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Anti-Corruption Internationally: Challenges In Procurement Markets Abroad—Part II: The Path Forward for Using Procurement Law to Help with Development and the Fight Against Corruption

Daniel I. Gordon

George Washington University Law School, dgordon@law.gwu.edu

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**ANTI-CORRUPTION INTERNATIONALLY: CHALLENGES
IN PROCUREMENT MARKETS ABROAD—PART II:
THE PATH FORWARD FOR USING PROCUREMENT
LAW TO HELP WITH DEVELOPMENT AND THE FIGHT
AGAINST CORRUPTION**

Daniel I. Gordon

Associate Dean for Government Procurement Law
The George Washington University Law School

**I. GROWING RECOGNITION OF THE IMPORTANT ROLE
PROCUREMENT CAN PLAY IN NATIONAL
DEVELOPMENT AND THE FIGHT AGAINST
CORRUPTION**

In international organizations as well as at the national and subnational levels, there is growing recognition of the role that improving procurement systems can play in supporting developing countries' efforts to improve the lot of their citizens as well as in battling the corruption that drains public resources around the world. This is evidenced by both the heightened level of activity taking place in the international arena and in the increasing number of countries signing up to minimum procurement standards. Key examples of recently revised international documents are the 2011 Model Procurement Law issued by the United Nations Commission on International Trade Law (UNCITRAL) and the World Trade Organization's Agreement on Government Procurement (WTO GPA). The European Union (EU) is also in the midst of a substantial overhaul of its Procurement Directive, and the World Bank is undertaking the first revision, after many years, of its procurement policy.

While important, these changes will not meet the sometimes unrealistic expectations that some have. We discuss below the difference between harmonization (or convergence) and uniformity among procurement systems and address how the growing acceptance of certain minimum standards fits in. We then turn to the limits of what good procurement laws can do to promote development and fight corruption, and point out broader contextual issues that are likely to be key if we are to make progress in the path forward.

**II. "HARMONIZATION" OF PROCUREMENT LAW IS MUCH
TALKED ABOUT – WHAT IS IT?**

**A. There is a Worldwide Trend to Move Toward More-and-
More Similar Procurement Rules**

Whether we use the term "harmonization" or "convergence," similarities are much in evidence, if you compare UNCITRAL's Model Procurement Law to the WTO GPA to the EU's Procurement and Remedies Directives. Some of the key similarities (translating some terms to our American parlance) are that procurement laws and regulations must be publicly

available, potential bidders must generally be given a reasonable amount of time to prepare and submit their bids, specifications in solicitations must not be unduly restrictive, solicitations must disclose the government's evaluation criteria and follow them, and governments must ensure that disappointed bidders have access to a forum that will consider protests.

The similarities reach further than these broad points. It is thus common for systems to distinguish between what we would call sealed bidding (with public bid opening and price as the only evaluation criterion) and procurements allowing non-price factors that can result in the selection of other than the low-priced bid. Particularly significantly, more and more systems require some sort of a "stay" on procurements to ensure that a protester will have a chance to compete for a contract that it believes is being awarded improperly to a competitor.

Moreover, these similarities reach beyond countries that have adopted the UNCITRAL Model Procurement Law, have acceded to the WTO GPA or are members of the EU. In every free trade agreement that the U.S. has signed over the past 20 years, it has included government procurement provisions that reflect the core requirements set out above, and that includes agreements with countries as diverse as the Dominican Republic, Oman, Australia, Jordan, and Panama.

B. Similarity Does Not Mean Uniformity

One could understand "harmonization" to mean a trend toward uniformity. That is, once harmonization runs its course, all countries will have identical procurement rules. That, however, is not what is happening. Two countries can have similarities in their procurement systems, but still many – and critical – differences. In fact, the various international agreements make no pretense of requiring identical rules. For example, the EU Procurement and Remedies Directives set minimum requirements, but each one of the 27 EU member states can implement those requirements as it wishes, and the result is that procurement rules are not identical. That means that a French company hoping to obtain government contracts in Greece or Ireland or Finland, for instance, will have to learn the procurement rules in each of those countries. No surprise, therefore, that cross-border procurements are still relatively rare within the EU, decades after harmonization of the member states' procurement systems through the Directives.

The same pattern can be seen in the context of a specific example from the WTO GPA. Article XI of that agreement sets 40 days as the normal minimum amount of time for submitting bids – but one country may use a 40-day deadline, while another uses a 45-day timeframe and a third one 50 days – a lack of uniformity that matters to a company considering submitting a bid and that needs to check the differing rules in countries that have acceded to the WTO GPA. In addition, a country that has acceded to the WTO GPA can have different rules for procurements that are covered by the agreement and those that are not, for example, by having shorter deadlines for bid submission for smaller purchases not covered by the GPA.

The differences go far beyond deadlines. Because the WTO GPA had to be agreed among countries with very different procurement systems, it merely sets a lowest common denominator threshold – an important achievement in itself, but not a recipe for uniformity. That means that the United States is fully compliant with the WTO GPA when we allow subjective assessments of past performance, and subjective tradeoffs between price and past performance or other non-price evaluation factors – while most other systems would view those subjective assessments as problematic, if not illegal. Similarly, although both the U.S. and the EU member states are bound by the WTO GPA, we routinely allow discussions between the government and offerors during a procurement, while the EU Procurement Directives strictly limit negotiations with bidders. One more example: while we view it as the core responsibility of our protest forums (the Court of Federal Claims and the Government Accountability Office (GAO)) to tell the government that it should re-open a procurement when the forum determines that a contract was unlawfully awarded, most countries – notwithstanding the similarity of a requirement for a protest forum – view it as beyond the power of a protest forum to call for the termination of a signed contract.

C. Similarity May Help Reduce Barriers to Entry, but the Lack of Uniformity Limits That

In theory, at least, having more and more similarity among procurement systems should reduce barriers to entry. Thus, one would hope that a bidder may be more willing to compete for a contract in a new government market when its procurement rules look familiar, the country has committed to not using anti-competitive specifications, and so forth. Whether the reality is so good is unknown – we simply do not have data. The little information we do have – the data from the European Union – suggests, as noted above, that companies are not obtaining contracts in foreign markets, even within the EU. There could be many reasons for that, but the lack of uniformity is certainly one candidate. For an Italian company thinking of competing for a government contract in Poland (another EU member state) or Singapore (another country that has acceded to the WTO GPA), the challenge of learning the Polish and Singaporean procurement rules must surely be a deterrent.

D. Uniformity is Not Attainable, Nor Desirable

So should uniformity be on the international agenda? Should we view efforts at harmonization as a failure, if they do not bring us to uniformity? In the author's view, the answer to both questions is: absolutely not.

First of all, uniformity is not attainable, at least not among sovereign states or in the foreseeable future. Anyone suggesting that the U.S. should forego the benefits of negotiations with offerors, evaluation of past performance, and “best value” tradeoff is simply out of touch with reality. Similarly, no one should expect the EU to agree to adopt these aspects of the U.S. approach to procurement. For that matter, even within the EU, it is hard to imagine, as a political matter, the European Commission in Brussels trying to dictate that all 27 member states of the EU adopt identical procurement rules. Uniformity is simply not going to happen.

What we have instead is neither uniformity nor “best practices,” but simply the lowest common denominator among very different procurement systems. The best example of this is the WTO GPA, which accommodates the very different procurement systems of countries that have acceded to it, particularly the U.S. and the member states of the European Union.

More importantly, though, uniformity is not something that we should be striving for. The United States, with our long history of the rule of law and our strong protections against corruption, can allow the subjectivity of past performance ratings and cost/technical tradeoffs, without fear of widespread abuse – while, for many countries, the risk of corruption makes use of those subjective tools unacceptable. Moreover, differences in procurement systems often reflect countries’ varying institutional and other histories, and having different rules is sensible. To give just one example: for historical reasons, GAO, which is the U.S.’s supreme audit institution, plays an important role in the adjudication of bid protests, while in virtually every other country in the world, it would be viewed as institutionally inappropriate for the national audit office to be functioning as an administrative court resolving procurement disputes.

Another problem with advocating uniformity is that it assumes that uniformity will open up procurement markets, but the opposite could be the case. If other countries decided that they want to have uniformity with the U.S. in terms of preferences for small businesses and domestic bidders, the result would be far more barriers to trade: every country could set aside procurements for its small businesses, as we do, and, instead of just one “Buy American Act,” we would have a Buy Italian Act and a Buy Australian Act and so forth around the world.

In short, harmonization of procurement rules around the world has led to growing similarities among various nations’ procurement systems. There is not, however, uniformity among procurement systems, and that is probably the way things will, and perhaps should, remain.

III. THE LIMITED ROLE OF PROCUREMENT LAWS IN PROMOTING DEVELOPMENT AND FIGHTING CORRUPTION

A. Improved Procurement Laws Can Be Helpful

Improving procurement law can help countries in developing their economies and combating corruption, in at least two broad ways. First, better procurement laws can provide direct benefits. A legal requirement for competition for public procurement contracts should reduce the frequency of sole-source awards, thus potentially bringing the benefits of competition as well as reducing the trade in public contracts as rewards to friends and relatives of government officials. By mandating transparency throughout the acquisition process, procurement laws can also encourage more firms to compete for government contracts, thus potentially leading to more vigorous competition with respect to both price and quality. In addition, procurement laws can facilitate efforts to fight corruption, by (to give one important example) giving oversight bodies legal authority both to investigate allegations of unlawful conduct

(through bidders' protests or otherwise) and to impose corrective measures. Although not viewed through the lens of the fight against corruption, enactment of the U.S. statutory provision giving GAO authority to issue protective orders in connection with bid protests, 31 U.S.C. § 3553(f)(2) (A), is an example of a procurement law that has enhanced accountability of public procurements.

Second, reforming procurement laws can address the problems caused by existing laws. In the author's view, procurement laws benefit from simplicity, clarity, and uniformity, and suffer from complexity and excessive detail. Although one can certainly criticize the amount of detail and complexity in the U.S. procurement system, the simple statutory statement in 10 U.S.C. § 2304 that, absent a lawful exception, "the head of an agency in conducting a procurement for property or services ... shall obtain full and open competition through the use of competitive procedures ..." has served the U.S. well. Moreover, procurement laws, if not revised periodically, risk creating barriers to improvement in governance and efficiency. Thus, if a country's procurement laws preclude the use of e-commerce in procurement, the country will not be able to take advantage of the enormous potential that the use of the Internet offers, in terms of increasing both competition and transparency. For that matter, if a country has not revised its procurement laws in the past 20 years, it may not be permissible for vendors and the government to use e-mail in communicating with one another, whether it's the government that wants to issue a solicitation or a vendor that wants to submit a bid. Outdated procurement laws may also not allow countries to take advantage of relatively new, but now widely accepted practices, such as framework agreements (what the U.S. system calls indefinite-delivery, indefinite-quantity contracts) or use of non-price evaluation criteria.

B. The Impact of Improved Procurement Laws Is, However, Limited

Notwithstanding these benefits from improved procurement laws, changing the legal framework for awarding contracts has only limited impact on the developmental benefit of procurements and on the struggle against corruption, for two overarching reasons.

1. Procurement Laws Generally Do Not Cover Procurement Planning or Contract Administration

First, procurement laws almost invariably focus only on the middle stage of acquisitions, the selection of the contractor. From providing timely and meaningful notice to potential bidders on upcoming procurements to enabling disappointed bidders a way to challenge the selection of a competitor, good procurement laws cover all the steps surrounding award of the contract. What procurement laws typically do *not* cover, however, are the steps before and after. Thus, planning for a procurement – the first step – is not typically the subject of procurement laws. Whether the government needs a new bridge may be a political decision (the U.S. experience with a "bridge to nowhere" comes to mind), or a transportation infrastructure decision, but it is, in most systems, not a decision affected by procurement

law. Similarly, the decision to use a contractor to perform services, rather than have government employees provide the services, is very often not a subject covered by procurement law, if it is addressed in law at all. In the U.S., those “insourcing” and “outsourcing” decisions straddle the line between procurement and management decisions, with a heavy dose of political considerations, but even in the U.S., those decisions are not ones viewed as exclusively within the province of procurement law.

Procurement law does have a significant, if limited role, in the procurement planning process. The one very important role procurement law can play is to prohibit unduly restrictive specifications and to allow potential contractors to challenge specifications. That is the one aspect of procurement planning where international norms have developed in a positive way. Otherwise, good procurement planning is very difficult to legislate. The U.S. has tried to require adequate market research through legislation, but the impact of that legislation has been limited.

Perhaps even more important than procurement planning, everything that occurs after award of the contract is often viewed as not part of procurement law. In many countries, once the contract is signed, the role of procurement law ends, and the role of the country’s ordinary contract law begins. That bright line is evident in the international documents related to procurement: neither the WTO GPA nor the UNCITRAL Model Procurement Law nor the EU Procurement Directives address contract administration (or contract execution or contract management, as that phase is also called). Yet whether the concern is development or the fight against corruption, contract administration is at least as important as selection of the contractor. In terms of economic development, if a country does an outstanding job competing a contract for a new highway with significant developmental potential, but then does not supervise the contractor adequately, it may find that the contractor does not deliver what it promised. Instead, what is delivered may be over budget or behind schedule or constructed using inferior materials or processes – if the highway is ever built at all. In fact, weaknesses in contract administration may undermine progress in improving the contract award process. Thus, a firm may win a contract by intentionally overpromising, in terms of schedule, price, or quality, knowing that it can recover, whether through corrupt acts or simply ordinary contract changes, during performance.

2. Procurement Law Details Matter Far Less Than What Happens on the Ground

Even with respect to the middle step in procurements, the selection of the contractor, there can be unjustified expectations. Time and again, there has been excessive focus on the details of procurement law, while translation of the law into practice has gotten inadequate attention. Examples of wasted focus on details of procurement law are legion. The Congress of the United States has a long tradition of trying to micro-management procurement law, with little if any benefit. The European Union created a scheme for “dynamic purchasing systems” in the 2004 Procurement Directive that was so complicated that those systems have reportedly rarely been used. The risk of time spent creating detailed regulation being wasted is par-

ticularly common in areas where technology is rapidly changing, such as e-commerce vehicles. Thus, in the U.S., much time and energy was spent in the 1990s developing legal rules for a “Federal Acquisition Computer Network” or FACNET – but the entire effort was eventually abandoned in the face of the rise of widespread use of the Internet.

More complicated is the way these questions have sometimes played out in discussions between developing countries and outside institutions financing procurements in those countries, whether the outsiders are more developed countries’ governments or international financial institutions. The desire to insist that the laws governing the procurements be adequate is understandable, since those laws will govern the way the procurements are handled, at least with respect to the legal framework. Accordingly, it is understandable that the outside institutions are skeptical of the use of many borrowing countries’ procurement legal frameworks, and would prefer to impose their own rules for purposes of procurements financed by the outside institutions. Imposing outside rules often appears to be a way to mitigate the risk of corruption and to improve transparency, especially because employees of the outside institutions are more likely to be familiar with their own institutions’ procurement rules than with the borrowing countries’ laws.

Yet all recognize that allowing the borrowing countries to use their own procurement laws has advantages – in terms of strengthening the domestic procurement systems as well as showing respect for the borrowing countries. Moreover, because, as discussed above, there are internationally only similarities, and not uniformity, with respect to procurement rules, borrowing countries may find themselves having to use one set of rules for procurements financed by one lending institution and another set of rules for procurements, conducted at the same time but financed by another lending institution. The resulting inconsistencies with domestic law (and among lending institutions) not only do not help build domestic procurement institutions – they may affirmatively weaken those institutions by diverting attention and resources from them due to the need to invest time and energy learning and applying parallel sets of rules – a challenging scenario that would cause problems even in countries with the best developed procurement systems.

Moreover, all of this risks distracting from the bigger picture. An excessive focus on legal and procedural details of the contract award process may lead to neglect of procurement planning and contract administration, and even with respect to the contract award process that is the subject of procurement law, the focus may be too much on rules and not enough on reality. From the point of view of employees and consultants representing outside institutions, the focus on the lending institution’s contract award rules is comforting – they represent familiar terrain. But whether that focus delivers results on the ground is another question entirely.

The fact is that even countries with highly developed, highly respected procurement systems face significant challenges in implementation. There are few countries in the world with procurement law systems as detailed and as developed as the U.S. has – and yet the U.S. is plagued with per-

sistent weaknesses in procurement planning and contract oversight, and even conducting competitions for award is often challenging. To take one simple example: the fact that U.S. law has full and open competition as the legal default, with sole-source procurements requiring justification and high-level approval in no way means that all sole-source contract awards are legal justified (much less that they are all good practice). The dozens of decisions issued by the Court of Federal Claims and GAO each year in favor of protesters claiming violation of procurement law attest to the difficulties that exist, even within a very sophisticated procurement legal framework.

IV. THE PATH FORWARD NOW MAY REQUIRE FOCUS MORE ON PRACTICE THAN ON LEGAL DETAILS

There may be benefit in outside lending institutions agreeing that borrowing countries may use their domestic procurement legal framework when conducting procurements financed by those outside institutions, much more often than is the case today. That does not mean that any legal framework will do, nor that lending institutions should cease oversight over the use of their loans (or grants) merely because a country's legal framework is viewed as acceptable.

A. Shifting to a Principled Approach to Assessing Countries' Domestic Procurement Legal Systems

Rather than the current focus on details of procurement law, it may be more useful to focus on the minimum essentials needed for a country's procurement system to be acceptable. While one could certainly improve this list, what follows is intended to touch on the core points:

- Procurement laws and regulations must be readily available to the public
- Competition for contracts should be the norm, absent a lawful exception
- Potential contractors must be given adequate advance notice of procurements, including details of what the government requires as well as the criteria that the government will use to select the winning bid
- Specifications must not be unduly restrictive of competitions
- Qualification of bidders must be transparent and fair
- Bidders must have access to a meaningful avenue for challenging specifications, exclusion from consideration, and contract award

It is noteworthy that two potential issues are missing from this list. First, nothing is said here about the procurement method used – the choice among what Americans would call sealed bidding, negotiated procurement, simplified acquisition procedures, and micropurchasing. The choice between sealed bidding and negotiated procedures is a complicated one, although it is understandable that many believe that it is advisable for countries with weaker governmental institutions, in general, and procurement systems, in particular, to stay away from negotiations. Similarly,

those countries may be well advised to rely as much as possible on price as the sole award criterion, with needed technical features assessed on a pass/fail basis (the equivalent of “low price, technically acceptable” in the U.S. system). And while every system allows for more flexible and less open and transparent procedures for small purchases, the core principles should be competition, transparency, and accountability, even if deviations are permitted for smaller buys.

Second, a ban on domestic preferences is not included in the list of core points set out above. Opposing those preferences is understandable for outside institutions dealing with developing countries, especially since contractors from the rich countries would like access to the borrowing countries’ government procurements. The rich countries’ arguments are, however, somewhat undermined by the fact that at least one highly-developed procurement system, the United States’, employs an extensive web of domestic preferences, and it is hard to justify the U.S., at least, insisting that a developing country not have the sort of domestic preference that the U.S. insists on for itself. It is worth noting, however, that in smaller economies, the effect of absolute preferences for domestic sources may sharply limit competition, and thus facilitate collusion among the limited number of domestic suppliers, while opening up procurements to foreign sources may disrupt that kind of collusion. If domestic preferences are allowed, price evaluation mechanisms may be preferable (for example, by increasing the price of bids from foreign sources by 10 percent for evaluation purposes), because they are not absolute.

Overall, under this principled-based approach, any procurement system that is consistent with the lowest-common-denominator approach of the WTO GPA would certainly pass muster, as would others, whether they followed the EU Procurement and Remedies Directives, the UNCITRAL Model Procurement Law, the government contracting provisions of the U.S.’s free trade agreements, or another similar model.

B. Shifting to Focus on Performance and Results, Rather Than Law

The challenge in shifting the focus from law to practice is the “how” question, that is, finding realistic ways to ensure good practice. This is a real and difficult challenge. In terms of procurement planning, while outsiders can counsel developing countries about which procurements are worthwhile, the ultimate decision about what to buy is obviously for the country to make – although whether the outside institution agrees to finance the procurement is, just as obviously, a decision for that institution to make.

Once a procurement is underway, and particularly once the contractor has been selected, the key principles set out above can form a roadmap for reviewing the process. For example, anyone wanting to assess the process will want to know whether there were unjustified barriers to competition, through restrictive solicitation requirements or failure to provide adequate advance notice to potential bidders. If the country decided not to conduct a competition, the reasonableness of that decision should be carefully scrutinized. Where a competition was held, judging whether it was fair

and meaningful competition is not easy. The number of bids received can be a useful measure, which is why the U.S. has come to focus on procurements that, while ostensibly conducted using full and open competition, led to receipt of only one bid. Yet, if collusion is potentially present, even receipt of multiple bids does not guarantee real competition.

In assessing whether there has been a fair competition, the most important stakeholders, at least in theory, are the potential or actual competitors that did not receive the contract. What is at issue is accountability for the contract award process, and disappointed bidders have the most obvious stake in that, so that it is no surprise that a country's bid protest system – its domestic review mechanism – plays a central role.

The question of the adequacy of a country's bid protest mechanism demonstrates the risk of focusing on legal details. As a formal matter, a country may address the requirement for domestic review procedures by allowing disappointed bidders access to the country's court system. Yet in reality that solution may be meaningless. The court system may be incapable, as a practical matter, of moving fast enough to provide disappointed bidders with timely relief; or the judges may be corrupt; or the courts may lack the independence needed to challenge the government's conduct of procurements.

There are some minimum requirements for the legal framework for a bid protest system, but they should not distract from the need to assess what happens in practice. Thus, if the law does not provide some way to correct improperly conducted procurements, it is inadequate. That can be through an EU-type "standstill" imposed before signature of the contract, or a U.S.-type post-award "stay" of performance, or potentially in other ways – but there must be some way for the protest forum to have the problem in the procurement addressed. Also, if the law requires such a quick decision on protests as to preclude meaningful review, that is a problem, and an extremely short period (for example, 3 days) may well be too short to allow for meaningful review.

But beyond those minimum parameters, the focus needs to shift to practical questions, such as whether potential protesters are afraid to file protests; whether the protest forum is independent of the contracting entity; whether it has authority to obtain all the information, including documents, that it needs to reach a decision; whether, in practice, it is willing to rule against a government entity; and whether its decisions are followed. Where the needed elements are present, protests can provide meaningful accountability and help ensure that gaps between the legal standards and reality are identified.

As to contract performance, again, any discussion needs to begin with recognition of how challenging it is to ensure effective management of contracts. The key is meaningful and timely oversight of the contractor, but addressing that has institutional, budgetary, and political aspects. In the U.S. experience, performance problems are particularly severe when the government is not in frequent communication with the contractor and there are not enough adequately trained government representatives on the ground. Because contract changes – increasing the price that the

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government will pay, delaying delivery, or reducing the quantity or quality of what is to be delivered – can undermine the value of the contract to the government, a control mechanism requiring high-level and transparent approval of more significant changes may be helpful. In the most extreme situations, the U.S. has resorted to frequent external oversight reviews, whether by GAO, inspectors general, or even Congressional committees, but such measures must, by necessity, be reserved for the largest projects. The construction of the Capitol Visitor Center in Washington, D.C., is an example of a large project that was the subject of intensive external oversight throughout performance of the contract.

V. CONCLUSION

As efforts continue to improve procurement around the world, it is important to keep in mind that the goal is not uniformity, but creation of the minimum legal standards required for a sound procurement system, with the focus then shifting to the surrounding elements that can translate the legal rules into good practice. That critical context includes, in particular, respect for the rule of law; strong, democratic governmental institutions; a public procurement workforce that is adequately staffed, compensated, and trained; independent oversight, audit, and judicial institutions; a private sector that is willing and able to compete for government contracts, and to speak up when procurement laws are not followed; and a free and vibrant press.