ISSUE OF COLLECTIVE INTEREST: TOWARD A NORMATIVE FRAMEWORK FOR PREVENTING CORRUPTION IN PUBLIC PROCUREMENT

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INTRODUCTION

This document was drawn up by the Secretariat and submitted to and distributed at the second meeting of the Committee of Experts of the Follow-up Mechanism for the Implementation of the Inter-American Convention Against Corruption, held on May 20-24, 2002, at OAS headquarters in Washington D.C., United States of America.[1]

As was noted at the time, it represents a contribution from the Secretariat intended to facilitate analysis of the first issue of collective interest selected by the Committee.

In consideration of the above, the content and opinions contained in this document are the sole responsibility of the Secretariat, which retains its intellectual property rights with respect thereto.

At its fourth meeting, the Committee adopted a methodology[2] for studying this issue of collective interest. In addition to providing background information, the methodology defines the goals and end result expected from the Committee's study of this issue and the procedure it is to follow in so doing.

The second phase of the procedure adopted provides for a far-reaching exchange of information, experiences, and best practices, with the participation of states parties, international organizations, representatives of the private sector, academic institutions, research facilities, nongovernmental organizations, and civil society bodies. Likewise, the third phase stipulates that once the previous phase has been concluded, the Committee will proceed to draw up and adopt recommendations regarding the issue of collective interest. This will be the end result arising from the Committee's consideration of the issue.

Thus, as has already been noted, this document was merely an initial contribution by the Secretariat and was not intended to serve as the focus for the Committee's consideration of the issue or as the basis for the recommendations on the matter. Nevertheless, should it so decide, the Committee reserves the right to incorporate ideas presented herein in its recommendations.

In drawing up this document, the Secretariat took on board information on pertinent developments in the member states and other international organizations; this information came from a number of different sources, including a hired consultant. The document does not, however, strive to be exhaustive or to cover all aspects of the issue. As stated above, its aim is to offer a number of preliminary ideas regarding the matter.

In light of the above, neither do the ideas included in this text claim to be original or to reflect any "revealed truth" – which, in any event, would appear not to exist – in such a complex area of public policy. In fact, not only are the concepts it contains debatable, it is also highly likely that some or all of them will be challenged or give rise to opposing views.

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[1] The document was also examined by the fourth meeting of the Committee of Experts, which took place on July 14-18, 2003, at OAS headquarters in Washington D.C., USA.

[2] The methodology adopted by the Committee can be found on the Mechanism's webpage.

Having made these clarifications regarding its scope, it should also be noted that the document is divided into two parts. The first offers some thoughts about government procurement as an instrument of public investment and as a source of corrupt practices, and about the possibility of drafting a “risk map” for corruption in the different stages of hiring processes. The second shares some ideas on regulatory provisions seen as being essential to prevent corruption within government procurement.

I. GOVERNMENT CONTRACTING SYSTEMS AND CORRUPTION

1.1. Government Contracting as an Instrument of Public Investment and a Source of Corrupt Practices.

The countries are in total agreement regarding the importance of contracting activity as an instrument that government institutions use to achieve their intrinsic purposes. This reality has been assuming greater importance with the processes of change that began a few years ago in all parts of the world and that basically involve the processes of globalization and integration of economies, as well as the transformation of the role of the State and its methods of intervention.

The size of the economic interests involved in government contracting procedures and their significance for the growth and development of countries have made clear the growing national and international importance of this subject. At the global level, it is sufficient to note that according to the World Trade Organization government contracting represents between 10 and 15 percent of GDP, not including defense-related goods.

The importance of this issue in the countries of the Americas is similar or even greater. According to estimates from the Inter-American Development Bank, in barely one year (1996) the governments of Latin America and the Caribbean spent between 131,000 and 197,000 million dollars. It is quite certain that this figure has increased substantially today.

As a result, the regulatory system for government contracts is an immensely important factor in the economic and social development of countries given its close relationship with government investment. However, at the same time and precisely because of this circumstance, the system has unfortunately been a field ripe for the proliferation of corrupt practices.

In this sense, it is correctly stated that corruption takes many forms. However, none of them is as widespread nor as costly as corruption involving contracts that governments sign to procure goods and services or to carry out public works. The explanation for this is quite simply that, as has been noted, contracting normally represents a significant percentage of public spending at all levels of government.

The volume of resources that countries invest through the instrument of contracting is supremely high as is unmistakably deduced from the WTO and IDB figures mentioned earlier. As a result, the potential for rewards or economic compensation as an illegal counterpart to administrative decisions that in one way or another benefit a bidder in public bidding or a particular contractor is practically incalculable.

This reality is evidenced in the great infrastructure (e.g., construction of airports, dams, roads) and public services projects that are frequently the projects that lead to the most notorious cases of corruption. However, it is no less true that corrupt practices are also evident in smaller contracts involving the procurement of high- priced goods and equipment (machinery, spare parts, vehicles, etc) as well as contracts for items used every day such as office supplies, uniforms and other inputs that are purchased or contracted for in significant volumes or amounts each year.

It is equally evident that corrupt practices in this sector of government administration evolve and generally spread to all government contracting activity (e.g., consulting and service delivery contracts) so that practically no contracting method can be said to be free of opportunities for corruption, with contracting for information technology being one of the most notable areas due to its complexity and price.

So then, the real possibilities for controlling corruption in this important sector of government administration require, as one of its minimum essential assumptions, the adoption of a regulatory system consisting of a series of elements and principles that taken together reduce opportunities for corrupt practices. However, it should be emphasized that good rules are not enough although they are certainly necessary given that the regulatory framework or system constitutes one of the central axes of an anti-corruption strategy.

1.2. Map of Corruption Risks in the Various Stages of Contracting Activity.

The analysis of the investment of public resources through the mechanism of contracting allows us to identify a map of the vulnerability associated with the various stages that generally make up the contract administration process. This map of corruption risks in government contracting thus encompasses the entire process from the policy decision itself to the signing and execution of contracts. It is important to identify the vulnerability of the process at each stage in order to specify the basic regulatory elements that will help reduce opportunities that foster corruption in this sector of government administration.

1.2.1. When Making the Policy Decision.

The conditions under which policy decisions are made to invest public resources are fundamental for generating trust regarding the manner in which the contracting process will proceed. The potential risks of corruption occur precisely in those processes in which the decision to carry out the project is linked to commitments reached with political sectors, specific economic groups, or interest groups with sufficient power to exert pressure so that decisions favoring them will be adopted. It cannot be ignored that in many cases the importance, impact or magnitude of a project and the influence of private interests regarding the project can foster this type of political commitment to invest public resources. The process of “negotiation” that can occur in the course of electoral campaigns or in the development and management of relations between the executive and the other branches of government can lead to “preselection” of the beneficiaries and/or executing agencies of public resources, to the detriment of the general public interest.

Although counteracting this practice requires much more than regulatory strategies, it is important to emphasize the need for certain mechanisms that will make it possible, for example, to ensure the independence of political leaders and their teams when making decisions regarding the investment of public funds, supplemented by the real possibility of citizen involvement in the monitoring, follow-up and oversight of those decisions. In this respect, efforts directed to institutionalizing participatory planning to allow for discussion of decisions whose size or impact require opportunities for community evaluation and analysis may be very important.

1.2.2. When Contracting Directly or Without Bids.

In those cases where legislation allows for the awarding of contracts without the process of public bidding, there is a greater risk of corruption when the mistaken belief prevails that direct, simplified contracting or contracting without public bidding is equal to discretionary or arbitrary contracting. It is clear that specific situations defined in the law merit exempting certain ordinary contracting from bidding in order to give government administration efficiency and flexibility, for example, in emergency situations or in contracts for small amounts. In this respect, it is important that the law define as strict exceptions those cases in which contracting without bidding applies and that it insist that such

contracting be clearly supported in the respective legal exception, governed by the principle of objective selection (which means prohibiting subjective, arbitrary or capricious criteria) and subject to compliance with minimum requirements that eliminate bias and contribute to transparency.

It should be added that the frequent presence of different and disperse regulations and procedures, either due to the nature of the public agency or, for example, the source of the funds, usually leads to other methods creating exceptions to the bidding procedure or specific rules for selection that can affect transparency and foster corrupt practices. On this concrete point, the regulatory system must seek to provide the broadest possible coverage, eliminating all those exceptions to procedures provided in the general rule that lack a clear and evident justification. .

1.2.3. When Structuring the Project.

A project that is adequately defined in terms of its technical, financial, social and legal characteristics is a guarantee of the appropriate definition of the rules of the game in public bidding. The processes that usually present the greatest difficulties in terms of objectivity, clarity and transparency in the rules of the game and in subsequent development of the process are precisely those that have been preceded by a very weak institutional capacity for preparing the project. When government agencies at the central or decentralized level lack the technical and personnel structure to adequately prepare and structure a project, it is advisable that they turn to independent consultants or experts to carry out with greater technical precision this delicate task that is not only a determinant of the transparency of the process but also affects the appropriate development of the future contract and thus the risks of cost overruns for different items due to deficiencies in structure or design, which also creates opportunities for corrupt practices.

In addition, it is important that the rules require the administration to conduct studies, designs and evaluations sufficiently in advance of the start of the selection process so as to avoid hurried decisions or decisions made under pressure from private interests or, finally, decisions affected by improvisations that can ultimately turn out to be much more costly to the government agency and to the transparency of the process.

1.2.4. When Defining the Rules of the Game.

It is during this stage that elements are most frequently introduced that tilt the process or bidding in favor of a specific bidder to the extent that rules, requirements or prerequisites are defined in the bidding conditions or bases for the process, with the prior knowledge that only that particular bidder is in a position to comply with them. To avoid this practice of favoritism through targeted bidding conditions, the regulations must definitively establish the obligation to include in the bidding conditions objective, fair, clear and complete rules that limit the possibility of decisions that are not impartial or transparent. For the same reason, there must be broad disclosure of the bidding conditions to allow all interested parties to submit comments, criticism and observations on the content and scope of the rules included therein, so that they can be publicly and openly discussed sufficiently in advance of the start of the process, thus helping to identify and eliminate possible subjective requirements, factors or prerequisites. This also reassures participants and encourages them to trust this crucial aspect of the process.

1.2.5. When Evaluating Bids and Awarding Contracts.

It is generally asserted that corruption in government contracting activity occurs during the process of evaluating and rating the bids but in reality what usually happens is that, although favoritism toward a particular bidder is strengthened in this stage, this can only happen if rules, conditions or elements were included in earlier stages to direct the process arbitrarily and clear the way for this result. In this stage, the greatest risk is in the intervention of one or more evaluators who act with bias, apply

subjective criteria or interpretations, give preference to unimportant requirements over substantive or basic requirements in order to manipulate the process.

When the project has not been properly structured or the bidding conditions have not been prepared with clear, objective and complete rules, either due to administrative omission or failure to provide for public disclosure and discussion of the content and scope of the bidding conditions, the process is much more open to corrupt practices in the evaluation stage because officials have more room to maneuver and act at their own discretion or subjectively, to impose decisions that favor a particular bidder and, consequently, to bring about an irregular award to the detriment of the principles of morality, transparency and objective selection.

1.2.6. When Signing and Executing the Contract.

In the stage following award of the contract, i.e., the process of revising and signing the contract text or instrument, there may be room for corruption risks associated with the negotiation of clauses favorable to the successful bidder that involve a substantial change in the original condition. This is detrimental to the general interest because in most cases the new conditions may have a financially negative impact on the government agency and provide a correspondingly greater benefit to the contractor. The inclusion of stipulations of this type also violates the principle of equal treatment for the other bidders who participated in the selection process given that this obviously involves a change in the rules to the extent that had they known that such changes would occur, they would probably have structured their bids under different conditions.

Goods, works or services may be also added at this stage that mean increases in the resources associated with the contract, or unjustified considerations or compensation that make the contract more of a burden on the government agency and provide greater opportunities for corruption that may even involve inspectors or officials who carry out the work of monitoring, following up and supervising contract performance.

To deal with these situations, it is important that unsuccessful bidders have flexible mechanisms for uncovering and denouncing irregularities of this type, for ensuring proper selection of suitable inspectors and establishing mechanisms for reporting on the part of contractors and responsible officials. In addition, it may be very useful and effective to organize information and reference price systems and to allow for community participation through the organization of qualified supervisory bodies. The existence of strengthened and independent oversight agencies is also fundamental.

1.3. The Costs of Corruption in Government Contracts.

If the actual prices of contracted goods and services are compared, independently of the selection process method (bidding or direct contracting), significant price differences can be found that can even reach high percentages over the real or market price, differences that can also be seen when the prices for contracts that result from bidding procedures are compared with prices for contracts entered into through direct contracting.

According to Donald Strombom, “where corruption is systemic, it probably adds at least 20 to 25 percent to the costs of government procurement.” According to an IMF document titled “Corruption, Public Investment and Growth,” a more thorough examination of government contracting practices in projects of some significance and size, added costs may even run as high as 50%.3[1]

Taking into account the WTO and IDB figures on the volume of resources that countries allocate each year to government investment through the contracting of goods, works and services, the magnitude and formidable cost of the problem is obvious. Hence the importance of building increasingly greater

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3[1] Donald Strombom. Corruption in Procurement. Economic Perspectives. USIA. Vol. 3, No. 5, November 1998.

public awareness of this phenomenon so as to foster an effective strategy for reducing the opportunities that corruption has been gaining in this field. As indicated earlier, one of the central axes of this strategy involves a regulatory system adequate to this purpose, consisting of a set of basic components and principles that are generally applicable, so that within this complex context the system will help to promote effective ethics, transparency and rectitude in government contracting procedures.

II. BASIC REGULATORY COMPONENTS OF A GOVERNMENT CONTRACTING SYSTEM TO PREVENT CORRUPTION

A regulatory system that governs contracting by public agencies is a determining factor in reducing corrupt practices to the extent that its structure responds to specific essential imperatives without which it is impossible to foster, in conjunction with other complementary mechanisms, transparency in government contracting procedures. These are certain regulatory elements that can be universally identified as essential for limiting the possibilities or opportunities for corruption in this field and that basically involve requirements in the planning of contractual activity, disclosure and public discussion of bidding conditions or the rules of the game for bidding or competing, publicizing the process, well-founded evaluation of bids, the possibility of discussing or disputing results prior to the decision, justified awards presented in a public hearing, a conflict of interest system, adequate information and reference price systems, official and citizen oversight, et al.

2.1. Good Rules Are Not Enough But They Are Necessary.

It should not be forgotten that a regulatory system consisting of a set of elements suitable for eliminating opportunities for corrupt practices is only one of the axes of a broader strategy that must involve other complementary instruments. The real ability to apply standards is a problem that exists in various areas of public and private life. In the field of government contracting, it often happens that officials and potential bidders know the law and its requirements, but are disposed to evade them even by calling on sophisticated devices that make their mandates completely illusory. Not all problems are resolved in the legal arena and hence the importance of recognizing that the promulgation of an appropriate regulatory system does not complete the task but doubtless constitutes a solid basis and a significant advance that must be accompanied by an additional series of mechanisms and instruments to make it possible to build transparency and thus trust, efficiency and effectiveness in contracting procedures.

2.1.1. Adequate Planning of Contractual Activity.

Planning is vital in government administration in order to guarantee proper utilization of resources, precise identification of goals and effective achievement of anticipated results. In the field of government contracting, planning must be an imperative designed to avoid improvisation, ensure normal development of selection procedures and guarantee the normal performance of contracts, as well as their timeliness and advisability. When government contracts are entered into outside of some minimum rules of prior planning, serious deficiencies occur in the appropriate structuring of the process that inevitably will arise as the major threat to transparency in the process. In addition, these deficiencies will seriously compromise the subsequent development of the contract, with all the negative consequences in the technical, material, financial and quality-related aspects involved when carrying out the purpose of the contract under conditions where planning is absent.

Based on the above, the law must be strict in requiring that all studies, designs and evaluations of a technical, economic, and budgetary nature and involving the timing and advisability of the project be prepared sufficiently in advance of the start of the contractor selection process so as to ensure the normal development of the process and its transparency and effective adaptation to the purposes of general interest that should guide all

government administration, as well as the subsequent execution of contracts according to the criteria of economy, quality and efficiency.

A rule of this type seeks both to make the process transparent by reducing the risks of corruption in the project structuring stage and to prevent subsequent haphazard development of the contract due to incorrect studies, data or documents prepared in a deficient or hurried way. To complement the preceding, the law should also establish the specific responsibility of the administration and public servants for failure to observe this essential duty of prior planning.

In this way, opportunities for possible manipulation of the contracting process in an effort to satisfy the political, situational or personal interests of the official in charge are substantially limited by planning requirements that call for mandatory compliance with prerequisites basically associated with the preparation of the studies, designs, projects and evaluations needed in each case and that no doubt constitute serious limitations on biased or arbitrary action by a public servant and thus on corrupt practices in this stage of the process.

2.1.2. Preparing Bidding Conditions with Objective Rules.

The bidding conditions are the document in which the government agency defines the purpose of the anticipated contracting and establishes the different components, conditions and requirements in terms of time, method and place for those who are interested in submitting bids. After the law, the bidding conditions should be the basic rule for the selection procedure and, as such, should contain, among other things, a clear definition of the purpose, a precise definition of the conditions or requirements for participating, criteria for evaluating the bids and the rights and obligations of the parties.

These bidding conditions must be binding on both the government agency as well as the bidders and the contractor selected. This based on the principle of general submission to the bidding conditions that constitutes a guarantee of transparency, equality and impartiality.

The bidding conditions should be prepared by the public agency with sufficient lead time during the planning stage of contracting activity. As the equality of the participants is one of the basic principles of the bidding or invitation to tender, the bidding conditions must establish general and impersonal rules that faithfully maintain that equality and ensure impartiality and objectivity in the selection process. Hence the importance of legally establishing the requirement that the government agency include in the bidding conditions clear, precise, objective, detailed and complete rules basically directed to prevent subjective or biased decisions. In this sense, the regulatory system for contracting must expressly require that the government agency include rules of the game with these characteristics, particularly with respect to the selection criteria or factors on the basis of which the bids will be rated and evaluated.

There should be an express prohibition on including subjective evaluation criteria or criteria not associated with some clear qualifying parameters that allow bidders to unambiguously establish how they will be applied and how their bids are going to be differentiated or compared. In addition, it should be expressly forbidden to include in the bidding conditions rules designed to direct the process in favor of a particular bidder, establishing, for example, as provided in the WTO Plurilateral Agreement on Government Procurement (Art. VI, no. 3), that specific trademarks or trade names, patents, designs or specific rates, specific sources, manufacturers or suppliers may not be required. A similar rule is found in Article 16 of the Model Law of UNCITRAL on government contracting.

In view of the above, the law must strictly establish that when preparing bidding conditions government agencies or public servants must at a minimum specify the following: a) The objective requirements needed to participate in the respective selection process so as to avoid undue exclusions, discrimination or favoritism. It should be clearly indicated which requirements for participation disqualify the bidder, which

requirements can be remedied and which cannot b) The rules of the game for the entire process, the content of which must be objective, fair, clear and complete and that correspondingly must allow for the preparation and submission of bids of the same type and ensure transparent selection c) The cost and quality conditions for the goods, works or services under the anticipated contract, defining them clearly, in detail and precisely based on studies and evaluations previously conducted for this purpose, and d) The objective factors or criteria for selection and qualification as well as the methodology for applying them.

The law may require a previous prequalification procedure for specific contracts that need certain levels of technical capacity, financial capacity or experience, in which case the rules for this preliminary step must also be strictly objective so as to avoid undue limitations on free competition or discriminatory effects. This prequalification step can be replaced by an adequate supplier registration system as provided, for example, in Article VIII d), and in Article X no. 2 of the WTO Plurilateral Agreement on Government Procurement under the name of “permanent lists of qualified suppliers.”

In addition, the law should expressly prohibit the inclusion in the bidding conditions of rules that lead bidders and contracts to make errors. Thus, the government agency is charged with the duty of extreme diligence and care in the clear, precise and objective preparation of the bases for bidding or invitation to tender within the parameters of objectivity, equality and impartiality.

The law should also prohibit the inclusion in the bidding conditions of requirements that cannot be met or exemptions from liability for the data, reports and documents that the government agency provides given that, on the one hand, it is the government agency that is responsible for preparing them in the planning stage, and on the other, requirements and exemptions of this type create uncertainty in the bidders and these uncertainties are usually reflected in higher projected contract costs starting with bid price structure itself given the need that bidders feel to cover those risks or contingencies against the possibility of having to assume their consequences.

Another significant aspect of the bidding conditions involves the determination of the purpose of the bidding or invitation to tender. The law should require that the government agency clearly and precisely identify in the bidding conditions the purpose being sought through contracting, as only on the basis of precise identification is it possible to submit bids that respond to what the administration actually requires.

In addition, without a clear definition of the purpose, interested parties would not be able to determine exactly what to propose and, similarly, the government agency would be unable to compare the different bids with a minimum of objectivity so as to ensure equal treatment of the participants. A confusing or imprecise definition of the purpose of the bidding or invitation to tender would result in the submission of bids that were heterogeneous and thus could not be compared to each other, which would considerably increase the degree of subjectivity in the evaluation and the possibilities for engaging in corrupt practices. For this reason, the law must require that bidding conditions establish the cost and quality conditions for the goods, works or services under the planned contracting, defining them clearly, in detail and precisely based on studies and evaluations conducted earlier for this purpose.

Bearing in mind that selection procedures consist of a sequence of actions carried out by the government agency and by individuals with a view to signing a contract, they must be handled in accordance with the law and the bidding conditions. In order for this subordination to the bidding conditions and the law to be effective, the legal system must establish consequences for non-compliance such as the possibility of suing or challenging for nullification of the process, the administrative action awarding the contract and the contract invalidly signed, without detriment to liability actions against the public servants responsible.

2.1.3. Disclosure and Public Discussion of Bidding Conditions.

To reduce or limit the chances that government agencies and public servants will be able to make decisions that are not impartial and transparent and to prevent in particular the inclusion of rules that are subjective, discriminatory or intended to favor a specific bidder, i.e., to ensure that the rules of the game are objective, clear and equitable, the law must require that the bidding conditions be made widely available so that all interested parties may express their comments, criticisms and observations in such a way that public and open discussion, sufficiently in advance of the start of the process, will help to identify and eliminate possibly subjective requirements, factors or prerequisites and will also give the participants confidence regarding the impartiality of the process and the objectivity of the rules of the game.

Similarly, the law must require disclosure of the draft text of the contract to be signed with the successful bidder in order to prevent later negotiation with that bidder of clauses involving substantial changes to the detriment of the principal of equal treatment for bidders and the general public interest due to changes in the original balance between the rights and obligations of the parties that can end up favoring the particular contractor, thus opening up opportunities for corruption.

The observations, comments and criticisms of experts, community spokespersons and those interested in participating regarding the content and scope of the bidding conditions are the best guarantee of impartiality, equality, rectitude, clarity, efficiency and transparency in the selection process that a government agency wishes to carry out to sign a contract, as the opportunity for debate and criticism regarding the rules of the game makes it possible to build trust, correct errors, eliminate instances of subjectivity or bias and achieve a proper balance between the different legitimate interests that are naturally in tension or conflict in this type of process.

To this end the law should provide for the use of public hearings, electronic media, the Internet and forums and meetings held with sectors or professional associations in the specific subject area as methods for publicizing and opportunities for discussing and formulating comments, criticisms and observations. The law should also provide for the government agency's obligation to answer clearly and precisely all observations made and to make necessary changes in the bidding conditions. This is because the trust of the participants depends as much on making opportunities available for the greatest number of observations, suggestions, criticisms and comments as on the requirement that the government agency responsible for the selection process provide effective and well-reasoned answers. Thus it should be required that observations be reviewed, analyzed and answered appropriately.

Prior publication of the bidding conditions on the Internet page of the respective government agency is an ideal way to publicize the bases of the process because it makes it possible to publicly disclose the content, receive observations and respond to them using the same means, keeping everyone interested in the issues being discussed up-to-date. One of the advantages of having a long enough period of time to analyze the rules of the game prior to the opening of bids lies precisely in the ability to exhaust the discussion regarding those rules, so that bidders can then effectively devote their efforts to preparing their bids because they trust the rules of the bidding conditions and consider them objective and impartial precisely because they have had the opportunity to analyze, question and discuss them and have received well-supported answers to their comments and have even been successful in having the government agency make adjustments and changes to the bidding conditions in order to adapt them to the criteria of impartiality, viability and objectivity.

2.1.4. Publicizing the Process, Equality and Free Access.

As part of the goal of ensuring that government contracting activity is carried out in an impartial and honest way and, as a result, that in the development of the activity specific contractors are selected in a truly objective way, preserving the general public interest, equal opportunity, competence and open participation, emphasis should be placed on the importance of legally requiring strict compliance with clear and precise disclosure rules that should be applied in the various stages of the selection process and should include all actions, reports and concepts developed during the selection process.

Broad and adequate public information regarding the decision to begin a selection process for a government contract ensures the effectiveness of the principles of free access, competition, open participation and equal opportunity, reducing the chances of discriminatory conduct, manipulation of the process and illegal practices that can easily amount to acts of corruption.

It is thus considered necessary, for example, that the law require the publication of notices or announcements in suitable media, including the Internet, to provide information regarding the opening of the process, the purpose of the process, the conditions for participating, the opportunity to learn about the bidding conditions and make observations regarding their content and, generally, all the conditions of time, method and place for interested parties and citizens to participate actively and effectively, whether in the selection process as such, or in the follow-up and supervision of steps taken and their results.

These notices or announcements must provide information regarding aspects such as identification of the bidding or invitation to tender, the government agency issuing the bid tender, its purpose, the terms for consulting the bidding conditions, methods or opportunities for their analysis and public discussion, deadlines and conditions for participating, the budget and generally any other relevant information that provides knowledge of the basic aspects of the process that is to begin.

It is important to emphasize that the Internet is one of the mechanisms that best contributes to knowledge and public disclosure regarding the initiatives of government agencies in the area of competitive bidding or contractor selection procedures in general. It can be stated that in many countries there are now no official central level or decentralized agencies of any size that do not have their own Web site that, as mandated by law, can be used to afford interested parties and the general population the ability to consult information related to their activities, services, procedures and other actions intrinsic to their functions, including everything concerning the administration of their government contracts.

In order to achieve the above-mentioned goals of disclosure and transparency, the law should also strictly require that in contracting procedures interested parties will be able to learn about and dispute the reports, ideas and decisions produced in those contracting procedures, under the conditions indicated for this. In addition, it is essential that the law expressly and strictly require that the actions of authorities in this area be public and that the authorities be required to allow free access to the files concerning their activities. Nothing should be secret in the selection process. As a corollary to the above, it should be legally required that government agencies issue copies of the actions taken and the bids received, with the sole exception of matters protected by secrecy due to legal and international standards on industrial property, copyrights or, in some specific cases, legal standards on defense and national security.

In addition, it is important that the law require that all essential administrative actions taken and, in general, substantive decisions made by government agencies in their contracting activity (evaluation of bids, awarding of contracts, etc.) must be justified or supported accurately and in detail so that interested parties can clearly understand their reasoning and can thus dispute or challenge them effectively at the time indicated for this in the law.

One of the key objectives of legal mechanisms to make the contractor selection process public relates to the need to ensure equal opportunity and free competition. Experts assert that in such processes, particularly in public bidding, the principle of *perfect equality of bidders* is one of the most important principles because it helps to eliminate acts of favoritism and subjectivity and thus corrupt practices. In effect, based on this principle, all bidders must enjoy exactly the same opportunities in the selection process, so that they are entitled to participate under identical conditions and thus without the interference of any type of advantage, privilege or discrimination that might affect this imperative of perfect equality.

So then, the equality of all bidders in the selection procedure must govern, starting with the request for proposals or invitation to participate and continuing to the award or formalization of the contract. Applying this principle, the law must prohibit the government agency from establishing discriminatory rules or acting so as to give an advantage to one bidder to the detriment of other bidders. Thus any discriminatory action that benefits one participant and has not at the same time been carried out or made available for the benefit of other bidders must be considered to be a violation of the law. It should not be forgotten that restrictions on competition significantly affect the ability of the State to contract for goods and services under adequate conditions of economy and efficiency.

In this context, the law must establish the consequences of a failure to observe legal standards on disclosure and equality. For example, the failure to provide events or methods for distribution or disclosure or the agency's granting of any advantage to one bidder that is not at the same time granted to other bidders, harms and restricts the participants' essential rights. Therefore, participants must have the legal power to challenge administratively and/or through litigation defective actions in the procedure and even the contract that is subsequently formalized.

In this way, the legal requirements on publicizing the process and the effective application of the principle of equality make it possible to ensure free competition, transparency and objective selection, thus limiting opportunities to engage in corrupt acts in this field.

The preceding should be understood as not limiting structural requirements regarding prequalification based on information systems and bidder or supplier registration systems that seek to ensure the necessary technical aptitude or capacity to carry out specific contracts, a subject about which some comments will be made below.

2.1.5. Strict Adherence of the Process to Rules of Economy and Efficiency.

One of the phenomena with a significant effect on the proliferation of corrupt practices in government contracting involves the existence of selection procedures characterized by multiple requirements, approvals, stages and formal demands that are unnecessary and almost invariably end up becoming opportunities for corruption. This bureaucratic scheme of multiple stages and unnecessary requirements promotes the occurrence of numerous cases where the process is irreproachable in terms of compliance with the entire series of requirements and ritual forms but where there is a stunning absence of the strict imperatives of timeliness and advisability in contracting, as well as an absence of the imperatives of objective selection, impartiality and transparency.

In the Overview section of the World Development Report 2002 published by the World Bank, it is forcefully stated that more red tape is associated with more corruption. This conclusion applies equally to government contract administration. Thus, the law must impose as a basic principle that procedures should take as little time as possible and cause the least amount of expense on the part of participants, that no more documents and copies should be required than those that are strictly necessary, nor should there be formalities or requirements that are not completely essential based on what is expressly established in the regulations. An effort should be made to reduce the costs of government contracting, adopting administrative mechanisms that limit paperwork, officially help it along, unify it and apply the duty of efficiency, diligence and flexibility to the entire process. The mandates of economy and efficiency basically affect the selection procedure but at the same time they require the State to act seriously when contracting and in good faith in the contract negotiation stage.

Concrete manifestations of these mandates might include the legal requirement to clearly establish in the bidding conditions the procedures and stages that are strictly essential for objective selection, in the context of the steps provided for this purpose by the law; the obligation to indicate preclusive and strict terms; the duty to officially support the proceedings; the prevalence of substance over formalism; and the simplification or reduction of unnecessary requirements and steps, among other

aspects directed to the same purpose. The preceding also helps to prevent economic, technical and budgetary lags that can also create opportunities for engaging in corrupt practices.

An important aspect that merits special note involves the need to strictly impose the duty to abstain from requiring the fulfillment of meaningless formalities or requirements except as expressly provided by law. Formal requirements should not be added that do not provide valuable and pertinent information for evaluation and if they are included they should not be determining factors. This aspect is crucial because public servants responsible for the process will not be able to point to the absence of such requirements to disparage or reject a bid in that due to their accessory or formal nature such requirements are not determining factors for purposes of the evaluation and objective comparison of the bids. Therefore, bidders must have the opportunity to remedy such formal defects in the time period established for this purpose. This rule regarding the prevalence of substantive factors limits the opportunities for corrupt practices by eliminating the chance that formal pretexts will be invoked to exclude one or more bids so as to illegally favor another.

The standards of UNCITRAL (Section III) and WTO (Art. XIII, no. 4 b) provide for giving bidders the opportunity to remedy incidental or insignificant errors in their bids, but the government agency is in any case empowered to reject them. This could potentially allow the arbitrary exclusion of a good bid based on simple reasons that could be remedied. The agency should have the legal ability to ask for a correction if it notes an insignificant error or the bidder should have the opportunity to remedy it within the period established for this.

2.1.6. Clear and Detailed Justification for Bid Evaluation.

Based on the fact that the legal mandate to include clearly, precisely and in detail the objective factors for selection and the precise method for their application has been satisfied during the stage of developing and defining the rules of the games, excluding criteria that are subjective or not associated with clear qualification parameters, the law must strictly stipulate that the evaluation may only and exclusively be carried out on those basis of those factors previously defined in the bidding conditions and that it is illegal for the government agency to depart from these factors and the method for applying them and even more so to apply other factors or criteria that were not expressly established in the bidding conditions. This lends confidence, seriousness and security to the process, preventing arbitrary, capricious or subjective decisions through which various corrupt practices are expressed in this field.

In addition and for the same reason, the law must impose the requirement to justify or support in a clear, detailed and precise way the evaluation of bids, exclusively applying the objective selection factors and methodology, exactly as provided for in the bidding conditions. This requirement prevents biased or subjective evaluations that foster corrupt practices, given that the law imposes on the government administration the inescapable obligation to support, explain the basis for or justify in detail the results of the evaluation, exclusively applying the factors provided for this purpose in the bidding conditions. If one or more factors or criteria other than those provided in the bidding conditions, or a different methodology, are applied in the evaluation, or if the results of the evaluation are not sufficiently justified or supported, the law must provide consequences for such conduct by allowing the bidders to challenge the evaluation before the award is granted, in writing and in public hearings, as will be seen later.

With respect to the evaluation of bids, it is pertinent to add that ideally the law should require that the bidding conditions adequately separate the technical and financial aspects of the bids, so that, once the technical, legal and financial qualification of the bids has been assured by applying the factors and the methodology provided in the bidding conditions, the process continues with the economic competition among those bids that achieve the minimum required level. This also avoids situations in which, although the rating points are assigned in a supposedly objective way, the contract ends up

being awarded on the basis of one point or a fraction of a point, creating dissatisfaction and doubt regarding the justice and impartiality of the decision.

On this subject, there is no doubt that special software can be developed to evaluate bids, particularly with respect to price and quality factors, that now or in the future can make it possible to carry out more efficiently and effectively the evaluation or rating of bids in the context of the principles of transparency, impartiality and objective selection as defined in the legal provisions, which given their nature will always be compatible with advances in technology and computer science. In this sense, innovations in the use of information technology must basically promote these principles, i.e., such innovations, as established in the WTO Plurilateral Agreement on Government Procurement, must guarantee and "promote the aims of open, non-discriminatory and efficient government procurement through transparent procedures" (Art. XXIV, no. 8).

Finally, it is advisable to ensure that there are several evaluators so that the assignment of a rating is not left to the discretion of one or two people. In this regard, the law should provide, for example, for the formation of several multidisciplinary committees for evaluating competitive bids.

In this way the effort is made, in summary, to prevent evaluators from acting with bias or subjectivity and thus to prevent favoritism, collusion and manipulation of the process to the detriment of a transparent process.

2.1.7. Opportunity to Learn About, Dispute and Discuss the Evaluation of Bids.

It is essential for the transparency of the process that the law, on the one hand, impose the obligation that the government administration inform interested parties of the results of the evaluation and, on the other hand, establish the right of interested parties to submit observations, criticisms or comments regarding that evaluation within a reasonable amount of time established for this purpose. In this way, bidders have the chance to carefully examine the results of the evaluation and its rationale in order to verify whether the rating factors stipulated in the bidding conditions and the methodology for applying them were correctly used in the evaluation and, if not, to present well-founded observations to the agency to demonstrate the defects or errors they may have produced and to request review or correction prior to award of the contract.

In any case, it should be established that bidders may not use this opportunity to complete, modify or add to their bids as what is involved here is simply their right to discover, analyze and, as applicable, dispute the result of the evaluation but in no way to remedy errors in the preparation and structuring of their bids.

The law should guarantee bidders the full exercise of this right to discover, discuss and dispute the result of the evaluation and, in this sense, it is necessary that it establish sufficiently broad terms to allow for effective actions and also include the ability to hear about the other bids so that bidders have all the elements for making the judgment and can analyze and adequately discuss the evaluation.

In addition to the above, the law should also impose on the government agency the obligation to study each and every one of the observations made and to respond precisely to each of them by invoking pertinent legal, technical, economic and documentary justifications. In order to make the discussion of the evaluation result more useful, it is advisable that the law require that the discussion be conducted in public meetings or hearings during which the agency must respond to the observations and allow the participation and active intervention of the bidders. As a result of this discussion, the agency must clearly and precisely justify its acceptance or rejection of each observation submitted by the bidders, explain the adjustments it has introduced in the evaluation result as a consequence of those observations and generally resolve all questions the bidders may have raised orally or in writing.

This mechanism for discovering, critiquing and discussing the result of the evaluation in a bidding process, prior to the award of the contract, is primarily designed to raise the level of commitment on the part of the government agency and public servants to adopting decisions that are objective, transparent, free of possible errors or omissions and, basically, above any type of subjective or biased motivations that could, to the detriment of the public interest, represent acts of corruption. In addition, it represents a factor that lends seriousness and confidence to the result of the process.

2.1.8. Well-Founded Awards Presented in Public Meetings or Hearings.

Once the stage for evaluating the bids is complete and observations regarding the result of the evaluation have been submitted by interested parties, it is advisable, as indicated, that the law provide that public meetings or hearings be held in which the agency must respond to each of the observations made by the bidders regarding the evaluation. This is the ideal scenario for carrying out the discussion between the agency and interested parties regarding the process and particularly regarding the evaluation of the respective bids. Based on the periods or deadlines the law establishes for making observations, the public agency must arrive at the hearing after having studied and analyzed each of the observations submitted by interested parties so that it can give precise and concrete answers to each observation during the course of the public meeting or hearing. It is advisable that the law provide that if, as a result of analyzing the observations, the agency decides that it should adjust or modify the preliminary result of the evaluation, it is obligated to make the pertinent changes and to report on them clearly, precisely and with supporting arguments during the course of the hearing.

Full and active participation of interested parties should also be allowed during the course of the public meeting or hearing so that they can discuss and deliberate the observations presented at the correct time and the answers provided by the agency, as well as the modifications or adjustments that have been made to the evaluation of the bids as a result. In addition, their right to make the statements they deem pertinent should be recognized, and the law should require that all such statements be incorporated in the minutes or written summary of the public meeting or hearing.

Once the discussion is complete, the observations submitted by interested parties have been presented, and any changes introduced in the original evaluation have been explained, if there is legal cause for them, the agency must report in that hearing the administrative decision it reaches as a final result of the process, which is the winning or selected bid. In this way, the public servants responsible are required to publicly justify the basis for such decision based on the law, the rules in the bidding conditions and the observations of the bidders. It is important that the law require that this public meeting or hearing be attended by a legal representative or delegate of the government agency who has broad powers to decide and who should be fully responsible for the administrative on the selection.

It is precisely this decision that in various laws is known as the contract award. It should take the form of a written document of the administration, which once announced, requires the government agency and the successful bidder to sign the respective contract within the time period provided in the bidding conditions or in the law.

It is essential that the law require that this award document be issued with sufficient support or justification, including a clear statement regarding the observations and how they were resolved by the agency, so that the content of this document, together with the written summary or minutes of the public meeting or hearing, will make it possible to know all the essential facts that were used as the basis for selecting the bid. This helps to lend transparency and openness to the process, as well as to reduce the risk of biased, subjective or arbitrary decisions that generally contain acts of corruption. It also has important probatory use when an effort is made to unravel the true reasons or motives behind the decision, particularly from the perspective of the misuse of power (decisions formally in

accordance with the law but designed to satisfy particular interests), which in many laws is grounds for invalidation of administrative actions.

Regarding this same aspect and in order to prevent the manipulation of the process, it is advisable that the law impose on the government agency the obligation to award the contract to the bidder that has submitted the most favorable bid, once the respective procedure is completed and in accordance with the rating factors and methodology specified in the bidding conditions. If the government agency is allowed to act at its discretion in making this decision, for example, if it is empowered to decide autonomously and freely whether to award the contract or not, at its discretion, a very wide door would be opened through which numerous opportunities for corruption would pass. The law, then, must require the agency to award the contract to the bidder who wins in the process based on the rules of the bidding conditions, unless there is a clearly exceptional circumstance that is specifically stipulated in the law as grounds for not awarding the contract (for example, evidence of falsehood in documents, evidence of collusion among the bidders, etc). Specifically on this subject, the WTO Plurilateral Agreement on Government Procurement stipulates the requirement to award the contract to the bid that is the winning bid based on the selection criteria provided in the bidding conditions, unless there are reasons of public interest not to do so. (Art. XIII, no. 4 b).

Finally, the law should provide for the effect of irregular awards, i.e., awards made in favor of the bidder who did not submit the best bid, particularly with respect to the ability to challenge administratively and/or judicially the act awarding the contract with the resulting monetary liability that such conduct entails for the government agency vis-à-vis the bidder that it deprived of the right to the award, without detriment to the monetary, criminal and disciplinary liability of the responsible official or officials.

2.1.9. Challenge Mechanisms.

Both in the Model Law of UNCITRAL on government contracting (Arts. 52 to 56) and in the WTO Plurilateral Agreement on the same subject (Art. XX, no. 2), mechanisms are provided for challenging the decisions adopted in the course of a selection process due to presumed violations of the rules, which can lead to provisional measures to correct the respective violations, including the possibility of suspending the contracting process.

From the point of view of the need to prevent an act of corruption from being reinforced through a subjective or arbitrary award, it is considered advisable to establish the ability of any participant in a selection process to exercise the power to challenge that decision administratively through appeals with easy procedures and precise grounds, without detriment to potential litigation or jurisdictional action thereafter, bearing in mind for this purpose some of the regulatory parameters provided in the models cited above. In this respect, an appeal for reinstatement or reconsideration with a short or summary procedure could be established that the agency would be required to rule on within a time period that could not be extended, including the ability to challenge the ruling through an appeal to a higher administrative authority with a similarly short and summary procedure, based on specific grounds such as, for example, evidence of fraud, corruption, bribery or clear violations of the law, the procedure or the bidding conditions.

This challenge mechanism should be established for certain crucial decisions in the selection process, particularly the act of award or some prior actions such as the adoption of the bidding conditions or the evaluation of bids in order to prevent subjective, arbitrary, biased or discriminatory decisions.

2.1.10. Special System for Contracting without Public Bidding.

Experts generally point to two systems government administrations use to select contractors: free selection and regulated selection of a particular contractor through procedures established in the law that restrict the freedom or autonomy of the government agency in this area.

There has been much discussion about which of these two systems should be the general rule and which the exception. It can generally be stated that the second of the two systems, i.e., contractor selection with prior completion of more or less complicated procedures, except in those cases expressly exempted by law, is the system most consistent with the goals of transparency, objectivity and morality in this area of government administration. In most laws and in international standards, this regulated selection procedure is called public bidding.

The adoption of this system as the general rule for selecting contractors basically seeks two objectives. The first is to give government organizations the ability to contract in the way most favorable to public interests. The second is to give private individuals the ability to compete among themselves to participate in the business that the administration seeks to do with their assistance or collaboration.

As noted earlier, the risk of corruption is greater when a public servant has greater freedom to choose a contractor through administrative actions that some laws and international standards call direct contracting, simplified contracting, restricted bidding or contracting without public bidding in general. The ability to move within a more or less wide margin of autonomy or discretion that is characteristic of such actions increases the opportunities for corruption. However, the need for a special system of contracting that is direct, simplified or without public bidding must be accepted in specific concrete cases under the following minimum conditions:

a) The law must clearly and precisely define the exceptions cases in which this special mechanism is admissible, for example, contracts for lesser amounts, extraordinary events involving disasters, a lack of multiple bidders, commercial or industrial activity of certain public sector companies in a system competing with private individuals, in all of which cases the need for flexible, timely and effective action is obvious.

b) The application and interpretation of the exception must be restrictive, i.e., it may not be extended by analogy to other similar events.

c) The law must expressly order compliance with some minimum requirements such as seeking at least two or three bids when appropriate. In some cases public or selective invitations may be required within an abbreviated procedure (in some laws this is called restricted bidding, limited bidding or selective bidding). Finally, there are computer selection systems that choose a contractor from among those entered in a public registry of bidders, consulting reference prices and bids through electronic information systems established for this purpose.

d) The law must expressly indicate the duty to act with transparency and, in all cases involving simplified contracting without public bidding, to make an objective selection governed exclusively by the goal of responding to the requirements of the public interest.

In summary, the law must expressly provide that public bidding is the general rule for the objective selection of a contractor, according to a procedure established by the law itself for this purpose or by the law's regulations, and that direct contracting or contracting without public bidding is to be interpreted restrictively and exceptionally and to be applied under precise conditions and requirements established in the law.

The guidelines for procurement under World Bank loans govern some cases in which it is justified to use abbreviated procedures and these are identified precisely ("Other Methods of Procurement," Nos. 3.1. to 3.13). Similar regulations are found in the Model Law of UNCITRAL (Chapter II) and in the WTO Plurilateral Agreement (Art. XV). However, it is relevant to insist on the need to supplement the regulations regarding cases that justify dispensing with the general procedure of public bidding

with additional requirements like those indicated in paragraphs b), c) and d) above in order to lend greater transparency, objectivity and impartiality to these special simplified contracting procedures.

It is also advisable that the law expressly establish a strict prohibition on evading the procedure or the requirements provided in the rules, regardless of the selection system applicable in each case, in that they must be understood as formalities that determine the transparency of government operations, and failure to observe them must create the possibility of challenging the award action, as well as the contract signed under such conditions either administratively and/or judicially or jurisdictionally.

The indicator that the legal norm would not err under these conditions is that simplified contracting or contracting without public bidding is not the equivalent of biased, subjective or arbitrary contracting, i.e., contracting without public bidding does not mean that the administration selects with complete freedom because, although it can select the contractor with greater freedom, its actions must be strictly subject to the principles of transparency, honesty, objective selection and defense of the general interest.

2.1.11. Disqualification and Conflicts of Interest System.

In order to preserve the principles of morality, transparency and equality of opportunity in government contract administration, it is absolutely essential that the law establish a series of grounds associated with the person of the potential contractor such as restrictions or limitations that prevent it from participating in selection processes and signing contracts with government agencies. In some laws, these impediments are called negative contracting requirements or disqualifications in that they constitute limitations on the general ability to contract and, thus prohibitions on signing contracts with specific persons who are associated with situations clearly defined by the law, such as serious penalties for failure to perform previous contracts, existence of criminal sentences or other types of final judicial or administrative decisions involving penalties or liability, as well as other events or circumstances.

In addition the law must restrict the ability to sign contracts with persons who have ties to specific public servants with decision-making power or who belong to certain hierarchical levels within government administration, such as those who are related to officials in a specific government agency. All public servants must also be barred from contracting with the government given their responsibilities in the exercise of government operations and so as to avoid pressures or influences that could come to represent corrupt acts.

Similarly, the law should restrict the ability to contract with private societies, companies, associations, foundations or corporations in which officials of the respective government agency have an interest, with specific well-founded exemptions, such as may be the case with corporations whose shares are traded on the exchange. This restriction on contracting would also be justified, for example, with respect to people who have occupied management positions in government agencies and resigned, which would preclude contracting with them, at least for a reasonable amount of time.

It is clear that in these and other similar cases defined by law there are obvious conflicts of interest that would make it advisable, in the interests of morality, impartiality and equal opportunity, to restrict the right to contract with a specific government agency with which such ties exist. Ultimately the goal is to prevent the official's power, conferred temporarily by the State, from being used for his or her own benefit or that of third parties, rather than for responding to requirements in the general interest in an ethical and transparent context.

To prevent arbitrary action, it is essential that circumstances that create disqualification, impediments, conflicts of interest or generally negative requirements that preclude contracting with the State be specific and interpreted restrictively so as not to allow application by analogy or beyond the facts or situations that justify them.

Finally, the law should establish the consequences for signing contracts under disqualifying or conflict of interest situations, among them the ability to challenge the validity of the contract, including through unilateral decisions of the government agency ordering immediate termination and payment of the contract, without detriment to the criminal and disciplinary liabilities of the contractor and the officials involved.

2.1.12. Supervision and Follow-Up of Contract Performance.

A crucial aspect to ensure competent, timely, honest and efficient performance of the contracts signed by government agencies involves the existence of adequate mechanisms to supervise and follow up the performance of the contract's objectives. In principle, the law should establish that the respective contracting government agency has responsibility for exercising what the experts call general management and supervisory jurisdiction over contract performance in order to ensure that the contract's objective is achieved according to the agreed upon terms with respect to technology, quality, time, method and place.

In the map of corruption risks in the contractual activities of government administrations, it can be noted that irregular situations usually occur in this contract performance stage. These include substantial changes in the technical, financial or material conditions that are approved by those in charge of supervising, monitoring or checking the development and performance of the contract, solely for the purpose of favoring the contractor and thus obtaining an illegal economic advantage. Similarly, unlawful acceptance of unplanned higher costs, labor or works may serve the same purpose.

Given the complexity of certain types of contracts, it is recognized that adjustments, changes or modifications must be made during contract performance due to unforeseen circumstances that could not be detected in the studies, designs or projects prepared during the planning stage of the respective contracting procedure. However, such actions must be carried out with the sole purpose of ensuring that the contract's objectives are fully achieved, which clearly involves the public interest, and with adequate and precise verification of the legal, contractual and factual bases supporting or justifying these actions.

To ensure that this purpose is effectively achieved with respect to modifications, adjustments or approvals like those mentioned, the law must mandate, for specific contracts of significant complexity or amount, an adequate system of periodic accounting by the contractor as well as by those directly responsible for activities in the supervision, control and monitoring of contract performance. This mechanism may consist of the obligation to submit periodic reports clearly explaining the status of project execution, progress, compliance, adherence to the projected schedule and unanticipated problems, difficulties and situations in general that have been noted during the respective period.

In addition, ongoing meetings or follow-up committees can be set up as an opportunity for discussing different situations involving all aspects of the development, performance and administration of the contract, so that possible adjustments or modifications can be made only in the case of unanticipated situations that have been explained, justified and analyzed in the reports submitted and in the follow-up committees.

It is also important that the law require the government agency to select the individual or legal entity that will carry out the inspection, supervisory and monitoring work on contracts of a certain amount or complexity using procedures that guarantee the hiring of suitable people or firms with broad experience in the area in which they will perform their work. For this purpose, it is essential that this process of selecting the inspector be carried out using technically precise and transparent criteria equal to those used to choose the principal contractor. In many cases, both selection processes should be started at the same time to avoid inconvenience, lags or difficulties in starting up and developing the respective project.

This prevents officials of the government agency itself from being the ones to carry out monitoring and oversight activities, thus reducing the opportunities for corruption, given that these functions will be the responsibility of one or more properly selected independent contractors that will also be entirely subject to the reporting mechanisms. This does not limit the contracting government agency's supervisory or overall management jurisdiction over the contract, which will always be its responsibility.

In the performance phase of government contracts it is equally important that the law allow qualified supervisory bodies to be organized to carry out the follow-up work on the various activities in this stage, with full powers to obtain information both from the government agency itself and from the contractor and those who carry out inspection, supervision or monitoring activities. In addition, the representatives of these supervisory bodies must be able to attend follow-up committee meetings and even to call for public hearings so that specific situations can be fully explained to the community when merited by the seriousness or importance of the situation.

These supervisory bodies may be made up of union or professional organizations in the area or specialty covered by the contract, and include the participation of associations, university institutions and representatives from the community itself.

This helps to create an environment of overall commitment on the part of interested parties regarding the adequate, efficiency and timely performance of the contract, a culture of social control of matters of public interest and, consequently, an environment of transparency and zero tolerance for practices or decisions that seek to satisfy individual interests or obtain illegal benefit during this stage of government contracting activity.

2.1.13. Information and Reference Price Systems.

An adequate information and reference price system is an effective tool for combating corruption based on overpricing negotiated in government contracts for public works, purchases of goods and delivery of services. A tool of this type must be capable of providing government agencies with complete and timely information and actual market prices on the goods and services they need to carry out their functions, the basic goal being to ensure that contracts are carried out with a degree of comparability to specific reference prices. In addition, such a system helps to foster the values of transparency, disclosure, efficiency, morality and other principles by encouraging and facilitating social control.

A system of this type should be designed to fulfill the following concrete objectives at a minimum: a) Actually reducing significantly the costs of government contracting by preventing price distortion. b) Legitimizing the process of government contracting by integrating and consolidating all the information needed for comparing relevant figures with up-to-date reference data. c) Contributing to effective achievement of the principles of transparency, disclosure, efficiency, morality and citizen control. d) Encouraging and promoting institutional, social and cultural change with respect to the problem of corruption, creating better conditions for social control over the contracting procedures of government agencies by means of new instruments that allow for effective participation and the promotion of education regarding public oversight.

To this end, the law should require that the supplier submit to a centralized information system the prices of commonly or frequently used goods and services in specific contracts that they are able to provide to government administration, with the additional duty of updating the registry periodically. In this way a data base would be created that contains the reference prices of the different goods and services that suppliers can provide to the government. For example, as an essential requirement for participating in government contracting, the law should require interested parties to submit a certificate of enrolment in this registry, issued by the operator of the information system.

This enrolment would be a prequalification requirement or subjective capacity without which contractors could not engage in contracting with the government, somewhat like requiring prior enrolment in the register of suppliers for specific contracts.

With this information from the registry of reference prices it is possible to establish price distortion margins, i.e., ranges in which bid prices may vary for specific goods or services as compared to their reference prices. The upper and lower limits of the ranges would be calculated by projecting the upper and lower thresholds of the indicative price depending on factors such as: a) the time of payment for the good or service. b) demand for the good or service by purchasing units, and c) the site for delivery of the good or service, taking freight and insurance costs into account.

To calculate the range of tolerable distortion in applying these factors, a baseline or parameter would be established that would consider, for example, that the payment would be made within a specific number of days, unit sales and delivery in the place for registry of the price, among other variables.

In addition to the above, the information system could be made up of various complementary subsystems such as the following that would allow it to operate effectively:

a) Demand subsystem that would consist of the group of goods and services that the government requires, properly classified according to codes, identifiers and standards, so that it would provide information relating to purchasing agencies, components required, processes through which purchases are made, etc.

b) Supply subsystem that provides information relating to the individuals or legal entities that are able to sell to the government, the components offered, the reference price for each and the places where they are offered.

c) Disclosure subsystem where basic information is published on contracts signed by government agencies, particularly information relating to contracting government agencies, codes for contracted goods and services, their unit prices and when and where they are contracted.

d) Control subsystem that makes it possible to compare and interpret in an automated way the different records in each subsystem, particularly those relating to the reference price, in order to verify the level of distortion between the indicative price and the final contract price.

In order to fully achieve the objectives of a system like that described, the law should establish that government agencies are required to consult the registry of goods and services and the registry of reference prices as a prerequisite to awarding and signing contracts in order to ascertain the indicative prices and avoid cost overruns in contracting.

Awards made on the basis of bid prices submitted by suppliers that exceed the range of distortion must generate system alarms and send pertinent data to oversight bodies for the respective investigation.

It is also advisable that the law require government agencies to prepare an annual purchasing plan by consulting the codes in the registry of goods and services and the registry of reference prices. Among other advantages, this would allow for adequate planning of contracting and orderly budget programming.

Finally, the law must provide that anyone has the right to access the information contained in the system in order to provide for more effective citizen oversight given the breadth and scope of such information. For this purpose, it could be mandated that the system operator maintain a web site accessible to the public with all the information from each of the subsystems and possibly with links to the web pages of all government agencies.

The law can mandate the creation of this information system based on basic parameters like those indicated and leave its overall regulation to the regulations that develop and implement the system.

2.1.14. Systems for Prior Registration or Enrolment of Suppliers or Bidders.

From the perspective of government agencies, the registries primarily represent information systems about which they can make decisions within their jurisdictions and powers. In the area of government contracting and from the perspective of private individuals, the registry of suppliers or bidders is conceived, in the legislation of various countries, as a prequalification requirement when seeking to contract with the government, i.e., as a requirement of subjective capacity that the individual must satisfy in advance for specific contracting modalities, such as works, consulting and supply contracts. With this criterion, not everyone can be considered qualified to aspire to contract with the government for specific contracts whose performance requires a certain level of professional qualification, technical capacity or experience.

In this respect, registration or enrolment of this type seeks to ensure, in advance, the technical ability or capacity needed to guarantee appropriate and timely performance of contracts of a certain size that, based on their very nature, cannot be carried out successfully if certain professional, economic, material and technical resources are lacking. The experts assert that this is a true, although special, capacity requirement, in that anyone lacking this capacity would be practically as unable to successfully complete the contract as someone who did not satisfy the general legal standing requirements.

Thus it is advisable that the law establish the basic aspects and objective foundations of a prior registration or enrolment system for possible government applicants or bidders, in terms of aspects such as the types or modalities of contracts to which it applies, classification, rules or formula for recording and verifying the technical, financial, performance background and experience requirements, and other data. It could be left to the law's regulations to establish overall detailed rules for this registry and generally for all information systems, including the reference price system mentioned earlier.

This registry of government suppliers or registry of bidders, in addition to fulfilling a subjective capacity function for all those entrants who are interested in participating in specific bidding procedures, would also be a valuable source of information and a useful tool that can be used in cases of simplified contracting or contracting without public bidding that the law establishes as exceptions, so that in such cases, for example, an electronic or automatic selection could be made among those enrolled using computer programs especially designed for this purpose. In this way, the opportunity for biased or subjective decisions designed to benefit a specific bidder in this type of selection process would be reduced.

The WTO Plurilateral Agreement on Government Procurement provides for the possibility of using registries of this type called "permanent lists of qualified suppliers" (Art. VIII, d), and Art. X, no. 2).

In addition, although these pre-registration systems for suppliers represent a certain limitation on free competition for private individuals who want to contract with the government, experts note that this is justified to the extent that only those who can be considered qualified in terms of their technical capacity, economic capacity, suitability and experience, based on the legal and regulatory requirements of the registry, can hope to sign contracts of a certain size or complexity with the government. Thus, it is important that a registration system such as this be organized technically, completely and objectively so that it will be completely reliable in terms of the data and information it contains as well as its function and operations, certification and disclosure mechanisms.

A registry like that mentioned is primarily an information system on which government administrations should rely in the process of selecting contractors and signing contracts due to the multiplicity of data

it could access regarding the capacity, suitability and aptitude of their potential contractors, thus facilitating the objective evaluation of bids. The required use of this registry in specific contractor selection processes contributes to ensuring that decisions in this area will not only be consistent with formal legal requirements but also with criteria of convenience, necessity, reasonableness and timeliness, thus increasing the level of transparency and legitimacy in government contracting activity. Based on this, it is absolutely essential that the registry be public and thus that anyone be able to consult it, especially for purposes of official or citizen oversight. To the extent possible, it should be possible to access the registry via electronic media and via the Internet, thus ensuring broader distribution of the information it contains.

In this context, there can be no doubt that the information systems available to the government and the citizens are key. In addition, the more developed, organized, complete, objective and public these systems are the greater will be the chances that in developing their contract management government agencies will make decisions that are increasingly correct and whose legitimacy cannot be questioned.

2.1.15. Oversight by Citizens and Civil Society Organizations.

The participatory exercise of citizen oversight depends on various factors. First, it is closely associated, on the one hand, with the development of greater awareness in society regarding citizens' rights and duties and, on the other, with the development of government's willingness to promote community participation with a sense of democratizing the exercise of public policy, transforming the relations between the government and civil society and recognizing rights, prerogatives and instruments suited to the effective exercise of citizen oversight. Particularly with respect to community participation in the oversight of government contract management, it is important that universities and unions or professional associations align themselves with experiments and initiatives in citizen oversight in order to improve and increase levels of understanding in technical or specialized aspects.

One of the principal mechanisms of citizen participation in the oversight of government administration is the supervisory bodies whose primary aim should go beyond assuming a simple role as an agency for consultation, opinion and complaints in order to achieve a degree of involvement in which their observations, criticisms or questions will have practical effects in terms of representing a system of qualified citizen participation that will make possible the rectification or correction of processes and decisions intrinsic to the government's contracting activity and other areas of administrative management and even promote the redirection of public policy and administration.

Clearly in order to achieve this it is absolutely essential that the legal system, starting with the Constitution itself, include provisions that establish mechanisms for the participation of society in the oversight of public administration, the instruments for exercising it, the methods of organization, ranges of activity, incentives, rules of conduct, rights and duties and other basic aspects, so that civil society will have an adequate regulatory framework for developing organized, qualified and effective activities for participating in the oversight of administrative management and, thus, in preventing corruption in such sensitive and important areas as the contracting activity of the government, given the considerable volume of public investment that is channeled through this instrument.

The priority objectives toward which the participation of civil society should be directed in the oversight of government administration, particularly to strengthen the fight against corruption, should be clearly indicated in the law and can include the following:

a) Verification of the correct application of public resources.

b) Participatory planning

c) Allocation of public resources in accordance with the law and plans, programs and projects approved by the competent authorities.

d) Fulfillment of the missions, purposes and coverage to which public resources are dedicated.

e) Submission of government contracting procedures to the principles of planning, transparency, objective selection, efficiency and economy.

f) Follow-up and oversight of the performance of government contracts through mechanisms such as qualified citizen supervisory bodies and public hearings.

Specifically with respect to government contracting activity, the law should expressly establish that all selection processes started by government agencies and all contracts they sign will be subject to the mechanisms of citizen monitoring and oversight. It is also essential to expressly impose on the authorities the duty to provide special support and collaboration to persons, organizations and associations that undertake campaigns for oversight and monitoring of government contract administration, as well as the duty to provide in a timely way the documentation and information they require to carry out such tasks.

In addition, the law can design incentives and create new tools and instruments to promote the use of such citizen oversight mechanisms, such as implementing information and registry systems, reference price systems, etc. that are freely accessible to citizens.

It should be noted that citizen supervisory bodies and in general the exercise of oversight and monitoring by civil society are necessary to strengthen a sense of responsibility and public issues. In addition, it is highly useful to add efforts to mobilize society against corruption in all areas of administrative management, particularly with respect to government contracts, without losing sight of the fact that the greatest responsibility lies with the government itself through its government agencies and official fiscal, criminal, political and disciplinary oversight agencies.

2.1.16. Official Oversight and System of Responsibility.

Generally the different laws govern a broad range of government institutions that include, among their functions and objective, oversight of the management of public resources in their different modalities, i.e., in their manifestations of fiscal or financial, criminal and disciplinary oversight.

What is essential here is that the different oversight bodies in each and every one of the cited areas of activity must be strengthened and achieve increasingly greater levels of independence and modernization in order to guarantee impartial, timely and objective investigations carried out with strict adherence to the law and without any type of political pressure, influence or interference or any other type of interference.

As noted, citizen oversight is essential to strengthen awareness of public issues and to mobilize society against corrupt practices at the different levels of administration, but it cannot be doubted that the major responsibility lies with the government through its oversight bodies.

Consequently, the constitutional and legal norms that govern the structure and functions of official oversight bodies must grant the greatest possible degree of autonomy and independence to both the executive and legislative branches, must provide instruments and mechanisms for institutional strengthening and must ensure continuous modernization.

Only the existence of strengthened, independent and modern government oversight bodies can ensure the exercise of the functions of investigation and fiscal or monetary, criminal and disciplinary sanctions strictly consistent with the law, with full respect for civil guarantees and due process and thus with greater levels of efficiency and effectiveness in the achievement of their objectives. In this

context, the fight against corruption in the field of government contracting can find in the official oversight bodies an indispensable ally for responding adequately and with greater chances of success to its numerous and complex challenges.

Supplementing the above, the law must establish a strict system of responsibility and sanctions that covers all public and private individuals who participate in the contracting activity of the State. This should be a system that in the context of efficient, effective and timely government administration confers diligence, rectitude and transparency on government contracting procedures.

In this sense, the law must include rules on the responsibility of individual contractors and public servants in civil, fiscal or monetary, criminal and disciplinary matters. It must also establish rigorous sanctions for the actions or omissions of such people who participate in contractual activity, including inspectors, consultants and advisors, without detriment, clearly, to the due process that government supervisory bodies must observe when investigating and penalizing the respective behaviors legally classified as infractions.

Specifically from the point of view of preventing corrupt practices in contracting activity, it is advisable to classify and penalize conduct such as the failure to observe the duty to plan contracting, particularly with respect to meeting requirements prior to starting the process, failure to conduct required studies or to prepare the bidding conditions with objective, clear and complete rules, including publishing and disclosing them by the means provided in the rules. This also applies to conduct designed to evade selection procedures or to conduct that reflects subjective or arbitrary evaluations to favor specific bidders; to the submission of artificially low bids; to awards illegally granted in violation of the law, the principle of objective selection or the rules of the game established in the bidding conditions; to violations of the system of negative requirements, disqualifications or conflicts of interest; to substantive changes in the stipulations of contracts without any justification or foundation in order to favor the contractor, either during contract negotiations or during contract performance; and finally to accepting or offering bribes to government officials in order to obtain favorable decisions in the development of contracting activity; or in any way having an illegitimate interest in the adoption or issuance of contracts; as well as other types of behavior.

Thus, the system of responsibility must cover everyone who participates in the contracting process and not only for failure to satisfy simple requirements and formalities, but also fundamentally for failure to observe principles, rules and standards that determine the transparency of contracting activity such as those relating to planning, disclosure, equal opportunity, impartiality, procedures, evaluation of bids and objective selection.

There is no doubt that a strict and rigorous system of responsibility can fulfill an important dissuasive role to prevent corrupt practices in the contracting activity of government agencies. If to this is added the existence of independent, strengthened, professional and modern public oversight bodies, along with appropriate tools for promoting, supporting and encouraging citizen participation in the oversight of this important sector of government administration, all on the basis of a regulatory system that includes rules and mechanisms such as those mentioned here, it is possible to build a very solid base for making significant progress in this goal of reducing the risks and opportunities for corruption in government contracts. This is a task that should involve the entire official and corporate world of the Americas and the entire world in the context of increasing globalization and internationalization of economies.