conduct.

[33] *See, e.g.*, Christopher R. Yukins, *Mandatory Disclosure: A Case Study in How Anti-Corruption Measures Can Affect Competition in Defense Markets* (2015), paper presented at the conference *"Ethical Dilemmas in the Global Defense Industry,"* Center for Ethics and the Rule of Law, University of Pennsylvania Law School, Apr. 16, 2015 (publication forthcoming).

[34] The state of Connecticut, for example, publishes a guide on state ethics codes for contractors. *See* Connecticut Office of State Ethics, *Guide to the Code of Ethics For Current or Potential State Contractors*, at 6 (2007), *available at* http://www.ct.gov/ethics/lib/ethics/guides/contractors_guide_final07.pdf. This is a good example of a public guide that simplifies, and harmonizes, contractors' efforts to adapt to a government's ethics requirements.

### *4.A.II. Making Codes of Conduct More Uniform Across Borders*

Another area of needed improvement is *uniformity* in government ethics codes[35]. In the United States, for example, ethics codes can vary wildly from jurisdiction to jurisdiction. In Connecticut, it is illegal to provide gifts of over $10 to a state employee[36]; in the federal government, the limit is $20, and in Hawaii a state employee must report any gift over $200[37]. This confusing welter of rules makes compliance by the private sector very expensive, and, at the extreme, can discourage enforcement by public agencies that recognize the somewhat arbitrary nature of bizarrely divergent rules.

The solution, again, is to look to corporate compliance in the private sector, which stresses *uniformity* to reduce implementation costs and enhance internal compliance. Multinational corporations regularly build compliance systems that span borders, which need to be understood and complied with in many jurisdictions and cultures. Multinational firms are able to maintain this consistency in compliance strategies in part because different nations, as they adopted compliance requirements internally, drew from international models and standards for compliance -- in no small part because multinational corporations and international organizations[38] themselves urged a consistent set of compliance standards.

[35] *Cf.* Alexandra R. Harrington, *Conflicting Trends: Lessons from Current Evaluative Mechanisms in International and Regional Anti-Corruption Systems Regarding Conflicts of Interest*, 4 Geo. Mason J. Int'l Com. L. 186, 191 (2013) (discussing variances in ethics codes).

[36] Conn. Gen. Stat. § 1-79 (e) (16); *see* Connecticut Office of State Ethics, *supra* note 34, at 6.

[37] Hawaii Rev. Stat. §84-11.5.

[38] *See, e.g.*, UN Office of Drugs & Crime, *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide* (2013), *available at* https://www.unodc.org/documents/corruption/Publications/2013/13-84498_Ebook.pdf.

Taking a page from the compliance story, governments could adopt more uniform ethics standards for their procurement officials. Efforts to harmonize ethics rules for procurement need not fail simply because of local differences in norms and criminal laws[39]. In both public procurement systems and private corporations, it is common to develop a separate, stricter set of ethics rules for those involved in procurement[40], because of the more acute risks posed in procurement. Where it is not possible to conform local ethics rules to international norms, therefore, it may be easier to draft and adopt ethics rules specifically for procurement which more closely follow broadly accepted international practices -- which, in turn, will mean that vendors entering that procurement market will encounter more familiar and workable ethics rules. Taken together, these efforts to harmonize ethics rules in procurement across borders could reduce compliance costs and enhance enforcement, and thus make it easier to manage the corruption risks inherent in every procurement system.

### *4.B. Knowledgeable Leadership: Vertical Integration in Risk Management*

Another important lesson for governments from private compliance efforts is that it is essential to move information on corruption "vertically," quickly and efficiently. A sound compliance system typically ensures that a company's senior leadership learns of corruption failures quickly and efficiently, so that the firm's leaders can assess the risk and order remedial action. That is not always true, however, of public anti-corruption systems.

[39] *See, e.g.*, Thomas Kelley, *Corruption As Institution Among Small Businesses in Africa*, 24 Fla. J. Int'l L. 1, 6 (2012) ("Corruption is so engrained in the culture of Nigerien society, including its business sector, that at present it supplies the logic and the rules that most businessmen live by."); Eleanor M. Fox & Deborah Healey, *When the State Harms Competition-the Role for Competition Law*, 79 Antitrust L.J. 769, 785 (2014) (discussing diverging anti-corruption laws).

[40] *See, e.g.*, UN Office of Drugs & Crime, *supra* note 38, at 39 (detailing policies for particular risk areas).

Under the European Union's current procurement directive 2014/24/EU, for example, Article 57 provides that individual agencies are to assess vendors for possible exclusion, based on past corrupt actions. Unlike the World Bank[41], Nigeria[42], the United States[43] and other countries, the European directive does not contemplate a debarment process, through which a more senior official would assess a vendor for exclusion across a procurement system; instead, the European directive describes a much more fragmented and decentralized process, one in which corruption (and its performance and reputational risks) will be assessed by relatively low-level officials, again and again. Probably no sound corporate compliance system would assess corruption risks in this *ad hoc*, highly decentralized way; nor, optimally, should a public procurement system. A better approach would be to ensure that information on corruption risks[44] moved smoothly to a more senior level of government, where a broader exclusion decision -- a debarment, if appropriate -- could be made.

### *4.C. Integrating Training with Private Counterparts*

Another area of possible improvement in managing corruption risk in public procurement lies in *training*. Through training, an enterprise works to ensure that applicable

[41] *See, e.g.*, Sope Williams, *supra* note 15.

[42] *See* Sope Williams-Elegbe, *The Reform and Regulation of Public Procurement in Nigeria*, 41 Pub. Cont. L.J. 339, 357 (2012) (Nigerian Bureau of Public Procurement holds authority list disqualified suppliers and service providers).

[43] *See* 48 C.F.R. Subpart 9.4, FAR Subpart 9.4.

[44] *Cf.* Courtney Hostetler, *Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects*, 14 Yale Hum. Rts. & Dev. L.J. 231 (2011) (discussing methods for better sharing information on procurement corruption in World Bank projects).

laws and corporate policies are understood, and will be followed. Corporate compliance training is not, it should be emphasized, limited to a corporation's own employees; firms often extend training to other companies in their supply chains, either on their own initiative or because of a legal requirement[45]. In California, for example, all major retailers and manufacturers (those with worldwide sales over US$100 million) must make efforts to eradicate slavery and human trafficking from their direct supply chains[46]. This means extending compliance training in anti-slavery and human trafficking laws beyond employees, to include supply chain partners. As a practical matter, this allows retailers and manufacturers to integrate their anti-corruption efforts with others in their supply chains. Governments could do the same, and include private sector suppliers in their anti-corruption training, so that both public and private officials can understand, together, the legal and ethical obligations they share.

### *4.D. Excluding Risky Personnel: Identifying and Clarifying Risk*

The discussion above focused on broader institutional lessons that governments might learn from corporate compliance systems. The lessons may carry to the more granular level, as well -- governments may be able to learn strategies from private compliance systems for excluding "risky" personnel, prone to corruption. Under the Federal Acquisition Regulation, for example, vendors are required to make "[r]easonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business

[45] *See, e.g., supra* note 31 and accompanying text.

[46] California Civil Code § 1714.43.

ethics and conduct."[47] The question, then, is whether public procurement systems can take a similar approach, to exclude vendors run by individuals who pose special corruption risks.

This question -- how to exclude contractors run by executives who have shown themselves to be untrustworthy in the past -- is a recurring headache for contracting authorities. It is more common for anti-corruption enforcement efforts to focus first on corporations, and individual managers, executives, or board members may not be targeted; even if they are, it may be difficult for contracting officials to gather information on those enforcement efforts. While the focus is changing in the U.S. federal enforcement regime, and new emphasis is being put on holding senior individuals accountable[48], it can still be difficult for procurement officials to gather information efficiently on senior personnel who may pose corruption risk.

The risk mitigation solution, it seems, is one typically used in the private sector: to identify caches of relevant data, and to make that information more readily available. One way to do that would be to clarify the bases for debarment or exclusion in publicly available databases. In the United States, for example, debarment officials must have clearly established grounds for debarring an individual. Those bases for debarment are not, however, set forth in the excluded person's listing on www.sam.gov, the public repository; nor is the list of excluded parties readily searchable by a simple name search[49]. This means

[47] 48 C.F.R. § 52.203-13(c)(2)(ii)(B), FAR 52.203-13(c)(2)(ii)(B).

[48] Memorandum from Deputy Attorney General Sally Quillian Yates, U.S. Department of Justice, Sept. 15, 2015, https://www.justice.gov/dag/file/769036/download.

[49] An example helps to illustrate the problem. According to the U.S. Department of Justice, on July 2, 2014, a U.S. federal district judge sentenced Vernon J. Smith III, age 61, of Edgewater, Maryland, to 42 months in prison, followed by three years of supervised release, for conspiring to defraud the United States, including fraud involving federal contracts. *See* U.S. Department of Justice, *Edgewater, Maryland Man Sentenced To 42 Months In Prison For Defrauding SBA And IRS Of More Than $7 Million* (July 2, 2014), *available at* https://www.justice.gov/usao-md/pr/edgewater-maryland-man-sentenced-42-months-prison-defrauding-sba-and-irs-more-7-million. While the Justice Department's press release on the conviction and sentencing is readily

that information on persons found guilty of corrupt behavior, while compiled in the U.S. government, is not readily available for risk mitigation efforts outside the enforcement agencies themselves.

### *4.E. Integrating Contractors Into a Public Disciplinary Regime*

The next step in public risk mitigation looks to bridge the gap between public and private compliance systems. Traditionally, public and private anti-corruption compliance regimes stood largely separate. Thus, for example, while conscientious contractors in the U.S. federal system honored the gift limit of $20, if a contractor ignored those ethics limits -- if, for example, a "bad" contractor regularly gave federal officials gifts worth over $20 -- the disciplinary punishment fell largely on the federal officials, not the contractor, unless the contractor was criminally prosecuted for bribery, was found non-responsible (non-qualified)[50], or was debarred -- all of which were severe measures, and therefore unlikely. There was, in other words, no *direct* means of extending the federal compliance regime's disciplinary regime to its contractors. This limited the effectiveness of the federal compliance regime. More broadly, it reflected a blind spot common in government compliance regimes: the government can discipline its employees for ethical infractions, but has difficulty disciplining outsiders to enforce its ethics rules.

available on an Internet search of the defendant's name, the *exclusion* record, buried in the federal government's database at www.sam.gov, is available only on a specific name search *within* the database. In other words, there would be no way for a German contracting official to know that the Mr. Smith was excluded for corruption unless the contracting official knew (as U.S. contracting officials know) to search for Mr. Vernon's name in the federal database. And even once a contracting official located Mr. Smith's debarment record in www.sam.gov, there would be no substantive information there on the *bases* for debarment -- nothing in the public database states why, exactly, Mr. Smith has been indefinitely excluded from federal contracting.

[50] *See* John Bryan Warnock, *Principled or Practical Responsibility: Sixty Years of Discussion*, 41 Pub. Cont. L.J. 881 (2012) (discussing U.S. federal process for determining non-responsibility).

This gap between public and private regimes was eased in the U.S. federal system when the Federal Acquisition Regulation was amended to require that when contracting officials assess an offeror's *past performance* -- an essential element of U.S. award evaluations -- the contracting officials must take into consideration the vendor's history of integrity and business ethics[51]. This means, in practice, that any vendor likely to seek a future award (any vendor, really) has a strong incentive to conform, among other thing, to federal ethics rules, or risk receiving a poor past performance evaluation and lose future awards. The gap between public and private compliance regimes was narrowed, therefore, by making compliance an evaluation factor for future contract awards; by doing so, the federal government helped reduce the risk of corruption in procurement.

### *4.F. Encouraging Reports of Corruption*

Another weakness in public compliance regimes lies in failing to fully incentivize potential whistleblowers who could disclose corruption. This contrasts with the private sector, which is often required to establish effective channels for communication, such as "hotlines," as part of a corporate compliance system[52]. In the public sector, in contrast, reporting tends to be much more *ad hoc*, and potential whistleblowers (both inside and outside the government) often have little incentive to risk reporting misconduct.

[51] 48 C.F.R. § 42.1501(a), FAR 42.1501(a). For a discussion of how past performance was incorporated into the federal procurement system during the Clinton administration, see, for example, Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 656-57 (2001).

[52] *See, e.g.*, 48 C.F.R. § 52.203-13(c)(2)(ii), FAR 52.203-13(c)(2)(ii) ("At a minimum, the Contractor's internal control system shall provide for . . . [a]n internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.").

To ease this problem, policymakers in the U.S. federal system have instituted both protections and incentives for whistleblowers. Under the False Claims Act, for example, whistleblowers are protected from retaliation, and they may receive a share (up to 30 percent) of the federal government's ultimate fraud recovery (which, with penalties, can amount to many millions of dollars)[53]. These protections and incentives in effect make whistleblowers an integral part of the federal compliance regime, and help to narrow the government's exposure to corruption risk.

### *4.G. Auditing and Review by Civil Society*

Another way to narrow corruption risk in public procurement is to encourage active oversight by civil society. The United States here provides an adverse counterexample; in the U.S. procurement system, audit and oversight is left largely to government officials (inspectors general, government auditors and the Comptroller General, for example)[54], and civil society has little (if any) formal role in reviewing anti-corruption measures in the federal procurement system. That is not, however, necessarily the best approach. In many nations, civil society plays formal, legally recognized role in

[53] *See, e.g.,* U.S. Department of Justice, *The False Claims Act: A Primer*, https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf; John T. Nicolaou, Survey, *Whistle While You Work: How the False Claims Act Amendments Protect Internal Whistleblowers*, 2011 Colum. Bus. L. Rev. 531 (2011).

[54] *See, e.g.*, Major Timothy M. Cox, *Promoting Integrity from Without: A Call for the Military to Conduct Outside, Independent Investigations of Alleged Procurement Integrity Act Violations*, 66 A.F. L. Rev. 225, 238 (2010) (discussing U.S. agency oversight); *see also* Frank Anechiarico & James B. Jacobs, *Purging Corruption from Public Contracting: The "Solutions" Are Now Part of the Problem*, 40 N.Y.L. Sch. L. Rev. 143, 144 (1995) (discussing New York City's procurement system, and noting that the "dilemma is that in trying to corruption-proof public contracting, corruption controllers mire the process in red tape, undermining the government's capacity to carry out essential goals and, ironically, creating new opportunities for corruption and fraud").

monitoring procurement[55]. Government agencies' reluctance to make their procurement processes transparent is part of the reason that civil society is excluded, and it is important to recognize that this reluctance can be caused, in part, by government officials' fear of embarrassment. A better course may be to recognize that civil society review can be highly beneficial in stemming corruption in procurement, and to weigh, honestly and openly, the costs and benefits of allowing more transparent review by members of civil society[56].

### *4.H. Adjusting Public Compliance Systems to New Risks*

Another possible improvement in public anti-corruption compliance systems would be to make it easier for governments to adjust to new corruption risks. Public compliance systems tend to be inflexible, and when a government encounters new corruption risks (as, for example, the U.S. government encountered in Afghanistan), the system's failure to adjust can lead to serious corruption failures[57]. To remedy this problem, it is important to recognize that anti-corruption compliance is, at its heart, an attempt to

[55] *See, e.g.*, Myrish T. Cadapan-Antonio, *Participation of Civil Society in Public Procurement: Case Studies from the Philippines*, 36 Pub. Cont. L.J. 629 (2007); Sabina Panth, *Three Examples of Procurement Monitoring by Civil Society* (May 5, 2010) (blog entry), http://blogs.worldbank.org/publicsphere/three-examples-procurement-monitoring-civil-society; Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas, 30 Law & Pol'y Int'l Bus. 53, 80 (1999)* ("the World Bank has permitted NGOs and concerned citizens to become more involved in the monitoring of its financing projects").

[56] *Cf.* Anne Janet DeAses, Note, *Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption in the Public Procurement Process*, 34 Pub. Cont. L.J. 553, 562 (2005)(discussing UN proposals for international monitoring body to stem corruption in procurement).

[57] *See, e.g.*, Major Marlin D. Paschal, *Getting Beyond "Good Enough" in Contingency Contracting by Using Public Procurement Law As A Force to Fight Corruption*, 213 Mil. L. Rev. 65 (2012).

mitigate the severe agency problems that can distort outcomes in any procurement system[58]. While the principal (the government) may seek optimal outcomes, the self-interest of agents (the contracting officials and the contractors themselves) can distort those outcomes[59]. Those distortions are amplified by corruption, and traditional mitigation strategies -- monitoring and sanctioning mechanisms[60] -- may fail under extreme and adverse circumstances, such as a war zone where corruption is endemic. The answer, it seems, is not merely to rely on traditional anti-corruption strategies, but to recognize that if the goal is to optimize public outcomes, the problem must be addressed in a unique social and political context[61], which may present other, non-traditional means of mitigating the risks, and distortions, of corruption.[62] Drawing on examples from the private sector, which has

[58] *See* Annika Engelbert, Nina Reit & Laurence Westen, *Procurement Methods in Kenya - A Step Towards Transparency?*, 7 Eur. Proc. & Pub. Priv. Part. L. Rev. 162 (2012) ("Public procurement is vulnerable to corruptive acts because it deals with asymmetrical buyer-seller relationships, important contract amounts, and complex and hence often nontransparent procedures.").

[59] *See, e.g.*, Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 Pub. Cont. L.J. 63 (2010); James Jurich, *International Approaches to Conflicts of Interest in Public Procurement: A Comparative Review*, 7 Eur. Proc. & Pub. Priv. Part. L. Rev. 242, 244 (2012); Gabriella M. Racca & Roberto Cavallo Perin, *Material Amendments of Public Contracts During Their Terms: From Violations of Competition to Symptoms of Corruption*, 8 Eur. Proc. & Pub. Priv. Part. L. Rev. 279, 293 (2013) ("Whenever delivered quality is shattered by opportunistic behaviour at the execution stage, transparency and non-discrimination principles are betrayed, since an incorrect execution undermines the competition principle put in place among competing bidders in the selection phase.").

[60] *See, e.g.*, Christopher R. Yukins, *supra* note 59, at 81.

[61] *See, e.g.*, Sope Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures* 9 (Hart 2012); Andrea Dahms, Nicolas Mitchell, Foreign Corrupt Practices Act, 44 Am. Crim. L. Rev. 605, 627 (2007) (noting that the World Bank and the International Monetary Fund "are also trying to control fraud and corruption by evaluating corruption levels when designing development assistance strategies and implementing anti-corruption projects.").

[62] See, for example, this discussion of how local circumstances have shaped responses to corruption in procurement in Italy:

been very versatile in developing new strategies in response to new corruption risks, governments may benefit by taking a broader view of possible solutions to new risks of corruption.

## 5. CONCLUSION

As this brief essay reflects, government anti-corruption compliance systems can draw many lessons from the private compliance regimes that the governments themselves helped establish. Public and private compliance systems are not always aligned of course; the victim compensation which is emerging as part of the "self-cleaning" required of European private contractors[63], for example, is an area where public and private interests

> In particular, given the dissimilarity of constrictions affecting the action of contracting authorities, it is clear that a local regulation may help the contracting authorities to respond better to the structural factors of their own geographical area. For example, while in some regions of the south the presence of criminal associations makes the risk of corruption the main constraint to the effective functioning of the procurement system, in some regions of the centre and the north the high levels of association between firms would suggest that here the main risk is collusion between them. Economic theory illustrates how, in the face of these two types of risk, the optimal structure of the public procurement system should be completely different. However, local regulations can have heavily distorting effects on competition in the award of public contracts and hence come to increase the costs for contracting authorities and cause a deterioration in the allocation of resources.
>
> Balancing these elements of the trade-off is a complex task, but . . . the choice of the Italian parliament (made necessary also by EU Law requirements) has been quite clear: to grant Regions and other local authorities a certain flexibility to adapt to the needs of their local territories, but making sure this does not translate into a limitation of competition.

Francesco Decarolis & Cristina Giorgiantonio, *Local Public Procurement Regulations: The Case of Italy*, 43 Int'l Rev. L. & Econ. 209, 215 (2015).

[63] *See* European Directive 2014/24/EU, Art. 57(6) ("the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct").

are more likely to collide. In general, however, lessons learned from private corporate compliance systems are likely to prove quite useful, as governments work to manage the risks of corruption in procurement.