



UNODC
United Nations Office on Drugs and Crime




**KONRAD
ADENAUER
STIFTUNG**


A Public Sector Corruption Risk Assessment Checklist

**Strengthening Public Accountability,
Transparency and Integrity Systems**

KAS Kenia Publication



“Corruption is a cancer, a cancer that eats away a citizen’s faith in democracy, diminishes the instinct for innovation and creativity”



James D. Wolfensohn



1 Thigiri Hilltop, off Thigiri Ridge Road
P.O Box 66471 - 00800, Westlands,
Nairobi, Kenya
Email: info.nairobi@kas.de
Website: www.kas.de/kenia/en

A publication of the Konrad Adenauer Stiftung. e.V.
©2023

ISBN: 978-9914-50-449-1

Designed and Printed by: **Colour House Services Ltd**

Telephone: **+254 721 897 074**
Email: colourhouseservicesltd@gmail.com

TABLE OF CONTENTS

ABBREVIATIONS	8
FORWARD	9
PART I: UNDERSTANDING CORRUPTION	12
1.0. Definition of Corruption	12
1.1. Classification of Corruption	13
1.1.1. Grand Corruption	13
1.1.2. Petty Corruption	13
1.1.3. Political Corruption.....	13
1.2. Forms of Corruption	13
1.3. Where can corruption happen?.....	14
1.4. Who can be involved in corruption?	14
1.5. How does corruption happen?.....	14
PART II: DETECTING CORRUPTION	16
2.0. Audits: Traditional and Blockchain.....	16
2.1. Self-Reporting	17
2.2. Citizen Reporting	17
2.3. Journalism and Media Reporting.....	17
2.4. Whistle-Blowing.....	18
2.5. Methods and Channels for Whistle-Blowing.....	19
2.5.1. Open reporting	19
2.5.2. Confidential reporting.....	19
2.5.3. Anonymous reporting	19
PART III: ASSESSING THE RISK OF CORRUPTION IN'	
BUDGET PROCESSES	22
3.0. Budgeting Cycle.....	22
3.1. Budget Process.....	22
3.2. The Risk of Corruption at Different Stages	23
3.3. Annual Procurement Planning	23
3.4. Budget Formulation.....	24
3.5. Macro Basis for the Budget.....	24
3.5.1. Preparation of Budget Policy Outline.....	24
3.5.2. Preparation of Expenditure Targets or Ceilings by the Ministry of Finance.....	25

3.5.3. Adoption of Budget by Parliament	26
3.5.4. Budget Execution	27
3.6. Financial Planning	27
3.7. Distribution of Budget Allocations to the Spending Units	27
3.8. Commitment Control.....	27
3.9. Verification	28
3.10. Payment Orders	29
3.11. Cash Management.....	29
3.12. Debt Management	30
3.13. Revenue Management	30
3.14. Accounting.....	31
3.15. Fiscal Reporting.....	31
3.16. Control: Audit /Oversight.....	31
PART IV: MAPPING THE RISK OF CORRUPTION IN PROCUREMENT PROCESSES	34
4.1. Corruption in Procurement.....	34
4.2. The Procurement Cycle	34
4.3. Pre-tender Stage.....	34
4.4. Tender Stage	35
4.5. Post-tender Stage.....	35
4.6. Procurement Methods	36
4.6.1. Open Procedure (Sealed Bidding).....	36
4.6.2. Restricted Procedure.....	37
4.6.3. Negotiated Procedure	37
4.6.4. Single Source Procurement (Direct Award or Limited Tendering).....	37
PART V: PREVENTING CORRUPTION IN PUBLIC PROCUREMENT	40
5.0. Sound Legal Frameworks.....	40
5.1. Integrity of Public Officials and Bidder Employees	40
5.2. Exclusion, Suspension and Debarment.....	41
5.3. Collective Action	41
5.4. Integrity Pacts	42
5.5. Principle-based Initiatives	42

5.6. Compliance Systems	43
5.7. Civil Society Procurement Monitoring	43
5.8. Access to Information	43
5.9. Whistle-Blowing	43
5.10. E-procurement	44
5.11. Corruption Control Measures	45
5.11.1. Audits and Checks	45
5.11.2. Conflicts of Interest	45
5.11.3. Processes and Controls	45
5.11.4. Staff Training	46
INDEX OF APPLICABLE LAWS	47
The Constitution of Kenya, 2010	47
Key statutes	47
Regulations	48
International Instruments	48

ABBREVIATIONS

ASIC:	Application Specific Integrated Circuits
AUCPCC:	African Union Convention on Preventing and Combating Corruption
CAJ:	Commission on Administration of Justice
EACC:	Ethics and Anti-Corruption Commission
IPCRM:	Integrated Public Complaints Referral Mechanism
KNCHR:	Kenya National Commission on Human Rights
MP:	Member of Parliament
NACCSC:	National Anti-Corruption Campaign Steering Committee
NCIC:	National Cohesion and Integration Commission
PPADA:	Public Procurement and Asset Disposal Act
TI-Kenya:	Transparency International Kenya
UNCAC:	United Nations Convention against Corruption
UNODC:	United Nations Office on Drugs and Crime
UNICITRAL:	United Nations Commission on International Trade Law

FOREWARD

Konrad Adenauer Stiftung (KAS) is a think tank working in Kenya since 1973. The core mandate of KAS in Kenya is the promotion and consolidation of democracy. The Constitution of Kenya 2010 provides the road map for political development and the stabilization of democracy. Through free and fair elections informed by adequate public civic education, this will be realised. As Kenya has recently held its election in August 2022, the new government together with its representatives both at the national and county level are settling in. The budget making process at both levels i.e. (National and county) are mostly done and implementation process is in progress. Implementation in this case means allocations and use of public funds across all sectors. According to the latest statistics on the corruption perception index as of 2022, for the public sector, Kenya is at 32 points and ranks 123 out of 180 countries¹. The scale used is from 0 to 100 meaning that the more the points the higher the rate of corruption. Apparently according to the current rating, corruption decreased a bit compared to the previous years.

Various factors contribute to the variances from global issues like peace and security to GDP of a country among other factors. Kenya is still ranked as a developing country meaning that the socio-economic status of the country still poses a risk to corruption. Consistent watch dog role through concerted efforts continually needs to be emphasised for better service delivery at all levels. It is for this reason that KAS Kenya in partnership with UNODC and EACC developed a Public Sector Corruption Risk Assessment Checklist to provide knowledge and information on how to recognize and detect corruption, especially in the allocation / use of public funds.

The main objective for this publication is to enhance the target actor's knowledge and information on how to detect and determine corruption especially in the allocation and use of public funds both at the national and county levels and how to mitigate the


¹ <https://www.transparency.org/en/cpi/2022/index/ken>

risks. The final output would strengthen knowledge and enforce actions to enhance transparency and accountability in budget and procurement implementation phases both at the national and county levels.

It is our hope that this publication will act as a reference document aimed at mitigating corruption in our governance systems and will complement other Anti-corruption initiatives.

Special thanks goes to Mr. Steve Ogolla an Advocate of the High Court of Kenya who worked tirelessly on this tool kit. Our sincere gratitude also goes to representatives from UNODC led by Ms. Jennifer Githu and EACC Mr. Solomon Atela for enriching the document by providing their insights. Last but not least, we wish to thank the Country Programme Coordinator, Ms. Sheila Ngatia for guiding this process to its completion.

Thank you!



Dr. Annette Schwandner
Country Director Kenya
Konrad-Adenauer-Stiftung e. V.



UNDERSTANDING CORRUPTION

PART I: UNDERSTANDING CORRUPTION

1.0. Definition of Corruption

Corruption is a complex phenomenon, without a uniform definition. Corruption may be defined as:

- The abuse of power, most often for personal gain or for benefit of a group to which one owes allegiance;
- The use of public office for private gain, or in other words, use of official position, rank or status by an office bearer for his own personal benefit, the abuse of entrusted power for private gain; and
- The misuse of positional power – public or private – to benefit narrow interests rather than the public good.

Following from this definition, examples of corrupt behaviors include:

- *Bribery*
- *Extortion*
- *Fraud*
- *Embezzlement*
- *Nepotism*
- *Cronyism*
- *Appropriation of public assets and property for private use*
- *Influence peddling*
- *Abuse of office*
- *Breach of trust*
- *Tax evasion*

In this list of corrupt behaviors above, activities such as fraud and embezzlement can be undertaken by an official alone and without involvement of a second party. While others such as bribery, extortion and influence peddling involve two parties – the giver and taker in a corrupt deal.

1.1. Classification of Corruption

Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs.

1.1.1. Grand Corruption

Grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good.

1.1.2. Petty Corruption

This refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.

1.1.3. Political Corruption

This relates to manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.

1.2. Forms of Corruption

Corruption can take many forms and can include behaviors such as: public servants demanding or taking money or favors'

in exchange for services, politicians misusing public money or granting public jobs or contracts to their sponsors, friends and families and corporations bribing officials to get lucrative deals.

1.3. Where can corruption happen?

Corruption can happen anywhere. It can happen in business, government, the courts, the media, and in civil society as well as across all sectors from health and education to infrastructure and sports. However, this checklist will map out areas where corruption is most prevalent.

1.4. Who can be involved in corruption?

Corruption can involve public sector institutions, individuals such as politicians, governments officials, public servants, business people or members of the public.

1.5. How does corruption happen?

Corruption happens in the shadows more often with the help of professional enablers such as bankers, lawyers, accountants and real estate agents, opaque financial systems and anonymous shell companies that allow corruption schemes to flourish and the corrupt to launder and hide their illicit wealth. Public sector corruption is prevalent in procurement processes and takes many of the forms such as such as bribery, embezzlement and abuse of functions.



DETECTING CORRUPTION

PART II: DETECTING CORRUPTION

Corruption can be detected through a variety of methods as discussed below:

2.0. Audits: Traditional and Blockchain

A working definition of an audit is a formal investigation of an organization's or individual's accounts or financial situation. Audits can be internal, meaning that they are conducted by the organization itself, or external, which means they are conducted by another outside independent entity. Internal and external audits have different purposes.

Internal audits review items such as the effectiveness of an organization's safeguards against fraud and corruption, whereas external audits often focus on an organization's financial statements and whether that organization has followed all relevant laws and regulations. Internal audits offer the management of an organization a snapshot of how policies and procedures are functioning, while external audits give a broader view and are often public.

The detection of corruption through auditing has the potential to be even more effective with the development of new technologies. One such possibility is using blockchain technology. The blockchain is essentially a digital ledger made up of records called blocks. Each block has information regarding a transaction and has a time-stamp that cannot be modified. Currently, most companies and governments have their own systems of documenting transactions and they provide this information to auditors. However, with

the blockchain, information is stored in a decentralized manner and auditors would not have to spend so much time externally confirming records.

2.1. Self-Reporting

Another mechanism of detecting corruption is self-reporting. Article 37 of UNCAC requires States to encourage corruption offenders to self-report, including by offering penalty mitigation and even immunity in certain cases. Article 39 encourages the private sector to report on corruption and to cooperate with the authorities on investigating corruption.

2.2. Citizen Reporting

Members of the public are often the first ones to witness or experience corruption, particularly in the area of public services. To help expose corruption, members of the public can be instrumental in reporting on corruption through standard crime-reporting channels at the national or municipal level, such as the police.

To encourage citizen reports on corruption, governments may develop more direct ways for the public to report corruption. For example, specialized anti-corruption bodies can establish dedicated reporting channels for corruption offences. Governments are required by article 13 of UNCAC to inform the public about such anti-corruption bodies and how to report corrupt acts, including anonymously.

2.3. Journalism and Media Reporting

Media reporting can be a means of corruption detection that prompts organizations and law enforcement agencies to conduct

investigations (or further investigations) into allegations of corruption. Reports of corruption in the media can also be used to gather more information about and evaluate instances where corruption has been detected and requires further investigation.

For media reporting and journalism to play an effective role in corruption detection, the media have to be free, independent and responsible. Access to information laws are useful tools that journalists and the media can use to assist in detecting corruption. Moreover, there must be legislative frameworks in place to protect journalists and their sources from unfounded lawsuits, recrimination and victimization.

2.4. Whistle-Blowing

Whistle-blowing may be defined as the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers to persons or organizations who may effect action.

Given that corruption can benefit the individuals directly involved, and there is a variety of means to cover up corruption within organizations, some corruption cases can only be detected if someone on the inside reports it. This kind of reporting activity is frequently called “whistle-blowing”, because the reporting person sends out an alert about the activity, with the hope that it will be halted by the authorities.

Usually, the whistle-blower reports the act to an appropriate internal manager, executive or board member. Some entities have established protocols for reporting. If that proves unsuccessful,

whistle-blowers might raise the issue with external regulatory or law enforcement agencies or may choose to expose the matter publicly by contacting the media.

2.5. Methods and Channels for Whistle-Blowing

2.5.1. Open reporting: Individuals openly report or disclose information, or state that they do not endeavor to ensure or require their identity to be kept secret.

2.5.2. Confidential reporting: The name and identity of the individual who disclosed information is known by the recipient, but will not be disclosed without the individual's consent, unless required by law.

2.5.3. Anonymous reporting: A report or information is received, but no one knows the source.

2.5.4. The Integrated Public Complaints Referral Mechanism (IPCRM) The IPCRM is an electronic information sharing platform. The initiative, established in 2012, brings together six agencies, namely; EACC, CAJ, KNCHR, NCIC, NACCSC and TI Kenya Chapter. Through the platform, the public have access to report issues on governance through any of the partners

accessible to them for referral to the relevant agency (partner) for action.

2.5.5. Civil Society Advocacy: Civil society organizations monitoring public procurement processes may identify possible improper public official actions and/or noncompliance with procurement procedures.



**ASSESSING THE RISK OF
CORRUPTION IN BUDGET
PROCESSES**

PART III: ASSESSING THE RISK OF CORRUPTION IN BUDGET PROCESSES

3.0 Budgeting Cycle

The budgeting cycle generally has four key phases namely; formulation, adoption, execution and control. Although the formulation and adoption stages do not deal with actual money flows, these budget preparation stages are key parts of a corruption process that manifests itself only in the actual payments or transfer of money at the execution stage.

3.1. Budget Process

The Controller of Budget oversees the implementation of budgets of the national and county governments by authorizing withdrawals from public funds after satisfying that such withdrawal, are authorized by law.

The budget process is defined as the process through which government expenditures are determined or allocated. Normally, a budget process is composed of four main stages: formulation, adoption, execution, and control.

In this checklist, we interpret the budget process broadly. We therefore include planning and programming which normally precedes the four stages and are not part of the core government fiscal process. Although the planning/ programming stages do not deal with actual money flows, the budget preparation stages may be part of a corruption process that manifests itself only in the actual payments or transfer of money at the execution stage.

3.2. The Risk of Corruption at Different Stages

The risk of corruption varies between and within the different stages of the budget process. We break the budget process into its composite stages and sub-stages, and provide an assessment of the risk of corruption in each of these.

Corruption in the budget process does not always boil down to dysfunctional rules/controls and faulty auditing. Overall, factors external to the budget process – people’s attitudes to honesty, cultural, and historical elements - may be the drivers of corruption. To capture key dimensions of corruption risks related to the budget process we will have to include not only political economy factors but also the question of systems, institutions, and budget outcomes.

3.3. Annual Procurement Planning

Public procurement management systems often include multi-year planning of public activities. The plan is often divided into one overall plan and a public investment programme. In principle, the budget builds on policies, aims, and strategies that are set out in the multi-year plan. If the planning process includes proper involvement by the legislature, it produces a plan which the executive and the civil service see as their task to implement, and the plan is technically sound, well disseminated, and clear.

In reality, however, the planning process may be imperfect in several ways. The legislative arm of government may not be involved thus leaving the preparation of the plan to the executive, and often only to the technical staff at the civil service level. This decreases the accountability of the executive, and makes allocation

biases more likely. Where the link between the plan and annual budgets is weak, it could set the basis for poor implementation of the annual budgets.

3.4. Budget Formulation

The budget formulation stage consists of three sub-stages: Macro Basis for the Budget, Preparation of Budget Policy Outline and Preparation of expenditure targets or ceilings by the Ministry of Finance.

3.5. Macro Basis for the Budget

Ideally Budget processes should start with an economic overview and revenue forecast for the budget year. The forecast will, together with an assessment of how the budget deficit should be financed, give directions for total recurrent and capital spending. This is considered an analytical job taken care of by the inner echelons of the Ministry of Finance, occasionally assisted by consultants.

There appears to be little scope for corruption at this stage, but it is of course possible to prepare for future embezzlement, taxation moneys, or favoritism to certain taxpayers by preparing pessimistic projections. The latter might be the case if the tax department or independent revenue authority plays a key role in the projection process.

3.5.1. Preparation of Budget Policy Outline

The budget policy outline represents the bridge to the multi-year plan document. It will, in broad terms, describe the policies and strategies in the plan which a current budget should emphasize, and how. The outline will, in particular, set the scene for the preparation of expenditure ceilings.

If the plan is inconsistent and unclear, so will also the policy outline be, which results in unclear directions for the preparation of the expenditure targets. In this case the concrete expenditure targets can be influenced by bureaucrats and the political level of the Ministry of Finance in a way which prepares the ground for corruption at later stages.

3.5.2. Preparation of Expenditure Targets or Ceilings by the Ministry of Finance

The preparation of expenditure targets (or ceilings) is in theory the first step that turns the verbal policy statements into concrete numbers in budget allocations. Usually quite a few features of this 'first shot' will remain and influence the final approved budget.

The legal principle is that budgetary allocation must be based on plans, macro frameworks, budget policy outlines, etc. In reality, there are several factors that make this process difficult. The more unclear the preceding policy documents are, the more difficult it is to link the budget allocations to them.

In practice, what is used is 'incremental budgeting,' that is to say, budget items are increased, sometimes by a uniform percentage, sometimes by slightly different percentages. This is done inside the Ministry of Finance - in isolation from the public eye - and often goes directly to the Cabinet for discussion.

It is easy to imagine how corruption can take form at this stage. A ministry which has good connections to the staff outlining the first set of ceilings, or to the Minister of Finance, can cut a deal

to increase its relative allocation. This allocation may be reversed in subsequent budget discussions, but in many countries with pressed budgetary situations, changes in the allocation suggested by the ministry of finance scarcely take place.

3.5.3. Adoption of Budget by Parliament

When after due discussion with individual Ministries – the Cabinet has come to an agreement on the budget, it passes from the executive over to the legislative. Painstaking committee work and a vote-by-vote debate in the National Assembly usually prepares for the final adoption of the budget by Parliament.

In many - if not most - countries there is, however, little time for scrutiny. The preparation and adoption of the budget is a considerable amount of work. Deadlines are set in legal forms and delays will lead to delays in, for example, civil servant salary payments. When delays occur in the earlier phases, the great urgency to have the budget adopted in a timely manner will often lead to a shortened time for legislative scrutiny.

Apart from this, in most instances, the legislative debate will often be about geographical allocations - MPs fighting for a piece of road or a hospital for their constituency - rather than focusing on uncovering and reporting on possible cases of corruption. Parliamentarians may also be on the receiving end of bribery. Special interest groups, such as a corporation in need of certain new roads, may secure the votes of parliamentarians through more or less subtle forms of payment. This may be done to overturn the proposed budget, or to safeguard an allocation that is in danger of being reversed in the parliamentary debate.

3.5.4. Budget Execution

With the budget adopted by Parliament, the execution falls mainly on the Ministry of Finance, or more specifically on the treasury functions of that ministry. This is the stage at which financial transactions are made, where money change hands and where corruption materializes into flows of money.

3.6. Financial Planning

Financial planning is the bridge between the preparation and execution of the annual budget. This is basically a planning operation where cash is not involved and the corruption risk is not great.

3.7. Distribution of Budget Allocations to the Spending Units

Distribution to the spending units can be done at a detailed or aggregate level and involves the actual spending authorization. Some countries provide weekly or monthly budget releases, while others make the whole budget available at the beginning of the year. During this phase of budget implementation there are many opportunities for corruption since one official, or a group, often have discretionary powers to authorize spending. For instance, a ministry with a high level of spending such as the ministry of works and communications may be favored so that suppliers who pay bribes win contracts.

3.8. Commitment Control

Ideally, the commitment control stage serves to ensure that resources for purchasing goods and services are committed only

up to the budgeted amounts so that these resources will become unavailable for other purposes. Weaknesses in this phase of the process provide a fertile ground for corrupt activities. The most frequent and perhaps the most damaging effects stem from violations of procurement laws and procedures, which usually specify delivery schedules, terms of delivery and payment, as well as tendering procedures.

One typical form of corruption at this stage is to bend rules in favor of some suppliers to the detriment of others. This practice has cumulative effects given that the frequent granting of privileges to the same enterprise will cause this to assume an increasingly dominant position in the market. Such near-monopolists are able to increase prices without losing their market share. Also, corruption at this stage may take the form of ordering goods and services which are either not authorized in the budget, or end up not being delivered.

3.9. Verification

The verification stage checks whether the previous stage of the process functions effectively. For non-delivery of goods and services to take place, staff at the verification stage must also be implicated in the corrupt scheme. Without collusion between the officials in charge of commitments and those responsible for verification, corrupt activities can be uncovered. Non-compliance with specifications, and a complete lack of budget authorization should also be unveiled at this stage, unless officials have been paid to look the other way.

3.10. Payment Orders

Payment orders are issued after goods or services have been received. The power of officers entrusted with payment orders includes not issuing payment orders if goods have not been acquired as planned. If these officers have discretion in ordering payments, once a transaction has been verified at the preceding stage, this may be used to extract bribes from the party awaiting payment.

3.11. Cash Management

The purpose of the cash management stage is to ensure that the government has the liquidity to meet payments at as low a cost as possible. A single treasury account is often used and in some countries the cash management function is outsourced to the Central Bank.

At the cash management stage, several fraudulent schemes can be organized: The cashier's Office may pay salaries to ghost employees (nonexistent or deceased). Payment of salaries and wages are often not subjected to the standard expenditure process. In the case of pension payments, officials may halt or slow down payments in the hope that they can extract bribes for reinstating the correct payments. If cash budgets are applied and the treasury runs out of money, one needs to prioritize payments. The officer(s) in charge of allocations will be given discretionary powers, which can be used for corrupt purposes. This may happen by manipulating the allocation of cash to favor line ministries and agencies from which a kickback may be arranged.

Governments will from time to time - particularly when the cash management function is not taken care of, or works badly - try to manage a cash crisis by incurring arrears. This may be used as a cover for non-payment by the cash office. Most suppliers will have to accept this because they are afraid of losing valuable government contracts. If suppliers have waited a very long time for payment, it may take the corruption game into a new cycle in which the creditors may try to bribe officials for in order to be paid! The bribe may take the form of a simple payment, the amount of which will be negotiated with the official, or a percentage of the payment made to the supplier.

3.12. Debt Management

Debt management is closely linked to cash management, particularly for short-term and domestic debt, and may be handled within the Treasury by the Central Bank or a separate debt or asset/liability management agency. If corruption takes place in the area of payments or cash management, it may also extend to the debt management level and thus draw Central Bank staff into being accomplices of budgetary corruption.

3.13. Revenue Management

The revenue management stage deals with the cash flows that result from revenue collection (but not the revenue collection itself). As there is easy access to cash at this stage, there is a temptation for corrupt practices. Whether temptation translates into action depends on the ease with which embezzlement can be detected.

3.14. Accounting

Accounting in the Treasury is often done on the basis of receipts and payment records. It is usually done in the Treasury itself or in a separate accounting department. It is important that records flow quickly to the treasury from other areas of government and that consolidated accounts are produced in order to quickly discover possible cases of corruption. Shoddy accounting practices will sharply increase the corruption risk at other stages of the budget execution process.

3.15. Fiscal Reporting

The fiscal reporting stage is the last in the sequence of treasury operations. Reports can come from the budget, accounting, or treasury departments within the Ministry of Finance. In some countries, ministries and agencies publish their own financial accounts and annual reports independently of the treasury. Again, flawed or opaque reporting will increase the corruption risk at other stages of the execution process.

3.16. Control: Audit /Oversight

The audit stage of the budget is where corruption should be detected and perpetrators taken to task. The audit process normally has three sub-stages: Internal Audit, External Audit and Legislative audit/Parliamentary oversight.



**MAPPING THE RISK
OF CORRUPTION IN
PROCUREMENT PROCESSES**

PART IV: MAPPING THE RISK OF CORRUPTION IN PROCUREMENT PROCESSES

4.1 Corruption in Procurement

One of the most corruption prone government activities is public procurement. The reasons for this include the volume of transactions and the financial interests at stake as well as the complexity of the process, the close interaction between public officials and businesses, and the multitude of stakeholders. Corruption in public procurement takes many of the forms mentioned above, such as bribery, embezzlement and abuse of functions.

4.2 The Procurement Cycle

To understand corruption in public procurement, it is important to understand the procurement process. Public contracting processes broadly follow the same general steps. There are generally three phases of the public procurement process: the pre-tender stage, the tender stage and the post-tender stage. Corruption risks exist throughout the entire procurement cycle.

4.3 Pre-tender Stage

The pre-tender stage includes the decision on the scope of the governmental need, that is, deciding which goods, services or works are to be purchased. The procurement officials need to identify the relevant technical requirements to determine what exactly will be sought from the private sector and when.

The pre-tender stage also includes the structuring of the contracting process. In this regard, procurement personnel generally follow a preexisting regulatory structure to determine how the process will work, including the timeframes for bidding, the stages in the process, the number of bidders who are eligible, any applicable restrictions or exceptions from normally applicable processes, and what transparent communications systems and opportunities are available between the procuring entity and the bidders. The pre-tender stage will also involve budgeting.

4.4 Tender Stage

The tender stage includes the invitation to tender, which is choosing which offeror will become the contract partner by evaluating the actual tender and the tenderer, and the award of a contract based on established terms and conditions for how the goods, services or works are to be provided. It includes any conditions or limitations relating to the award, including agents and subcontractors that may have connections to government officials.

4.5 Post-tender Stage

The post-tender stage (often referred to as contract administration) refers to the administration of the contract to ensure effective performance. Further interactions of many kinds between the successful bidder and governmental authorities continue during the course of contract performance, for example, regarding benchmarks, changing orders, payment schedules, licensing and permits. The choice of the procurement procedure is a crucial factor in the procurement process. In particular, it determines the number of stages intervening between the decision to buy and the actual purchase.

It is important to understand how the choice of the procurement method can have an impact on corruption in public procurement. There are different ways of categorizing procurement procedures, for instance distinguishing between types of procedures with or without a public notice, procedures with one or several stages, or procedures with or without negotiations. The choice of tender method regularly depends on the estimated contract value, the estimated number of bidders and the complexity of the relevant good, service or work (particularly if the procuring entity is able to specify its exact need).

4.6 Procurement Methods

4.6.1 Open Procedure (Sealed Bidding)

Open tendering is a formal single-stage procurement method in which any interested company, without any pre-selection, may submit a bid; bids are usually made against detailed government specifications, and the award is usually made to the bidder offering the lowest price.

This method allows maximum transparency and competition, for it generally requires a public notice advertising the contract opportunity, exhaustive technical specifications and contractual terms, a public opening of tenders and the absence of the possibility to negotiate the contract. In general, a procuring entity must use this procurement method unless the use of alternative methods is justified.

4.6.2 Restricted Procedure

A restricted procedure is different from an open procedure in the sense that only pre-selected qualified companies are allowed to submit a bid. There are slight variations in restricted procedures under different frameworks. They may involve a restriction of the bidding to those companies which pre-qualified following a public advertisement and on the basis of disclosed minimum and/or selection criteria.

A restricted procedure may also mean that a public advertisement of a contract opportunity is not required, as interpreted in the UNCITRAL Model Law. This may happen, for instance, if the subject matter of the procurement is available only from a limited number of suppliers.

4.6.3 Negotiated Procedure

A negotiated procedure is often used for cases in which it is not feasible (or not possible) to formulate exhaustive technical specifications and contractual terms. It is thus necessary to enter into a dialogue with the offerors to conclude the contract. A negotiated procedure is also often used for cases of failed tendering procedures, for example, where only non-responsive tenders were delivered. Another frequent reason for a negotiated procedure is circumstances of urgency or a catastrophic event.

4.6.4 Single Source Procurement (Direct Award or Limited Tendering)

Single-source procurement often allows the procuring entity to choose the contracting partner without any form of transparency or competition. This type of procurement constitutes a major

departure from the fundamental principles of public procurement. Grounds for direct contracting may include, for instance, the low estimated value of the contract, the fact that the goods, services at issue are available only from a particular provider, urgent needs, a catastrophic event, the need for additional supplies to be procured from an existing contractor, or special concern regarding national defense or national security.

The type of procurement procedure chosen may have a direct impact on the corruption risk involved in a public procurement. For this reason, the open tendering procedure is often considered the method of first resort, that is, the default procurement method, and single-source tendering—which poses perhaps the highest risk of corruption and favoritism—is typically allowed only under exceptional circumstances.



**PREVENTING CORRUPTION IN
PUBLIC PROCUREMENT**

PART V: PREVENTING CORRUPTION IN PUBLIC PROCUREMENT

5.0 Sound Legal Frameworks

Sound legal frameworks for public procurement and anti-corruption are important pillars in the fight against corruption. Both are prerequisites for a transparent, competitive and objective procurement system. Respect for the rule of law is essential. Experience has shown, however, that legislation alone is not sufficient to prevent corruption in public procurement. If that were the case, corruption in public procurement would barely exist in countries with advanced legal regimes based. It is essential that legal frameworks be supported by other efforts to ensure qualities such as accountability and integrity. Various additional strategies have proven to be particularly useful in fighting corruption in public procurement.

5.1. Integrity of Public Officials and Bidder Employees

Both the public sector and the private sector must ensure that only professional, honest, reliable and skilled staff who demonstrate integrity are involved in public procurement activities. Staff must be appropriately informed and trained on how to navigate through complex legal frameworks, such as public procurement and anti-corruption laws. A robust compliance programme that includes a Code of Conduct is considered important, to provide contractors and potentially public agencies a framework for following the law.

Procurement personnel, in particular, exercise discretion throughout the entire procurement cycle. Efforts to limit the discretion of procurement officials with specific rules of operation

have proven effective in curbing corruption. To this end, important decisions such as the approval of tender documents, the decision to reject a bid or the decision to award a contract to a particular bidder should be made by more than one person, or through a process that includes several informed stakeholders.

5.2. Exclusion, Suspension and Debarment

As anti-corruption initiatives around the world gain momentum, one device for fighting corruption—debarment, or blacklisting, of corrupt or unqualified contractors and individuals—has emerged as an especially noteworthy tool. Governments and international institutions have developed their own debarment systems, to exclude contractors that have committed certain types of wrongs such as bribery or fraud or, more broadly, to exclude contractors that pose unacceptable performance or reputational risks because of bad acts or broken internal controls.

5.3. Collective Action

Collective action, which is a collaborative and sustained process of cooperation of like-minded stakeholders, has become a concrete policy issue in the fight against corruption. This is particularly true in the area of public procurement, where private companies, governments, international organizations, civil society, academia, etc. join forces to limit the opportunity for corruption in the business environment. The goal of this collective action is to create a level playing field for companies competing for government contracts.

Public procurement processes should be transparent and

exclusively based on market economic criteria, such as price, quality and innovation, so that the best bidder is awarded the contract and not the bidder who, for instance, paid the highest bribe. Collective action seeks to put this principle into action and to ensure that bidders competing for public contracts are not disadvantaged for acting honestly and ethically.

5.4. Integrity Pacts

Integrity pacts usually refer to a particular tender and include a written agreement between the procuring entity and all bidders agreeing to refrain from corrupt practices. A violation of the agreement is sanctioned, for instance, by penalty payments, right of exclusion for future tenders, damages, etc. Frequently, an independent monitor is appointed to oversee compliance with the integrity pact.

5.5. Principle-based Initiatives

Public procurement processes are often very complex and this complexity plays an important role when it comes to corruption in the area of public procurement. Principle-based initiatives include the promotion of collective action methods, training and capacity-building programmes, information campaigns and best practice sharing. In particular, training programmes with the contributions of the public sector, the private sector and civil society explaining corruption risks in the procurement cycle and how to tackle these risks are vital so that anti-corruption efforts in public procurement are effective.

5.6. Compliance Systems

Compliance systems include business principles that reject corruption and put standards and procedures in place to ensure that the entity acts according to the legal requirements. A compliance system in the area of public procurement should not only focus on anti-corruption law but also on public procurement law. The content of the compliance system will be different if it is for the government or a private bidder, depending whether it relates to an entity which may pay a bribe or an entity receiving a bribe.

5.7. Civil Society Procurement Monitoring

Civil society plays an essential role in monitoring procurement processes to ensure that public procurement is conducted in a transparent, competitive and objective manner. Civil society be it a single citizen, media, a company, an NGO, academia, etc. may identify possible improper public official action which may be the result of collusion between a public official and a bidder.

5.8. Access to Information

In order to allow effective monitoring by civil society, access to government information is needed. Good practice in the area of public procurement suggests that information regarding awarded contracts, including the name of the contractor and the contract price, should be publicly available, either through transparency measures or through access to information regimes.

5.9. Whistle-Blowing

Whistle-blowing, the reporting of information about perceived corruption, has proven to be an important tool in the fight against

corruption. In the area of public procurement, whistle-blowing by individuals directly involved in the procurement process is particularly important. Those persons involved in the process may be the only ones who have access to procurement documents, such as the evaluation report on the submitted bids, and therefore the highest potential knowledge of corrupt behavior. In addition, these individuals usually possess the necessary technical and/ or legal knowledge to notice corruption.

5.10. E-procurement

E-procurement became a key component in the reform and modernization of public procurement frameworks in many countries worldwide. The use of electronic procurement can be very efficient in increasing competition and transparency, and can therefore greatly help in reducing corruption in public procurement. E-procurement tools include the electronic publication of contract opportunities, the electronic distribution of tender documents and the electronic submission of bids. Importantly, all the tools of e-procurement (e.g. e-communication, e-submission, e-tendering, etc.) have one essential effect: they eliminate or minimize the direct human interactions between bidders and the procurement personnel, interactions which are one of the main sources of corrupt behavior in public procurement.

E-procurement in the area of anti-corruption is also important for other reasons. In particular, e-procurement has the advantage of allowing for easy data generation and data management. This could in particular be helpful in the assessment of offered prices, to assess whether bid prices are reasonable and in line with market rates, such as by benchmarking collected data such as prices/price

items in an electronic database with offered prices in a particular tender procedure in order to detect overpricing or bid rigging. Electronic data collection and data management in the area of public procurement could also constitute an important tool.

5.11. Corruption Control Measures

5.11.1. Audits and Checks

- Conducting regular and random audits to look for trends and patterns
- Conducting sample audits to check the accuracy of invoices and whether goods and services have been delivered
- Checking the quality of goods and services
- Checking invoices against prices in the contract
- Auditing employee access to sensitive tender information

5.11.2. Conflicts of Interest

- Establishing a framework for employees to manage conflicts of interest – including declaring and reviewing any conflicts at each stage of the procurement process
- Rotating employees in high-risk positions
- Segregating duties throughout the procurement process – for example, have different people approve and receive goods and services

5.11.3. Processes and Controls

- Conducting due diligence to establish the legitimacy of suppliers (for example, check

details on tenders and quotes, conduct ASIC searches to identify any links between prospective suppliers and employees or whether entities have appropriate assets or business facilities)

- Checking financial delegate paperwork is complete before approving expenditure
- Controlling sub-contracting processes
- Monitoring tenders and contracts to detect contract splitting
- Requiring staff to sign invoices verifying that goods and services have been received
- Ensuring payment system controls exist to detect duplicate invoices
- Maintaining robust contract management and oversight to enforce terms, milestones and deliverables
- Monitoring variations in contracts and project scope after approval

5.11.4. Staff Training

- Conduct regular training and staff development
- Ensure staff involved in procurement understand total cost of ownership

INDEX OF APPLICABLE LAWS

The Constitution of Kenya, 2010

Key statutes

- i) Anti-Corruption and Economic Crimes Act, No. 3 of 2003.
- ii) Public Officer Ethics Act, No. 4 of 2003.
- iii) Ethics and Anti-Corruption Commission Act, No. 22 of 2011.
- iv) Leadership and Integrity Act, No. 19 of 2012.
- v) Bribery Act, No. 47 of 2016.
- vi) Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009.
- vii) Commission on Administrative Justice Act, No. 23 of 2011.
- viii) Public Procurement and Asset Disposal Act, No. 33 of 2015.
- ix) Witness Protection Act, No. 16 of 2006.
- x) National Police Service Act, No. 11A of 2011.
- xi) Elections Act, No. 24 of 2011.
- xii) Election Offences Act, No. 37 of 2016.
- xiii) Public Finance Management Act, No. 18 of 2012.
- xiv) Political Parties Act, No. 11 of 2011. Mutual Legal Assistance Act, No. 36 of 2011.
- xv) County Governments Act, No. 17 of 2012.
- xvi) National Payment System Act, No. 39 of 2011.
- xvii) Public Appointments (Parliamentary Approval) Act, No. 33 of 2011.
- xviii) Prevention of Organized Crimes Act, No. 6 of 2010.
- xix) Access to Information Act, No. 31 of 2016.
- xx) Public Audit Act, No 34 of 2015.
- xxi) The Penal Code (Cap 63).

Regulations

- i) The Public Officer Ethics (Management, Verification and Access to Financial Declarations) Regulations (Legal Notice No. 179 of November, 2011)
- ii) The Anti-Corruption and Economic Crimes (Amnesty and Restitution) Regulations, 2011 (Legal Notice No. 44 of 2011)

International Instruments

- i) United Nations Convention against Corruption (UNCAC)
- ii) African Union Convention on Preventing and Combating Corruption (AUCPCC)

LIST OF INSTITUTIONS FOR REPORTING CORRUPTION INCIDENTS

- i) Commission on Administration of Justice
- ii) Ethics and Anti-Corruption Commission
- iii) Office of the Controller of Budget
- iv) Office of the Director of Public Prosecutions
- v) Kenya National Audit Office
- vi) Kenya National Commission on Human Rights
- vii) Transparency International Kenya



1 Thigiri Hilltop, off Thigiri Ridge Road
P.O Box 66471 - 00800, Westlands,
Nairobi, Kenya
Email: info.nairobi@kas.de
Website: www.kas.de/kenia/en