

**UN  
Convention  
Against  
Corruption**



**Parallel Checklist Report  
on **UNCAC**  
Implementation**

**USA**

Prepared by TI USA  
2007



## II. PREVENTIVE MEASURES (CHAPTER II)

### C. Article 9 Public procurement and management of public finances

#### 4. Subparagraph 1(a) of article 9 (Systems of procurement designed to prevent corruption)

#### 5. Subparagraph 1(b) of article 9 (Establishment of conditions for participation in public procurement)

#### 6. Subparagraph 1(c) of article 9 (Criteria for public procurement decisions)

#### 7. Subparagraph 1(d) of article 9 (System of domestic review of public procurement decisions)

The U.S. has a comprehensive system of laws and regulations governing procurement. The principal statutory provisions are set forth at Title 41 of the U.S. Code, and the principal implementing regulations are set forth at Title 48 of the Code of Federal Regulations (referred to here as the “FAR”). These statutes and regulations apply throughout the government<sup>1</sup> and address all aspects of procurement, including bids and solicitations; qualification of bidders and offerors; evaluation of proposals; types of contracts; awards; performance; cost and pricing considerations; modifications during performance; and termination.

By statute, the FAR is issued and maintained by a Council consisting of the Administrator of the Office of Federal Procurement Policy; the Secretary of Defense; and the Administrators of the National Aeronautics and Space Administration and the General Services Administration; or their designees. Individual agencies are permitted to supplement the FAR only to satisfy unique needs of the agency. A transparent process of public notice and comment rulemaking is regularly employed to amend and update the FAR to address new legislative requirements, issues that arise in litigation, or policy initiatives that source from the current Administration.

Under the FAR, in order to promote broad competition, executive branch agencies are required to define their needs in the least restrictive manner possible. They are encouraged to define the performance they expect rather than soliciting a specific product, so that bidders and offerors may propose competing solutions.

Except in the case of emergencies or where the value of a proposed purchase is very small, agencies must advertise publicly, and in advance, for all goods and services required, stating their requirements and setting forth the basis on which proposals will be evaluated and an award will be made. Contracts may be awarded only for goods and

---

<sup>1</sup> Two executive branch agencies – the Federal Aviation Administration and the Transportation Security Administration within the Department of Homeland Security -- are exempted from the FAR and from certain acquisition statutes. In each case, however, they have developed parallel acquisition regulations that reflect most of the underlying principles and requirements of the FAR.

services that conform to these advertised requirements and only to contractors who are determined to be “responsible.” It is notable that a ‘responsible’ contractor is, for these purposes, defined to mean that the contractor has, among other things, a satisfactory record of integrity and business ethics, and a satisfactory performance record. Pre-qualification of bidders and offerors is permitted in some cases, most notably in the case of major construction and public works contracts or where manufacturing a product to the required specifications is particularly difficult.

Disappointed offerors may challenge the terms of a solicitation or any award by filing a “protest” with the procuring agency; with the Government Accountability Office (“GAO”); or with the U.S. Court of Federal Claims. Most protests are filed at GAO, which reports that in Fiscal Year 2006, some 29% of the protests which were decided on the merits were sustained, and in another 10%, the protester obtained some form of relief from the procuring agency.<sup>2</sup> Although the protest mechanism is imperfect, it provides a meaningful level of transparency into the source selection process.

Price must be an evaluation factor in all procurements, and where it is the only factor, bids are opened in public. Where price is only one of several factors to be considered and offerors submit substantial written “technical” proposals, they are permitted to request confidential treatment of those proposals; in that case, only the winning proposal, or the relevant portion of the winning proposal, is made public. Where it is necessary to award a contract without a firm fixed price because of uncertainties in the required performance (such as where research and development work in a new area is needed), the government has authority to perform audits before and after award in order to determine that the costs charged by the contractor are fair and reasonable.

All solicitations and contracts must include certain standard terms and conditions that are required by law. Among the mandatory contract terms and conditions that assist in preventing corruption are those that –

- prohibit collusive bidding
- prohibit the payment of bribes or gratuities to government personnel
- prohibit the payment of contingent fees for obtaining a contract, except where the recipient is a bona fide employee or agent of the seller
- prohibit the payment of kickbacks to or for a subcontractor
- require disclosure of certain payments made to influence or attempt to influence any Federal official in connection with the award of a contract, and prohibit the use of appropriated funds to make such payments
- prohibit the disclosure, before the award of a contract, of (a) contractor bid or proposal information, or (b) source selection information, by any federal official involved with the procurement
- prohibit the receipt, before the award of a contract, of (a) contractor bid or

---

<sup>2</sup> GAO-07-155R (Nov. 15, 2006), available at <http://www.gao.gov/special.pubs/bidpro06.pdf>. In Fiscal Year 2006, GAO received 1,327 protests. Specific data on protests filed at the agency level and the Court of Federal Claims are not available, but far fewer protests are filed at the Court, probably due to the relative cost and formality of proceedings there.

proposal information, or (b) source selection information, by any person except as authorized by law

- prohibit employment discussions between an offeror and an agency official who is participating personally and substantially in a procurement for a contract for which the offeror is competing

These requirements are based primarily on criminal statutes found in Title 18 of the U.S. Code or on provisions of the Procurement Integrity Act, 41 U.S.C. § 423. A variety of criminal, civil, and administrative penalties are available for violations, including “debarment” of contractors whose criminal or fraudulent conduct demonstrates that they are substantially lacking in integrity. A debarment is an administrative sanction which precludes a contractor from selling to the U.S. for a period of up to three years. In addition, agencies are authorized in certain instances of contractor misconduct to terminate a contract or insist on a reduction in the contract price.

In addition, the FAR has been recently amended to require companies that win contracts with the US government to adopt written codes of business ethics and conduct; to institute training programs and an internal control system (small businesses are excepted); and to display Federal agency Office of the Inspector General (“OIG”) Fraud Hotline Posters unless they have instituted other mechanisms to encourage and facilitate the reporting of suspected instances of improper conduct. While the new rule has some exceptions, it imposes significantly greater requirements than are contained in current FAR regulations and should aid in the prevention of procurement related corruption.

Where government procurement officials engage in misconduct such as bribery or self-dealing, they are prosecuted, as demonstrated by several recent high-profile cases.<sup>3</sup> While the number of such prosecutions is very small in comparison to the number of procurements conducted each year by the U.S. government, the consensus of lawyers in the industry is that the small numbers reflect a system that works well.

Yet, as in any system, there is room for improvement. There are two areas of particular concern. The first is the adequacy of oversight of contracts and contractors who are charged by law with planning, defining, procuring, and supervising the performance of all acquisition contracts. The second is an apparent stagnation, or perhaps decline, in competition due to changes in the nature of the procurement vehicles that are most frequently used by government agencies. Because open competition is so important to the integrity of any procurement system, declines in competition must be carefully scrutinized.

---

<sup>3</sup> See, e.g., “Former Air Force acquisition official released from jail,” GovExec.com (Oct. 3, 2005), available at <http://www.govexec.com/dailymag/1005/100305k2.htm>; “Former CIA No. 3 indicted for steering contracts to friend,” CNN.com, (Feb. 13, 2007), available at <http://www.cnn.com/2007/LAW/02/13/cia.foggo/index.html>; “Report Spells Out Abuses by Former Congressman,” NYTimes.com (Oct. 18, 2006), available at [http://www.nytimes.com/2006/10/18/washington/18inquire.html?\\_r=1&n=Top/Reference/Times%20Topic/People/C/Cunningham,%20Randy&oref=slogin](http://www.nytimes.com/2006/10/18/washington/18inquire.html?_r=1&n=Top/Reference/Times%20Topic/People/C/Cunningham,%20Randy&oref=slogin).

Acquisition Workforce. A recent study,<sup>4</sup> found that government agencies have not engaged in adequate human capital planning for the acquisition workforce. The result appears to be a decline in the number of qualified and properly trained personnel available for planning and supervision of \$400 billion in annual contract actions. In fact, a recent survey of the skills of the acquisition workforce conducted by the Office of Federal Procurement Policy and the Federal Acquisition Institute, indicates clearly that the existing workforce would prefer to have more and better training in specific areas relating to contract management and administration, negotiation skills, use of performance metrics, and performance-based acquisition.<sup>5</sup> The same survey also confirms that staffing levels in these positions are declining and likely to continue to decline – perhaps dramatically. An inadequate number of acquisition personnel often translates into inadequate oversight of contracts and contractors.

Recently-reported issues with contracting for the Iraq war are a case in point.<sup>6</sup> With billions appropriated by the Congress for Iraq reconstruction, the opportunities for corruption are substantial. Given the political controversy over the war, estimates of losses due to contractor fraud and corruption are difficult to gauge. However, attorneys knowledgeable about procurement believe that the majority of contracts related to Iraq reconstruction are performed lawfully, and that while corruption is of great concern, the system seems to be working. Nonetheless, the issue of corruption in US contracting in Iraq continues to garner much attention in the media and on Capitol Hill, where Congressional hearings on the issue occur with regularity.

The Special Inspector General for Iraq Reconstruction (“SIGIR”) has published numerous reports that underscore the risks of fraud and abuse associated with weak contract oversight.<sup>7</sup> It has also noted differences among implementing agencies’ contracting procedures as a source of concern.<sup>8</sup> Both issues should be expeditiously investigated and addressed.

---

<sup>4</sup> The Study was conducted by the Acquisition Advisory Panel created pursuant to Section 1423 of the Services Acquisition Reform Act of 2003, which was enacted as part of the National Defense Authorization Act for FY 2004, Pub. L. No. 108-136, 117 Stat. 1663 (2003).

<sup>5</sup> See Federal Acquisition Institute, “2007 Contracting Workforce Competencies Survey – General Analysis,” Oct. 2007, available at [http://www.whitehouse.gov/omb/procurement/workforce/workforce\\_comp\\_survey\\_101707.pdf](http://www.whitehouse.gov/omb/procurement/workforce/workforce_comp_survey_101707.pdf).

<sup>6</sup> See, e.g., “State Dept. Use of Contractors Leaps in 4 Years,” New York Times (Oct. 24, 2007) (study “found that there were too few American officials in Iraq to enforce the rules” that apply to State Department contractors).

<sup>7</sup> To access the SIGIR reports, see <http://www.sigir.mil/reports/Default.aspx>; see also Statement of Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction Before the Subcommittee on State, Foreign Operations and Related Programs, Committee on Appropriations, United States House of Representatives, October 30, 2007, available at [http://www.sigir.mil/reports/pdf/testimony/SIGIR\\_Testimony\\_07-017T.pdf](http://www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-017T.pdf).

<sup>8</sup> Statement of Joseph McDermott, Assistant Inspector General-Audit, Special Inspector General for Iraq Reconstruction Before the United States House of Representatives Appropriations Committee, Subcommittee on Defense, Thursday, May 10, 2007, available at [http://www.sigir.mil/reports/pdf/testimony/SIGIR\\_Testimony\\_07-010T.pdf](http://www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-010T.pdf); Iraq Reconstruction, Lessons in Contracting and Procurement, available at [http://www.sigir.mil/reports/pdf/Lessons\\_Learned\\_July21.pdf](http://www.sigir.mil/reports/pdf/Lessons_Learned_July21.pdf).

SIGIR is working in conjunction with other agencies involved in oversight in Iraq, including the Office of Inspector General of the Department of Defense, the Department of Homeland Security (DHS), the Federal Bureau of Investigation (“FBI”) and the Department of Justice National Procurement Fraud Task Force to coordinate and enhance procurement fraud investigations.<sup>9</sup> SIGIR reports that as of October 30, 2007, it has opened 52 investigations, 30 of which are being prosecuted by the DOJ. It has also suspended 17 companies and individuals and debarred 10.<sup>10</sup>

Decline in Competition. Competition is a touchstone of any procurement system that seeks to be fair, transparent, and efficient. Yet, a shift over the past 20 years by the U.S. government to increasingly rely on large, multi-agency “contract vehicles”<sup>11</sup> may have decreased competition.

The Acquisition Advisory Panel concluded that this may be due to problems in how the process used to award task and delivery orders under these vehicles is used by government personnel, who may not understand either the legal underpinnings or the procedural requirements that apply. The result may be, in fact, that actual competition for substantial quantities of procurement dollars has declined.

The U.S. procurement system could be improved by better oversight over multi-agency contract vehicles which utilize a task or delivery order system for procuring goods and services, more transparency in the award of task orders, and better enforcement of the competition requirements that relate to such orders.

Outsourcing. Some commentators have raised concerns about a lack of adherence to the FAR when procurement is outsourced. There has been an increasing tendency of the U.S. to relinquish procurement responsibility and oversight through blanket U.S. contributions to various global initiatives where procurement oversight is weaker. Without diligent U.S. review, the potential for relationships to influence contracting outcomes is increased. Furthermore, contractors hired to replace acquisition personnel are not covered by official ethics rules because they are not government employees. This is an area that deserves attention.

---

<sup>9</sup> Statement of Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction Before the United States House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism and Homeland Security, Tuesday, June 19, 2007 available at [http://www.sigir.mil/reports/pdf/testimony/SIGIR\\_Testimony\\_07-012T.pdf](http://www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-012T.pdf).

<sup>10</sup> Statement of Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction Before the Subcommittee on State, Foreign Operations and Related Programs, Committee on Appropriations, United States House of Representatives, October 30, 2007, available at [http://www.sigir.mil/reports/pdf/testimony/SIGIR\\_Testimony\\_07-017T.pdf](http://www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-017T.pdf).

<sup>11</sup> Contract vehicles are awarded to multiple contractors and do not themselves require performance; rather, individual requests are issued under these vehicles to the multiple contractors, who then submit proposals for consideration.

### III. CRIMINALIZATION AND LAW ENFORCEMENT (CHAPTER III)

#### B. Article 16 Bribery of foreign public officials and officials of public international organizations

##### 17. Paragraph (1) of article 16 (Active bribery of a foreign public official or an official of a public international organization)

The United States has prohibited foreign bribery since the enactment of the Foreign Corrupt Practices Act (FCPA) in 1977<sup>12</sup> with both the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) having overlapping responsibility for enforcement. Enforcement has increased in recent years, with fourteen prosecutions initiated by the DOJ as of October, 2007, a record number for a single year. Monetary penalties and individuals sentenced to jail are also increasing. On April 26, 2007, the DOJ and SEC announced the largest monetary fine for FCPA violations against Baker Hughes Inc. and a related subsidiary, including fines of \$21 million and the disgorgement of over \$23 million in profits related to the payment of approximately \$4 million in bribes over a two-year period to an official of Kazakhoil, the Kazakhstan state-owned oil company.

Despite additions to the DOJ staff for purposes of FCPA enforcement, the increase in enforcement activity continues to strain the resources of both the DOJ and the Securities and Exchange Commission and should be reviewed.

As a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), the US was evaluated by the OECD Anti-bribery Working Group which found it had implemented the foreign bribery criminal prohibitions in a “detailed and comprehensive manner.”<sup>13</sup>

One area of growing concern highlighted by the Working Group is the potential misuse of “facilitation payments” which are exempt from the FCPA prohibition on foreign bribery.<sup>14</sup> According to the Commentary to the OECD Convention, “*small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned.*” However, the Commentary suggests that countries “address this corrosive phenomenon by such means as support for program of good

---

<sup>12</sup> 15 U.S.C. §§ 78m and 78dd-1 et. seq.

<sup>13</sup> OECD Working Group on Bribery, Phase 1 Report on the United States Implementation.

<sup>14</sup> The exemption reads, “Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.”

governance.” A growing number of companies now prohibit such payments, and reformers where such payments are made are calling for action to outlaw what are considered bribes in their countries.

## **V. ASSET RECOVERY (CHAPTER V)**

### **A. Article 52 Prevention and detection of transfers of proceeds of crime**

The United States has treated the prevention and detection of financial crimes as an issue of increasing importance since enactment of the Bank Secrecy Act (BSA) of 1982.<sup>15</sup> Since then, Congress has amended the BSA many times to improve its effectiveness, for example, making money laundering a criminal activity and requiring regulators to enhance training and procedures to identify money laundering.<sup>16</sup> The United States has been an active participant in the Financial Action Task Force and the Egmont Group (a network of Financial Intelligence Units), the two premiere organizations that promote international cooperation in anti-money laundering and counter-terrorist financing. Domestically and internationally, the BSA, as amended by the U.S.A Patriot Act,<sup>17</sup> and its implementing regulations have now established a legal framework that exceeds that called for in the UN Convention.

In addition, in 2006, the US government unveiled a new national strategy to fight high-level corruption, including the return of stolen assets. The strategy includes commitments to work with international financial centers, the G8 and other governments and FATF to develop capacity to and implement best practices for identifying, tracing, freezing, recovering and repatriating illicitly-acquired assets.

Despite the existence of this web of requirements, there is room for improvement in the system. The U.S. should further evaluate remaining hurdles facing those seeking the return of stolen assets and seek to eliminate them. Some experts have called attention to the need for a single point of contact within the U.S. government to accept and actively facilitate asset recovery requests.

The United States Government Accountability Office (GAO) has recommended that the Departments of Treasury and State work with the U.S. intelligence and law enforcement agencies to improve the accuracy and completeness of account identifying

---

<sup>15</sup> The Currency and Foreign Transactions Reporting Act, also known as the Bank Secrecy Act (BSA), as amended, 31 U.S.C. § 5311-5330, effective Sept. 13, 1982.

<sup>16</sup> See the Anti-Drug Abuse Act of 1986, which included the (MLCA) Money Laundering Control Act of 1986, Pub. L. No. 99-570, 18 U.S.C. §§1956, 1957, and the Money Laundering Suppression Act of 1994 (Title IV of the Riegle-Neal Community Development and Regulatory Improvement Act of 1994).

<sup>17</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act] (codified in scattered titles of U.S.C.).

information needed by financial institutions to identify and freeze assets.<sup>18</sup> Other experts in the field have indicated a need for increased scrutiny by financial institutions on transactions involving Politically Exposed Persons (PEPs), and in ensuring that PEPs lists are accurate, appropriately inclusive and up-to-date. The asset recovery issue will command further attention in the near future.

---

<sup>18</sup> “Foreign Regimes’ Assets: The United States Faces Challenges in Recovering Assets, but has Mechanisms that Could Guide Future Efforts,” United States Government Accountability Office, Report to Congressional Requesters, September 2004 [still accurate?]