



# APEC Procurement Transparency Standards in the Philippines

A Work in Progress



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**Lead researchers from PWI:** Caroline R. Belisario, Frances Caerina Sy, Vivien Suerte-Cortez,  
Anthony S. Septimo, Riza T. Halili, Yolanda Vicente and Lourdes Rachielle Manahan

**Editors:** Laura B. Sherman (TI-USA), Robert N. Walton (TI-USA), Alexandra Andrei (TI-USA)

**Design:** Joshua Maki

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Transparency International-USA (TI-USA) is a non-profit, non-partisan organization founded in 1993 to combat corruption in government and international business and development. TI-USA promotes systemic reform through collaboration with a global network of local TI chapters in almost 100 countries, high level collective action with government, private sector and international organizations, and extensive expertise in developing tools and approaches to combating corruption. See [www.transparency-usa.org](http://www.transparency-usa.org)



Procurement Watch, Inc. is a non-profit, non-partisan, civil society organization created by a group of concerned and seasoned individuals from government, academe, the legal profession, and the private sector, brought together by the challenge of reducing, if not eliminating, graft and corruption in government through procurement reform. PWI aims to enhance transparency, accountability and efficiency in public procurement through a multi-sectoral, constructive and procedure-focused approach. It envisions itself as a change agent in achieving a corruption-resistant public procurement system. See [www.procurementwatch.org](http://www.procurementwatch.org)

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**Nancy Z. Boswell**

President & CEO, TI-USA

**Caroline R. Belisario**

Executive Director, Procurement Watch, Incorporated

# Table of Contents

Abbreviations and Acronyms	2
Executive Summary	3
Introduction	5
1. Development of the APEC Transparency Standards on Government Procurement	6
2. The Philippines' Economic and Governance Context	8
3. Legal Framework for Public Procurement	10
4. Findings of the Legal Assessment	18
5. Results of the Private Sector Consultation	24
6. Conclusions and Recommendations	27
Annex 1 APEC Transparency Standards on Government Procurement	29

## Abbreviations and acronyms

<b>APEC</b>	Asia-Pacific Economic Cooperation
<b>APEC Standards</b>	APEC Transparency Standards on Government Procurement
<b>BAC</b>	Bids and Awards Committee
<b>COA</b>	Commission on Audit
<b>CPAR</b>	Country Procurement Assessment Report
<b>CPAR</b>	Country Procurement Assessment Report
<b>CSO</b>	Civil Society Organizations
<b>EOI</b>	Expression of Interest
<b>GDP</b>	Gross Domestic Product
<b>GPPB</b>	Government Procurement Policy Board
<b>HOPE</b>	Head of the Procuring Entity
<b>IRR</b>	Implementing Rules and Regulations
<b>ITB</b>	Invitation to Bid
<b>NBPs</b>	Non-Binding Principles on Government Procurement
<b>NSCB</b>	National Statistical Coordination Board
<b>OECD</b>	Organization for Economic Co-operation and Development
<b>OMB</b>	Office of the Ombudsman
<b>Phil-GEPS</b>	Philippine Government Electronic Procurement System
<b>PTG</b>	Procurement Transparency Group
<b>PWI</b>	Procurement Watch, Incorporated
<b>RFP</b>	Request for Proposals
<b>TI-USA</b>	Transparency International-USA
<b>UNCAC</b>	United Nations Convention against Corruption

## Executive summary

Corruption damages economic development, hinders the growth of fair market structures and impedes the ability of developing countries to attract scarce foreign investment. Nowhere is the cost of corruption more evident than in public procurement. Procurement spending accounted for about 29 percent of the Philippines budget in 2010. With poor rankings on all major corruption indices, the importance of transparency and integrity in the Philippines public procurement system is especially important.

As part of its effort to control corruption, the Philippines ratified the United Nations Convention against Corruption and adopted other measures to combat or prevent corruption, as well as to strengthen integrity in government activities. As a member of the Asia Pacific Economic Cooperation (APEC), the Philippines agreed to adopt the 2004 Transparency Standards on Government Procurement (APEC Standards).

Transparency International-USA (TI-USA) and Procurement Watch, Inc. (PWI) cooperated on a project to analyze the Philippines' incorporation of the APEC Standards into the legal framework and determine through consultations with the private sector whether those laws and regulations are implemented in practice and actually help reduce corruption.

The legal review shows that the Philippines legislation incorporates most, though not all of the 11 principles set forth in the APEC Standards. Indeed, there have been dramatic improvements since a decade ago when the World Bank's 2002 Country Procurement Assessment Report characterized the public procurement system in the Philippines as "dysfunctional" because it was "characterized by multiple laws, rules and regulations." However, the legal analysis and consultation with the private sector and civil society reveal a continuing need for the government to incorporate the remaining important elements of the Standards and improve implementation in practice by the procuring entities. It also highlighted the need for greater coordination and consistency between federal and regional implementation.

In addition, the private sector needs to make significant changes in the way it participates in public procurement. Strengthening the ethical standards and practices of individual private sector companies is crucial, as is developing private sector collective action to demand greater government compliance with the current legal framework

Consultations also demonstrated that civil society monitoring is an essential tool in ensuring adherence to the legal framework but that its capacity to monitor is limited to certain stages in the procurement process and is hampered by the limited numbers of monitors and the need for more technical and financial support.

Following is a summary of key recommendations for public and private sector and civil society. It is important to note that many of the recommendations for the Government were made independently in the World Bank's 2008 Country Procurement Assessment Report but have not yet been implemented.



### *For the Government*

- Complete incorporation of the APEC Standards in the legal framework by adopting measures to require (i) notice and an opportunity for public comment prior to adoption of new legislation or regulations, (ii) procuring entities to notify persons affected by bid protests and (iii) procuring entities to debrief losing bidders.
- Require bidders to have in place codes of conduct, training programs and internal controls to detect corruption.
- Strengthen monitoring powers of the Government Procurement Policy Board to monitor the Philippine Government Electronic Procurement System posting compliance and impose sanctions on entities that do not comply.
- Develop incentive mechanisms for government entities that promote greater transparency and adherence to the procurement law.
- Create an independent review mechanism for bid protests, separate from the procuring entity, and adopt whistle-blower protection.
- Adopt a freedom of information act to promote transparency in government processes.
- Allow end-to-end procurement monitoring by private sector and civil society monitors, from bid preparation to project implementation
- Fund the participation by independent observers in major procurements either directly or on a shared basis with the winning bidder.

### *For the Business Sector*

- Improve ethical conduct by adopting appropriate codes of conduct, training programs and internal controls to detect, sanction and remediate corruption.
- Support civil society and private sector monitors in the procurement process.
- Work collectively with the Government Procurement Policy Board on how to further increase procurement transparency and integrity.

### *For Civil Society*

- In light of the new procurement regulations, provide training for civil society monitors and interested private sector monitors.
- Mobilize resources to foster local, grassroots civil society monitors for the procurement and delivery of goods and services at the local level.
- Adopt end-to-end procurement monitoring, from bid preparation to actual project implementation.

## Introduction

Government procurement typically accounts for the largest share of public expenditures aside from government salaries and social benefits. Government procurement is generally between 14 to 20 percent of a country's GDP, which on a global basis is approximately \$1 trillion annually.<sup>1</sup> This massive spending goes, in large part, to essential public services such as clean water, education, healthcare and infrastructure. With estimates that corruption can add 10-25 percent to the cost of public procurement, the potential financial and social costs are staggering.<sup>2</sup>

Therefore, Transparency International (TI) chapters around the world have made the reduction of corruption in government procurement a high priority objective. TI has published a Handbook for Curbing Corruption in Public Procurement and developed innovative approaches to enhance transparency and integrity in government and the private sector and to engage civil society in oversight.<sup>3</sup>

TI has promoted domestic and multilateral approaches that encourage transparent procurement rules and procedures as a crucial step toward reducing corruption. Greater access to information on public procurements increases predictability, permits public oversight and provides greater assurance of the effective use of public resources. It also leads to more effective outcomes, and greater government accountability, thus enhancing public trust.

The Asia-Pacific Economic Cooperation ("APEC") Transparency Standards on Government Procurement ("APEC Standards"), agreed upon in 2004 by the APEC member economies, represent an important government commitment with the potential to improve the integrity of public procurement and reduce corruption. Their impact on raising the transparency of procurement, however, depends on implementation and application in practice.

This report is one in a series initiated by TI-USA to assess and promote implementation by APEC economies of the APEC Standards. It is based on the legal framework review carried out by Procurement Watch, Inc. ("PWI") and the results of a business consultation conducted by PWI and TI-USA in Makati City, the Philippines. Section 1 outlines the background of the APEC Standards. Section 2 presents information on the Philippines' economic situation and the context for public procurement. Section 3 includes an overview of the legal framework for government procurement. Section 4 details the implementation of the APEC Standards in the Philippines' legal framework. Section 5 focuses on the consultation held with the Makati Business Club member firms and civil society to gauge the private sector's views on the Philippines' commitment to the APEC Standards and private sector participation

1. The World Bank estimates global GDP as US\$58.228 trillion in 2009. See [http://www.google.com/publicdata?ds=wb-wdi&met=ny\\_gdp\\_mktp\\_cd&dim=true&dl=en&hl=en&q=world+gdp](http://www.google.com/publicdata?ds=wb-wdi&met=ny_gdp_mktp_cd&dim=true&dl=en&hl=en&q=world+gdp). The figure of 14-20% comes from the other TI-USA country reports in this series.

2. The World Bank estimates that corruption can add 20 percent or more to the cost of public procurement. See <http://go.worldbank.org/VAT2EY5A00>. TI estimates that damage from corruption represents on average 10 to 25 per cent of a contract's value. See TI's Handbook for Curbing Corruption in Public Procurement (2006) at 13, available at [http://www.transparency.org/publications/publications/other/procurement\\_handbook](http://www.transparency.org/publications/publications/other/procurement_handbook).

3. TI has developed an Integrity Pact, a tool aimed at preventing corruption in public procurement. See [http://www.transparency.org/global\\_priorities/public\\_contracting/integrity\\_pacts](http://www.transparency.org/global_priorities/public_contracting/integrity_pacts). It has also produced "Business Principles for Countering Bribery" in cooperation with international business, academia, trade unions and other non-governmental representatives. These principles provide a framework for ethical business practices, available at [http://www.transparency.org/global\\_priorities/private\\_sector/business\\_principles](http://www.transparency.org/global_priorities/private_sector/business_principles).

in strengthening the integrity of public procurement. Finally, Section 6 presents the conclusions and recommendations for strengthening the transparency of public procurement process in general and the Philippines' commitment to the APEC Standards in particular.

This report is intended to provide useful guidance to: (i) the Government of the Philippines on gaps in the legal framework and practical implementation; (ii) the business community on how the procurement process works and steps it should take; and (iii) civil society, including professional associations, academics and non-profit organizations, on areas for potential reform and oversight.

## 1. Development of the APEC Transparency Standards on Government Procurement

APEC was formed in 1989 by 12 Asia-Pacific economies with the aim of becoming the region's leading economic forum. APEC has since grown to 21 members: Australia, Brunei, Canada, Chile, People's Republic of China, Hong Kong, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Taiwan, Thailand, the United States, and Vietnam. Anti-corruption efforts in various areas have been a crucial part of APEC's mission to support sustainable economic growth and prosperity in the Asia-Pacific region. One area of focus is government procurement where systemic corruption commonly undermines competition, wastes public resources, and ultimately hampers economic growth and development.

In order to improve the efficiency of government procurement through sharing experiences and best practices, APEC economies established a Government Procurement Experts Group in 1995. In August 1999, the Experts Group completed the development of a set of Non-Binding Principles on Government Procurement (NBPs) for adoption by APEC economies on a voluntary basis.<sup>4</sup> The NBPs focused on transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination. At the same time, other working groups in APEC negotiated general transparency principles applicable to a variety of sectors, such as customs, trade, and investment.<sup>5</sup> In 2004, APEC members incorporated transparency NBPs into the area-specific Transparency Standards on Government Procurement.<sup>6</sup> The complete text is set forth in Annex 1.

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4. APEC Government Procurement Experts Group Non-Binding Principles on Government Procurement, available at <http://www.osec.doc.gov/occic/apec.html>

5. Leaders' Statement to Implement APEC Transparency Standards (Oct. 27, 2002), available at <http://www.america.gov/st/washfile-english/2002/October/20021028114159gomez@pd.state.gov0.1174127.html>

6. 2004 16th APEC Ministerial Meeting (Nov. 17-18, 2004), available at [http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2004/2004\\_amm.aspx](http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2004/2004_amm.aspx).

The APEC Standards cover key aspects of public procurement:

- publication of, and access to, regulations governing public tender procedures;
- publication of draft regulations and opportunities to submit comments;
- access to invitations to public tenders;
- equitable treatment of bidders;
- requirements for publication of information concerning evaluation criteria and contract award decisions; and
- availability of review mechanisms for decisions involving tenders and prompt and impartial resolution of disputes.

The APEC Standards represent a political commitment by APEC members to transparency and integrity in government procurement. Implementation is crucial for spurring economic growth, and fair competition and promoting confidence in government actions. In principle, the availability of and easy access to public procurement information are key to conducting successful tenders and developing and strengthening sound economies that maximize the use of public resources. Availability and access to information also reduce the opportunity for discretionary action by government officials and therefore the potential for corruption.

At the 2007 APEC Ministerial Meeting in Sydney, Australia, member economies submitted reports on the assessment of implementation of the APEC Transparency Standards in various areas, including government procurement, and pledged to close the remaining implementation gaps. These reports showed general progress in implementation of the APEC Standards from the perspective of the respective APEC economies, focusing on the harmonization of national laws and regulations with the APEC Standards. They did not examine how those laws and regulations are implemented in practice or their impact on improving integrity in procurement.

The goal of this report is to provide private sector and civil society input into the degree to which the APEC Standards have been implemented in both law and practice in the Philippines, and to produce recommendations on ways to improve implementation. Adding this perspective widens the discussion on the implementation of the APEC Standards from an inter-governmental exercise to a broader multi-stakeholder effort that promotes concrete anti-corruption reforms. With funding from the GE Foundation, TI-USA undertook a project in the Philippines with the cooperation of PWI to evaluate the implementation of the APEC Standards. With the Center for International Private Enterprise and local TI national chapters, TI-USA conducted similar projects in four other APEC countries –Indonesia, Mexico, Peru and Vietnam. All of the reports are available on the TI-USA website at [www.transparency-usa.org/news&resources/publications](http://www.transparency-usa.org/news&resources/publications).

## 2. Philippines' Economic and Governance Context

### Country Profile

With a population of slightly more than 90 million people spread out over 7,107 islands, the Philippines is the 4th largest economy in South East Asia and the 36th largest economy in the world.<sup>7</sup> In 2010, the gross domestic product (GDP) at current prices was Php 8,575,034 million (US\$189 billion).<sup>8</sup> As elsewhere in the world, the make-up of economic activity is shifting in the Philippines. GDP in agriculture fell by 2.5 percent while manufacturing grew by 9.2 percent and the services sector by 7.7 percent in the third quarter of 2010.<sup>9</sup>

Following the ouster of Ferdinand Marcos in 1986, a new Constitution was ratified. It restored political institutions that were stamped out during martial law, and reinstated the presidential form of government.<sup>10</sup> The 1987 Constitution also created the foundation for civil society participation in government affairs in promoting governance and transparency. This was also supported by several Executive Orders that promoted better governance and transparency in procurement.

Since 1987, there have been numerous efforts at reform and strengthening government and institutionalization of transparency and integrity in government actions. In 2001, President Estrada was forced to resign by mass protests as a result of corruption scandals. The following government was also plagued by allegations of cheating in national elections and numerous graft and corruption cases.<sup>11</sup> The current President, Benigno Simeon Aquino III, campaigned on a platform to attack corruption, stating that “if there’s no corruption, there would be no poverty”<sup>12</sup> and that attacking corruption would be his top priority.<sup>13</sup>

### Corruption in the Philippines

Corruption in the Philippines has been a long-standing challenge. The power of local clans and cronyism is believed to impede important political reforms and to perpetuate a culture of corruption.<sup>14</sup> Since its inception in 1994, the Transparency International Corruption Perception Index has placed the Philippines among

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7. International Monetary Fund, World Economic Outlook Database. (April 2010), available at . <http://www.imf.org/external/pubs/ft/weo/2010/02/weodata/weorept.aspx?sy=2010&ey=2010&scsm=1&ssd=1&sort=country&ds=.&br=1&pr1.x=45&pr1.y=10&c=566&s=NGDP%2CNGDPD&grp=0&a=>. The US\$ figure is provided by the IMF.

8. National Statistical Coordination Board (“NSCB”), Press Release, “Third Quarter 2010, “Investors’ and Consumers’ Confidence boost Economy to a 6.5 percent GDP growth, available at <http://www.nscb.gov.ph/sna/2010/3rd2010/2010qpr3.asp>. All US\$ figures in this report are based on the exchange rate on January 1, 2011, 1 USD = 43.6205 PHP and are approximate.

9. Third Quarter 2010 Gross National Product and Gross Domestic Product by Industrial Origin: Gross Value Added in Agriculture, Fishery and Forestry, NSCB (November 2010), available at <http://www.nscb.gov.ph/sna/2010/3rd2010/2010aff3.asp>; Third Quarter 2010 Gross National Product and Gross Domestic Product by Industrial Origin: Gross Value Added in Industry, NSCB (November 2010), available at <http://www.nscb.gov.ph/sna/2010/3rd2010/2010ind3.asp>; Third Quarter 2010 Gross National Product and Gross Domestic Product by Industrial Origin: Gross Value Added in Services, NSCB (November 2010), available at <http://www.nscb.gov.ph/sna/2010/3rd2010/2010ser3.asp>

10. Hutchcroft, Paul D. & Rocamora, Joel, “Strong Demands and Weak Institutions: The Origins and Evolution of the Democratic Deficit in the Philippines,” *Journal of East Asian Studies* 3 (Hutchcroft 2003) at 277, available at [http://www.eai.or.kr/data/bbs/eng\\_jeas/200907021021520.pdf](http://www.eai.or.kr/data/bbs/eng_jeas/200907021021520.pdf).

11. Id. at 281, 283.

12. Sandra Aguinaldo & Jam Sisante, “PNoy renews anti-corruption vow as US grants \$434-M aid,” (Sept. 24, 2010), available at <http://www.gmanews.tv/story/201842/aquino-vows-to-fight-corruption-as-us-grants-434-m-aid>.

13. Richard Lloyd Parry, “Benigno Aquino lists war on corruption as top priority,” *The Times* (May 12, 2010), available at <http://www.timesonline.co.uk/tol/news/world/asia/article7123338.ece>.

14. Hutchcroft 2003 at 285.

the most corrupt countries in East Asia.<sup>15</sup> It currently ranks 134 out of the 178 countries reviewed, slightly improved from its 2009 ranking at 139.<sup>16</sup>

The perceived level of corruption is reflected in other major indices. The World Bank indicator on corruption ranks the Philippines in the lower part of the 25th to 50th percentile, with almost three-quarters of the 213 countries surveyed viewed as better at controlling corruption.<sup>17</sup> In the World Bank's 2010 Doing Business report, the Philippines ranked 148 out of 183 countries ranked and ranked poorly in areas where corruption often occurs. For example, it ranked 156 out of 183 for starting a business and dealing with construction permits and 132 for protecting investors.<sup>18</sup>

According to the 2009 Social Weather Stations (SWS) Survey of Enterprises, public perception of corruption in procurement has remained unchanged since 2007.<sup>19</sup> According to the survey, three out of five (64 percent) managers see "a lot" of corruption in the public sector and 48 percent of managers believe that either most or almost all companies in their respective line of business give bribes to win public sector contracts.

While estimates of the losses from corruption in public procurement vary, they are huge. A 2008 report estimated that more than 30 percent of funding for government contracts is lost to corruption annually.<sup>20</sup> This is a large increase from 1998 when a 2000 World Bank report estimated 20 percent of public procurement in the Philippines was lost to corruption.<sup>21</sup>

## Total Value of Procurement

Almost 29 percent of the 2010 budget, or Php 442.7 billion (US\$10.15 billion), was spent on procurement<sup>22</sup> with five government agencies accounting for about 52 percent of the entire government procurement budget.<sup>23</sup> Public Works and Highways, Agriculture, Education, Health and National Defense.

15. For example: in 1995 the Philippines ranked above only Indonesia. In 2000 the Philippines ranked above only Vietnam and Indonesia, in 2005 the Philippines ranked above only Cambodia, Myanmar and Indonesia, and in 2010, the Philippines ranked above only Cambodia, Laos and Myanmar. Transparency International Corruption Perceptions Index, available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/previous\\_cpi](http://www.transparency.org/policy_research/surveys_indices/cpi/previous_cpi).

16. Corruption Perceptions Index 2010 at 9, available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results). The 2009 data is available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table).

17. World Bank Worldwide Governance Indicators (2009), available at [http://info.worldbank.org/governance/wgi/mc\\_chart.asp](http://info.worldbank.org/governance/wgi/mc_chart.asp).

18. The International Bank for Reconstruction and Development/World Bank, *Doing Business – 2011*, available at <http://www.doingbusiness.org/reports/doing-business/~media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB11-Chapters/DB11-CT.pdf>.

19. Social Weather Stations, *2009 Survey of Enterprises*, <http://www.sws.org.ph>

20. Bertelsmann Transformation Index 2008. <http://www.bertelsmann-transformation-index.de/122.0.html?&L=1>

21. "Philippines: Combating Corruption in the Philippines," Report No. 20369-PH (2000) at 45, available at <http://www1.worldbank.org/publicsector/anticorrupt/FlagshipCourse2003/PhiliCombatCorrupt.pdf>.

22. This figure is derived from the amount allocated to "capital outlay" and the amount allocated for procurement within the expenditure category, "maintenance and other operating expenses," minus the amounts for debt servicing, personnel costs and the allotment for the Internal Revenue Service.

23. The computation of the total procurement for the top five agencies is based on the approved Government Appropriations Act. The method used is the same as that used to derive the total value of procurement for the 2010 Budget.

## 3. Legal Framework for Public Procurement

### A. Background

The World Bank undertook comprehensive reviews of the Philippines' legal framework for procurement in 2001-02, with updates in 2004, 2005 and 2008.<sup>24</sup> The 2002 World Bank Country Procurement Assessment Report ("2002 CPAR") stated that the public procurement system in the Philippines is "dysfunctional," characterized by "multiple laws, rules and regulations which while adhering to the principles of competition and transparency, are inefficient and prone to abuse."<sup>25</sup>

The Report noted that the overlapping rules and regulations caused confusion, which was compounded by agencies with overlapping functions. This provided an environment where monopolies flourished and participation in procurement was limited to a few.<sup>26</sup>

Seeking to address many of the problems identified in the 2002 CPAR, Congress adopted the Government Procurement Reform Act (GPPRA). The government issued Implementing Rules and Regulations in 2003, which, as described below, provide the rules and procedures intended to modernize, standardize and regulate procurement activities.<sup>27</sup>

Although these procurement reforms were recognized internationally as moving toward global procurement standards, the 2008 CPAR of the Philippines' procurement system pegged the overall risk level at Medium or Moderate, based on assessment results against the four pillars: Pillar 1: Legislative and Regulatory Framework; Pillar 2: Institutional Framework and Management Capacity; Pillar 3: Procurement Operations and Public Procurement Market Performance; and Pillar 4: The Integrity and Transparency of the Public Procurement System. Although the Philippines met international assessment standards for a low risk level under Pillar 1, it was ranked as high risk on Pillars 3 and 4. The 2008 CPAR identified areas for improvement, particularly to address "allegations of corruption, public awareness, and implementation and enforcement."<sup>28</sup> Key recommendations included:

- strengthening of monitoring and enforcement institutions and mechanisms;
- strengthening of capacity on procurement;
- improvements in procurement processes and procedures;
- enhancing linkages between financial management and procurement; and
- development of complaint and review mechanisms for procurement related disputes.<sup>29</sup>

In response, the 2003 implementing regulations were revised in 2009. Following is a summary of the basic principles and elements of the present system.

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24. World Bank, "Country Procurement Assessment Report," (2003) ("WB CPAR 2002"), at 8, available at <http://siteresources.worldbank.org/INTPHILIPPINES/Resources/cpar.pdf>.

25. *Id.* at 10.

26. *Id.* at

27. RA 9184, available at [http://www.lawphil.net/statutes/repacts/ra2003/ra\\_9184\\_2003.html](http://www.lawphil.net/statutes/repacts/ra2003/ra_9184_2003.html).

28. World Bank, "Philippine Country Procurement Assessment Report (2008), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/04/21/000334955\\_20090421082041/Rendered/PDF/476020REVISED010WB0CPAR0081April020.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/04/21/000334955_20090421082041/Rendered/PDF/476020REVISED010WB0CPAR0081April020.pdf).

29. *Id.* at 57.

## B. Government Procurement Reform Act

The fundamental principles behind the GPRA are:

- Transparency in the procurement process and in the implementation of procurement contracts.
- Competitiveness
- Streamlined procurement process
- System of accountability for government officials and the private sector
- Public monitoring of the procurement process

The GPRA applies to the procurement of infrastructure projects, goods and consulting services, regardless of the source of funds, whether domestic or foreign, by

- all branches and instrumentalities of government
- its departments, offices and agencies
- government-owned and/or-controlled corporations and
- local government units.

The GPRA and the Implementing Rules and Regulations (IRR) brought about a number of major changes in public procurement. The most notable are:

- Creation of the Government Procurement Policy Board and its Technical Support Office
- Establishment of Bids and Awards Committees (BACs) in each procuring entity to conduct competitive and transparent purchases through public bidding
- Mandate the use of e-procurement through the Government Electronic Procurement System
- Provide for the mandatory use of standard bidding documents and forms
- Regulate the application of alternative procurement methods
- Use of civil society and private sector monitors to observe the conduct of bidding processes during bid opening and evaluation
- Simplify the inefficient pre-qualification procedures and its replacement with simplified eligibility screening procedure
- Strengthen the post-qualification process to ensure that the award is made to the lowest calculated and responsive bidder

The Government Procurement Policy Board. The GPRA created the Government Procurement Policy Board (GPPB), a policy and oversight body mandated to handle all procurement matters affecting the national interest. It is empowered to formulate and amend public procurement policies, rules and regulations and amend, whenever necessary, the IRR. In pursuance of this power, the GPPB has the power to mandate the use of standard bidding documents and forms, and generic procurement manuals to facilitate the understanding of the law and its implementation.

Bid Award Committees. Each procuring entity must have at least one BAC, which is composed of five to seven members designated by the Head of the Procuring Entity (“HOPE”).<sup>30</sup> The BAC is responsible for all parts of the procurement process. It advertises and/or posts the invitation to bid, conducts pre-procurement and pre-bid conferences, determines the eligibility of prospective

30. IRR § 11



bidders, receives bids, conducts the evaluation of bids, undertakes post-qualification proceedings, and recommends award of contracts to the HOPE. The HOPE can never be the Chairman or a member of the BAC to safeguard checks and balances.

The HOPE may create separate BACs depending on the number and quantity of the items to be procured, the geographical location of the end-user units or the nature of procurement. In some procuring entities there are separate BACs for each type of procurement. In others, there are alternate members to the BAC who are trained to procure all types of goods and services and who have the same qualifications as their principals, but serve only when the principals are absent or unavailable.

Electronic Procurement. Section 8 of the GPRA establishes a single portal to serve as the primary source of information on all government procurement, the Philippine Government Electronic Procurement System (“Phil-GEPS”). The Phil-GEPS has six main features, of which only the first four are operational:<sup>31</sup>

- Electronic Bulletin Board,
- Registry of Manufacturers, Suppliers, Distributors, Contractors and Consultants,
- The Electronic Catalogue,
- The Virtual Store,
- Electronic Payment, and
- Electronic Bid Submission

In theory, procuring entities must use Phil-GEPS for all procurement opportunities, regardless of the type or size. Further, all procuring entities are required to post in the Phil-GEPS all supplemental bid bulletins, results of the bidding, and other related information in its bulletin board for transparency. However, many of the local procuring entities are not currently registered or connected to Phil-GEPS.<sup>32</sup>

Potential bidders must register on Phil-GEPS. Once registered, they are informed automatically of procurement opportunities relevant to their industry and business. The Phil-GEPS is also the portal to download the bidding documents for which the bidders pay a fee.

Civil Society Monitoring. Section 13 of the GPRA says that the BAC shall, in all stages of the procurement process, invite at least two (2) observers to sit in its proceedings, one from a duly recognized private group in a sector or discipline relevant to the procurement at hand, and the other from a non-governmental organization, provided that no observer can have any direct or indirect interest in the contract to be bid out. The GPRA, however, does not provide funding for the civil society monitors. The BAC must also invite a representative from the Commission on Audit (“COA”).

The GPRA confers the following responsibilities on monitors:

- prepare reports indicating their observations on procurement activities conducted by the BAC,

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31. IRR § 8.

32. Interview with Rosa Maria Clemente, Director of Phil-GEPS, March 2011.

- furnish the procuring entity, the GPPB, and the Office of the Ombudsman (OMB) with copies of the report, and
- declare and refrain from observing the process should there be any potential or actual conflict of interest in the contract to be bid.

Access to documents (minutes of BAC meetings, abstract of bids, post-qualification summary report, annual procurement plan and related and related procurement plans, and opened proposals) are granted as long as a confidentiality agreement is signed between the civil society observer and the procuring entity.

Civil society and private sector monitors are invited to participate in some, but not all, stages of procurement. These are pre-bid conferences and bid opening. In addition, the 2009 IRR gives monitors a role in reviewing implementation of awarded contracts to check whether the contracts are completed according to technical specifications. Monitors are not invited to participate in the formation of procurement plans, the design of technical specifications or the post-qualification stages of procurement.

Types of Procurement. Competitive bidding (also known as public bidding) is required as a general rule for procurements valued at more than Php 500,000 (\$10,000). Alternative methods of procurement may be justified.<sup>33</sup>

There are five alternative methods of procurement:

- **Limited source** bidding involves the procuring entity directly inviting pre-selected suppliers or consultants with known experience and proven capability to directly bid. This can only be resorted to if (1) procurement is highly specialized with only a limited number of sources or if (2) major plant components limits the eligible bidders to maintain quality and performance of the plant as a whole. Procuring entities can only invite supplier or consultants that have pre-qualified and appear on a bidder list that is updated periodically and maintained by GPPB.<sup>34</sup>
- **Direct contracting** or **single source** procurement is commonly resorted to when there are patents, trade secrets, copyrights, and exclusive dealers and manufacturers that make a certain bidder the only one that can supply the goods or services needed. Here, a certain supplier is simply asked to submit his price quotation which will still be up for negotiation.<sup>35</sup>
- **Repeat orders** refer to directly procuring goods from the previous winning bidder to replenish goods procured under a previous contract that is within six (6) months from the Notice to Proceed. Repeat orders can only applied to contracts awarded through public bidding and cannot exceed 25 percent of the quantity in the original contract and cannot exceed Php 250,000 (\$5,000).<sup>36</sup>
- **Shopping** is used for (1) an unforeseen contingency that needs immediate purchase, however, the amount shall not exceed Php 100,000 (\$2,000) and (2) procurement of regular office supplies and equipment not available in the Procurement Service provided that the amount does not exceed

33. IRR § 2. The threshold for using alternative bid methods is lower for local government units. See IRR Annex H.

34. IRR §§ 48 and 49.

35. IRR §50.

36. IRR §51.

Php 500,000 (\$10,000)) and it does not involve the splitting of contracts.<sup>37</sup> Shopping requires obtaining quotations from bonafide suppliers for a commodity with technical specifications that are required by the procuring entity.

- **Negotiated procurement** involves directly negotiating a contract with a supplier, contractor, or consultant.<sup>38</sup> This can only be used under extraordinary circumstances, namely:
  - Two failed competitive bids;
  - Emergency cases;
  - Take-over of contracts;
  - The contract is connected to an on-going infrastructure project;
  - Purchase of goods from another government ; and
  - Small value procurement

Key Stages in the Procurement Process. The GPRA seeks to standardize the bidding process across all procuring entities, regardless of the level of government. The six major stages are:

- The pre-procurement conference is an internal meeting within the agency to ensure that the procurement is in accordance with the project and annual procurement plan. Among others purposes, it seeks to determine the readiness of the procurement at hand.
- Advertisement of the Invitation to Bid (ITB) or Request for Expression of Interest (EOI). Procuring entities are required to post the ITB for goods and construction works or the EOI for consulting services on Phil-GEPS website, the procuring entity website and in a newspaper of general nationwide circulation, particularly for contracts of more than Php 2 million (\$45,850) for goods, Php 5 million (\$114,625) for infrastructure and Php 1 million (\$22,955) for consulting and post it at the procuring entity's location.
- The pre-bid conference is the opportunity for the potential bidders to discuss and clarify the technical and financial components of the contract. Attendance of the bidders is not mandatory. At the option of the procuring entity, the right to ask questions at the pre-bid conference can be limited to those who have purchased the bidding documents.

Any statements, discussions, clarifications and agreements made on the different aspects of the procurement at a **pre-bid conference** are documented by the BAC Secretariat. The minutes of the pre-bid conference are to be made available to all participants not later than three calendar days after the pre-bid conference in a Bid Bulletin but are not required to be posted on the procuring entity's website. In many cases, however, the minutes of the pre-bid conference are not available within the period specified

Statements made at the pre-bid conference cannot modify the terms of the bidding documents, unless those statements are specifically identified in writing as an amendment to the bidding documents and issued as a Supplemental Bid Bulletin. The law requires procuring entities to inform bidders of the Supplemental Bid Bulletin if they have submitted their bid before the issuance of the said document and allow them to modify or withdraw their bid in accordance with the IRR. The BAC Secretariat

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37. IRR § 52.

38. IRR §§ 48 and 53.

generally sends out Supplemental Bid Bulletins to all participating bidders and observers. Some procuring entities post any Supplemental Bid Bulletin on their websites, but others do not.

Supplemental Bid Bulletins are supposed to be posted in the Phil-GEPS. There are many cases, however, where Supplemental Bid Bulletins are issued late in the process or close to the deadline for submission of bids, making it difficult for participating bidders to prepare bids. It is usually the burden of the prospective bidder to follow up with the BAC Secretariat if there are any Supplemental Bid Bulletins issued that could affect the preparation of the bidder's bid.

Requests for clarification(s) on any part of the Bidding Documents or for an interpretation must be in writing and submitted to the BAC of the procuring entity concerned at least ten calendar days before the deadline set for the submission and receipt of bids. The BAC responds by issuing a Supplemental/Bid Bulletin, signed by the BAC chairman, which is distributed to all bidders and posted on Phil-GEPS, at least seven calendar days before the deadline for the submission of bids. Supplemental Bid Bulletins may also be issued upon the procuring entity's initiative for purposes of clarifying or modifying any provision of the Bidding Documents, again with at least seven calendar days before the deadline for the submission of bids. Meeting the deadline has been a problem and the information is not always available when needed.

The **receipt and opening of bids stage** is the stage where the bidders submit their bids to the BAC of the procuring entity. While the time frame is set out in the Invitation to Bid/Request for Expression of Interest, the maximum times are:

- For Goods and Services, forty-five (45) calendar days.
- For infrastructure projects:
  - Projects budgeted at Php50 million (\$1.16 million) and below – 50 calendar days
  - Projects budgeted above Php 50 million (\$1.16 million) – 65 calendar days
- For consulting services, 75 calendar days

During **bid opening**, the BAC checks the submission of the bidders with respect to the evaluation criteria, required documents and minimum technical specifications of the procurement at hand. The bids are also checked in terms of mathematical calculations. Thereafter, the BAC ranks all complying bidders to determine the lowest calculated bid. The bidders or their duly authorized representatives may attend the opening of bids, as can civil society monitors who have been invited.

After the bid opening, the BAC Secretariat conducts a **bid evaluation**. The BAC Secretariat then prepares an Abstract of Bids, which is made available to all participants. Each of the bids is ranked in the ascending order of their total calculated bid prices, as evaluated and corrected for computational errors, and other bid modifications, to identify the lowest calculated bid. The minutes of the bid opening are supposed to be made available to the public upon written request and payment of a specified fee to recover cost of materials.

- The **post-qualification** is the stage where the BAC verifies, validates, and ascertains all the statements

and documents submitted by the lowest bidder. The Contract is awarded to the bidder with the lowest calculated and responsive bid.

### C. Transparency and Integrity Mechanisms in Public Procurement

In addition to civil society monitoring, the GPRA and other laws contains a number of provisions to promote transparency and integrity in the procurement process and set clear standards for government officials and bidders.

***GPRA Sanctions.*** Sanctions apply to government officials and bidders. The GPRA provides for penal sanctions for officials that try to manipulate the procurement process. The HOPE may impose administrative penalties on bidders who try to circumvent procurement rules and regulations, especially for any documented attempt by the bidder to influence the outcome of the bidding in his favour and other acts that try to defeat the purpose of competitive bidding.<sup>39</sup> Bidders who commit these offenses may be suspended for one year on the first offense and two years on the second offense and be permanently barred for the third offense. Contracts won through corrupt practices may be terminated. Bidders are also made liable for any damages in their goods and services. Bidders may be suspended and blacklisted during the contract implementation stage for non-compliance of their contract, poor performance, unsatisfactory delivery of goods, or inferior quality of goods.<sup>40</sup>

***Prohibition on Conflicts of Interest.*** The GPRA requires all bidders to submit a sworn affidavit that they are not related by marriage or blood up to the third degree to the HOPE, any member of the BAC, the Technical Working Group, the BAC Secretariat, the head of the end-user unit, or the project consultants<sup>41</sup>

***Bid Protest Mechanisms.*** There are provisions in the GPRA giving bidders the right to question BAC decisions through the protest mechanisms, such as filing of a request for reconsideration and submission of a verified position paper at any stage of the procurement process. The HOPE must respond to all protests within seven calendar days.<sup>42</sup> This mechanism does not meet international standards since it is not independent of the procuring entity. There is currently no independent procurement body that handles protest appeals.

***Procurement Transparency Group.*** The Procurement Transparency Group (“PTG”) was formed in 2007 to monitor compliance, deter anomalies in the awarding of contracts and prevent losses due to irregularities.<sup>43</sup> Chaired by the GPPB, it is composed of 11 members, five of whom represent civil society organizations. In addition, the Presidential Anti-Graft Commission, the Department of Justice, and the Department of Interior and Local Governments participate, as well as other departments. The

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39. GPRA § 69.

40. IRR, Appendix 11.

41. GPRA § 47.

42. GPRA §§ 55 and 56.

43. Executive Order 662-A, available at [http://www.gppb.gov.ph/laws\\_rules/laws/EO\\_662A-2007.pdf](http://www.gppb.gov.ph/laws_rules/laws/EO_662A-2007.pdf).

PTG is charged with monitoring selected government procurement, based on the contract value, type of procurement, susceptibility to problems and the importance of the project to national development goals. The Executive Order establishing the PTG also enhances transparency, requiring procurement entities to update their annual procurement plans on a quarterly basis and issue quarterly reports on the status of proposed procurements. Procuring entities must post the annual plans and monitoring reports to the procuring entity's website and forward them to the PTG for posting on PHIL-GEPS.

**Anti-bribery laws.** The Civil Service Code and the Revised Penal Code prohibit public officials from receiving or demanding bribes.<sup>44</sup> The Penal Code prohibits:

- performing an act in connection with officials duties in consideration of any offer, promise, gift or present received by such officer, personally or through the mediation of another<sup>45</sup>
- acceptance of any gifts offered to a public official by reason of that person's office<sup>46</sup>
- refraining from arresting or prosecuting an offender in consideration of any offer, promise, gift or present.<sup>47</sup>

Article 212 of the Revised Penal Code makes it a crime to offer or promise or give gifts or presents to the persons referred to above. The same penalties, other than those relating to disqualification or suspension from duty, apply to the person offering the bribe as apply to the public official.

**Plunder (Illicit Enrichment) Law.** Republic Act No. 7080 makes it a crime for any public officer who, by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt criminal acts in the aggregate amount or total value of at least Php 50,000,000 (\$1.16 million). In addition any person who participated with that public official in the commission of an offense contributing to the crime of plunder is also punishable.<sup>48</sup> The Plunder Law makes it clear that it applies in cases of illicit enrichment in connection with public procurement.<sup>49</sup>

**Access to Information.** Transparency in the procurement process is an important element in deterring corruption. Civil society and private sector monitors have a right to obtain procurement-related documents as part of the monitoring process, subject to signing a confidentiality agreement,<sup>50</sup> However, this right is not given to the general public.

The Philippine Constitution provides a right of access to official records and documents but provides no specific procedures for obtaining information and no enforcement mechanism.<sup>51</sup> The Code of Conduct

44. Title VII Chapter 2, § 2 of the Revised Penal Code, available at <http://www.rips.gov.ph/html/tool/resourcefile.asp?ID=36>.

45. Revised Penal Code, Art. 210.

46. Revised Penal Code, Art. 211.

47. Revised Penal Code, Art. 211-A.

48. Republic Act 7080, § 2.

49. Republic Act 7080, § 1.d.2.

50. IRR §§ 13.5 and 19.

and Ethical Standards for Public Officials and Employees states that officials will make documents accessible to the public but there is no process established and no enforcement mechanism. Although a bill to allow access to key public documents from government agencies was passed by the Senate in 2009, it failed to pass the House of Representatives in 2010. Therefore, there is still no mechanism for the public to access government documents and no enforcement mechanism to require public officials to respond to requests for access.

## 4. Findings of the Legal Assessment

Based on the legal framework described above and other relevant laws, the following is a review of the Philippines' implementation of the APEC Standards.

### 1. Prompt publication of all laws, regulations, and procedures pertaining to public procurement

The Administrative Code (Section 18) states that laws will take effect fifteen (15) calendar days after the completion of publication in the Official Gazette or in a newspaper of general circulation unless otherwise provided.<sup>52</sup> Further, Section 24 of the Administrative Code specifies the following must be published in the Official Gazette:

- All legislative acts and resolutions of public nature;
- All executive and administrative issuances of general application;
- Decisions or abstracts of decisions of the Supreme Court and the Court of Appeals, and other courts of similar rank; and
- Such documents or classes of documents as may be required to be published by law.

The GPRA and IRR were published in accordance with the Administrative Code.

### 2. Publication of either a positive or negative list of the procuring entities subject to the procurement rules

As noted above, the GPRA states that it covers procurement by branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or-controlled corporations and local government units. It also covers procurements by multilateral donor organizations.

### 3. Publish in advance of any procurement rules the government proposes to adopt and provide a

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51. Constitution, Bill of Rights, §7.

52. See also, Executive Order No. 200, "Providing for the Publication of Laws either in the Official Gazette or in a Newspaper of General Circulation in the Philippines as a Requirement for Their Effectivity" (June 18, 1987), available at [http://www.lawphil.net/executive/execord/eo1987/eo\\_200\\_1987.html](http://www.lawphil.net/executive/execord/eo1987/eo_200_1987.html).

reasonable opportunity to the public to comment on such changes

There is no law requiring the government or a procuring agency to request public comment prior to issuance of laws or regulations. Nonetheless, there have been instances where the government has sought input from the private sector and civil society prior to adoption of new laws and regulations. Prior to the adoption of the GPRA in 2003 and the revised IRR in 2009, for example, there was consultation with stakeholders on the scope of the law and implementing regulations.

In addition, the GPPB receives public comment and feedback on procurement through civil society monitoring and reporting. Consultation also takes place between specific procuring entities and civil society.<sup>53</sup>

At the regional level, local stakeholders and civil society may be invited to take part in local development councils which provide recommendations on future procurement. The Guidelines on Establishing Procurement Systems and Organizations by the GPPB states “it is important that all stakeholders are consulted” prior to preparing the technical specifications (procurement of goods and services), scope of work (procurement of infrastructure), or terms of reference (procurement of consulting services) but there are no consequences for failure to do so.<sup>54</sup>

4. Provide information and respond to questions about actual or proposed procurement rules

The BAC acts as the general point of contact during the procurement process. According to the IRR, the BAC acts as the central channel of communications with end users, the project management office, other units of the procuring entity, other government agencies, providers of goods, civil works and consulting services, and the general public.<sup>55</sup>

The GPPB maintains a Technical Support Office which operates a Help Desk. The Help Desk provides information, opinions and clarification to bidders, government agencies and the public regarding procurement rules. It can be reached via phone, email and on-line chat through the GPPB website. Questions and answers are posted online to provide assistance to the public.<sup>56</sup>

5. Notify persons affected directly by administrative proceedings regarding public procurement

There is no requirement to notify bidders that a protest has been filed or of any other administrative

53. Examples include the Bantay Eskuwela presentation by PWI to the Department of Education and group discussions on implementation, success and challenges in procurement by the Affiliated Network for Social Accountability.

54. Guidelines on Establishing Procurement Systems and Organizations, at 36-7, available at <http://www.gppb.gov.ph/downloadables/forms/GPM%20-%20Vol.1.pdf>.

55. IRR, § 14.1(10).

56. See [http://www.gppb.gov.ph/about\\_us/tso.htm](http://www.gppb.gov.ph/about_us/tso.htm).



proceedings that may affect bidders or other persons. There are, however, provisions requiring notice to companies prior to their suspension or blacklisting.<sup>57</sup>

#### 6. Maintain domestic procedures for prompt review and correction of final administrative actions

Section 55 of the GPRA provides that decisions of the BAC at any stage of the procurement process may be questioned by filing a request for reconsideration within three calendar days upon receipt of written notice or upon verbal notification. The BAC has seven days to act on the request for reconsideration

If the request for reconsideration is denied, a party may protest the decisions of the BAC in writing to the HOPE. The protest must be filed within seven calendar days from receipt by the party concerned of the resolution of the BAC denying its request for reconsideration. A protest may be made by filing a verified position paper with the HOPE, accompanied by the payment of a non-refundable protest fee. The non-refundable protest fee is no less than one percent of the budget assigned to the contract. If the HOPE decides against the complaining party, that party may seek court review.<sup>58</sup> A protest does not stay or delay the bidding process. However, a contract cannot be awarded until the protest is resolved.<sup>59</sup>

In addition to the protest mechanism of the GPRA, bidders and monitors may also seek review of procurement decisions by the Resident Ombudsman or the COA. The COA has the right to declare a “misprocurement” for violating mandatory provisions of the procurement act or related laws. Further OMB may also investigate procurement fraud for endorsement to the *SandiganBayan*, a tribunal court for public officials.

#### 7. Publish public procurement opportunities in a transparent manner accessible to all suppliers

There are numerous provisions in the GPRA and IRR that promote transparency in the bidding process.

Publication of Procurement Opportunities. The GPRA provides for the publication and posting of major procurement opportunities.<sup>60</sup> Publication can be done in a number of ways: in a newspaper of general nationwide circulation, on PhilGEPS, on the website of the procuring entity concerned, and through postings at any conspicuous place in the premises of the procuring entity concerned. Obtaining a copy of the advertisement through the newspaper is relatively easy and inexpensive. In major cities and provinces, bidders of all types, from small scale to large scale, can easily get a copy of newspapers of general nationwide circulation.

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57. GPPB, Uniform Guidelines for Blacklisting of Manufacturers, Suppliers, Distributors, Contractors and Consultants

58. IRR § 58.1.

59. IRR § 57.

60. GPRA §21. The following procurements do not need to be published: contracts with an approved budget of Php 2million (\$46,511) and below for goods, Php 5 million (\$116,279) and below for the procurement of infrastructure projects, and Php 1 million (\$23,255) and below or those whose duration is four months or less for the procurement of consulting

Access to Phil-GEPS is only available to registered persons. Civil society observers who wish to validate whether the procuring entity posted the advertisement of a procurement or a procurement award in the Phil-GEPS as required generally cannot do so. There is also a question as to whether postings on Phil-GEPS are done in a timely manner. For example, the GPRA provides that the invitation should be posted for seven calendar days starting on date of advertisement. However, there are instances where the posting of the invitation on Phil-GEPS is merely an afterthought. In fact, in some agencies, they said that they post the advertisement, even if it is past the deadline, merely for compliance purposes.

Despite the mandatory requirement of posting on Phil-GEPS, the compliance rate is low. Since the start of Phil-GEPS in 2003, there have been slightly over one million bid opportunities posted. This number cannot even be close to the actual number of procurements during the past eight years because there are almost 50,000 government agencies, instrumentalities, government-owned and controlled corporations, and local government units in the country that conduct procurements. The low compliance rate, especially at the level of the local government units, is attributed to poor access to internet connectivity as well as the lack of technical capacity of the BAC Secretariat in each procuring entity. Moreover, there are no punitive sanctions or incentives for government agencies, instrumentalities and the like to comply with the posting requirements in the Phil-GEPS.

Equal Access to Information. GPRA provides that an invitation to bid or a request for expression of interest include certain minimum information.<sup>61</sup>

*Name of the contract and a brief description of the goods, project, or services.* Most of the procuring entities follow a format as shown in the standard Bidding Documents. However, the extent of the description of the product or service varies, depending on the procuring entity. Some merely provide the name of the project while others provide the technical specifications for the goods. For infrastructure projects, the law requires that the location for the contract to be bid shall also be published.

*The date, time and place of the deadline for the submission and receipt of the eligibility requirements, the pre-bid conference if any, the submission and receipt of bids, and the opening of bids.* Invitations to Bid include statements of the dates and deadlines for specific procurement stages. However, the necessary timelines for submitting a responsive bid may be shortened or not followed by the procuring entity.

*The period of availability of the Bidding Documents, the place where the Bidding Documents may be secured, the website where the Bidding Documents may be downloaded, and, where applicable, the price of the Bidding Documents.* Published advertisements include information as to where the bidding documents may be secured. In some, a statement is placed stating that the bidding documents are also available at Phil-GEPS. Further, some invitations provide that the bidding documents are available at the website of procuring entity, without specifically giving the website address.

*The contract duration or delivery schedule.* The contract duration or delivery schedule are required to be

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61. Id.

included in the invitation to bid. But not all advertisements and postings do so.

*The name, address, telephone number, facsimile number, e-mail and website addresses of the concerned procuring entity, as well as its designated contact person.* Most of the contact details of the procuring entity are indicated in the advertisement. Some advertisements, however, only list the BAC Secretariat as a contact point, without designating a specific contact person. This causes difficulty for some of the potential bidders when they end up being passed around, or have their call transferred from one department to another.

8. Make all the information required to prepare a responsive bid available to all suppliers

Most of the procuring entities follow the format in the standard Bidding Documents. However, the extent of the description of the product or service varies, depending on the procuring entity.

Any supplemental information, such as clarifications or amendments to the Invitation to Bid/Request for Expression of Interest or the bidding documents, must be made available to all bidders. Bidders who have submitted bids prior to the issuance of a Supplemental Bid Bulletin must be informed and allowed to modify or withdraw their bids.

Bidding documents are made available upon request with a nominal payment to recover cost of reproduction of the bidding documents and other related expenses. However, civil society observers may obtain advance copies of the bidding documents from the procuring entity for free.

9. Maintain transparent criteria for evaluating bids and evaluate bids and award contracts strictly in accordance with the criteria

The Invitation to Bid/Request for Expression of Interest provides prospective bidders with information on the criteria to be used by the procuring entity for the eligibility check, the short listing of prospective bidders, in the case of the procurement of consulting services, the examination and evaluation of bids, post-qualification, and award. Generally, for goods and services (other than consulting services) and construction, bids are evaluated on a pass/fail basis.

For consulting services, the criteria for bid evaluation are specified in the bidding documents and is either a “quality-based” evaluation or a “quality-cost” evaluation.

The IRR states that the BAC will “evaluate all bids on an equal footing to ensure fair and competitive bid comparison.”

## 10. Award contracts in a transparent manner

Bids are opened in the presence of all bidders and monitors. Minutes of bid evaluation proceedings are kept and made available to all bidders and monitors and to the general public upon request for a processing fee. For consulting services, all bidders are furnished the ranking and total scores of the evaluation after the approval by the HOPE of the ranking. These rankings are also supposed to be posted on Phil-GEPS and the procuring entity's website but so far this feature of Phil-GEPS has not been implemented.

The BAC Secretariat is required to post a notice of award within three calendar days from its issuance on Phil-GEPS, the website of the procuring entity, if any, and in a conspicuous place in the premises of the procuring entity. In practice, however, this does not often happen. Of the total 1,197,549 bid notices posted on PhilGEPS only 210,710 Contract Awards have been posted, less than 18 percent compliance by procuring entities.

Some procuring entities post the award notice on Phil-GEPS with a note stating that it also serves as a notice to losing bidders. Others send a letter by fax to inform losing bidders. There is no requirement for procurement entities to provide a debriefing to losing bidders.

## 11. Treatment of confidential information

The last APEC Standard requires APEC members to protect commercially sensitive information provided by suppliers during a public procurement. Outside monitors are required to sign confidentiality agreements prior to receiving any bid documents or participating in the procurement process.

Section 19 of the GPRA requires that all submitted documents by the bidders be treated with confidentiality and that divulging information from bidding documents prior to the time specified for public opening of the bids is subject to penal sanctions under Section 65 of the GPRA. In addition, all those involved in the procurement (e.g., BAC, BAC secretariat, end-user unit) are ethically liable to safeguard confidential documents. Section 7.c of the "Code of Conduct and Ethical Standards for Public Officials and Employees" states that public officials and employees (including those involved in a procurement shall not "use or divulge, confidential or classified information officially known to them by reason of their office and not made available to the public, either to: (1) further their private interests, or give undue advantage to anyone; or (2) prejudice the public interest."

## 5. Results of the Private Sector Consultation

In December 2010, TI-USA and PWI hosted a consultation with some private sector firms affiliated with the Makati Business Club and civil society to obtain their perspective on how effectively the APEC Standards are implemented in practice. One objective of the workshop was to gather recommendations on how the Philippines Government, the private sector and civil society can improve compliance with the APEC Standards and, as a result, increase transparency and integrity in public procurement. Representatives from a variety of large and small Philippines and foreign firms attended with participation from companies in the consulting, construction, manufacturing, insurance, industrial equipment and technology sectors. The Coalition Against Corruption, an alliance of academics, the business sector, civil society organizations and Catholic Church that fights corruption, also participated, as did a representative of the Government Procurement Policy Board.

### *Compliance with the Legal Framework*

There was a consensus among the participants that the legal framework governing public procurement in the Philippines is, for the most part, adequate. However, there are many problems in the implementation and enforcement of the procurement procedures. Participants noted the high degree of discretion by public officials in adopting procurement procedures, which results in inconsistent procedures among procuring entities. This is particularly a problem with regional and local procuring entities, where knowledge of the GPRA and IRR is insufficient.

### *Transparency in the Procurement Process*

The participants agreed that procurement rules are readily available and accessible through the internet. While procurement rules are published in advance, only a few participants believed that the government invited comment on new procurement rules.

One significant obstacle to transparency in the procurement process is that not all procurement opportunities are advertised as required by the law. This could be remedied to some extent if all procuring entities were to use Phil-GEPS, but some lack the internet access and computer skills to do so. As a result, some opportunities are advertised only through regional and local publications.

Phil-GEPS is not without its deficiencies. There are variations in the way procuring entities post opportunities. This presents a potential for corruption because bidders who can get inside information about a posting will know where to look, while the others may never see the posted opportunity. Sometimes the information available on Phil-GEPS is incomplete because of failure to follow the rules. In most cases, no individual is identified as a contact. Many bidding opportunities are posted late, leaving insufficient time for bidders to respond.

### *Bidding process and bid evaluation*

Participants agreed that most bidding documents contain sufficient information to respond and some indicated that bidders are notified in a timely manner if there are changes to the bid document. Some participants noted that they had received timely responses from a procuring entity in response to a request for additional information on a procurement opportunity.

Participants noted a number of problems in the actual procurement process. Almost all considered the solicitation of favors to be a factor in public procurement. Many participants felt that some projects are geared toward a particular bidder at the outset and employ narrow technical specifications to ensure that the pre-determined bidder is selected. Other participants reported the following problems:

- Failure to publish a procurement plan on PhilGEPS
- Difficulty in obtaining bid documents
- Incompleteness of procurement documentation such as bid documents
- Inconsistencies by procuring entities with respect to preparing and making available to all bidders minutes of the pre-bid meetings and supplemental/bid bulletins for interested parties
- Inability of bidders to obtain copies of the minutes of the meeting or the abstract of bids upon written request.
- Delay in posting – or a failure to post altogether – an award of a contract

### *Protection of Whistleblowers and Dispute Resolution*

Many of the participants emphasized the need to provide whistleblower protection and the significant problems that whistleblowers have encountered. Participants recounted their experiences in reporting irregularities in a procurement and the retaliation they suffered. The participants expressed their desire to see a more independent grievance or complaint mechanism that protects whistleblowers and can act on anonymous tips.

The GPPB presently does not have enforcement authority, nor the ability to impose sanctions, but only the ability to provide its opinion on the proper procurement procedures. Nor does it have the authority to sanction improper practices by a procuring entity. The participants noted that GPPB cannot provide incentives for proper implementation or sanctions for improper implementation.

### *Role of the Private Sector*

A lack of integrity in the business community was seen to play a major role in perpetuating corruption in public procurement. The participants recognized that the business community must do more to promote fair competition among bidders in public procurements. More companies should adopt and promote codes of conduct and ethics in business to reduce the frequency of collusion between bidders and government entities.

Presenters and participants recognized the need to promote business integrity and shared accounts of recent efforts to do so. The Asian Institute of Management, for example, runs a project to assist small and medium-size enterprises in adopting codes of conduct. The European Chamber of Commerce of the Philippines and the Makati Business Club launched a four-year Integrity Initiative in 2009 aimed

at promoting integrity and good corporate governance. However, more effort needs to be devoted in individual companies to promoting a culture that deters corrupt actions and collective action should be brought to promote such efforts.

One notable area in which the private sector has teamed with civil society is in procurement monitoring. The Makati Business Club and the Coalition Against Corruption have organized volunteers to participate in numerous procurements. Participants acknowledged that the mere presence of such monitors serves as a strong deterrent to misconduct by BACs of government procuring entities.

### *Role of Civil Society*

Participants noted that civil society monitors play a significant role in deterring corruption, as demonstrated by a partnership between the Department of Health and the Coalition Against Corruption to monitor procurement of medicines. The Department of Education also works with the Coalition Against Corruption for procurements of textbooks. In both cases, there has been a significant decline in corrupt activities and evidence of lower prices to the procuring entity.

Participants also noted a number of challenges, however. Private sector representatives suggested that procurement monitors should be involved in the process earlier, such as in the bid preparation phase. This could be very effective, since it is at that stage where many bidders can be excluded through schemes such as the adoption of technical standards that are not germane to the procurement. But such early involvement is not possible at this time because monitors are only invited to participate in pre-bid conferences and bid openings.

More importantly, government contracts are bid out at a rate that exceeds the ability of trained procurement observers to monitor them. While there are almost 50,000 government agencies in need of observers,<sup>62</sup> there are only 14 organizations listed on the GPPB website as observers nationwide, though procuring entities can invite organizations which are not listed.<sup>63</sup> Since the adoption of the GPRA, PWI has trained more than 1,500 individuals as monitors, but it has proven difficult to maintain the needed level of engagement. Only one-fifth of those trained are currently active in procurement monitoring, in part because of the time commitment and funding required. Moreover, procurements occur throughout the Philippines, thereby adding to the costs of the organization sending the observer. An additional and significant hurdle is that, in many cases, government entities send out invitations to observers only a day or two before the pre-bid conference or bid opening, leaving little to no time to prepare.

With the adoption of the 2009 procurement regulations, monitors need to be retrained, an expense beyond the reach of civil society budgets. At the same time, numerous procuring entities are now requesting monitors so the demand has grown dramatically.

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62. Interview with Mr. Joel Eayte, Training and Operations Chief, Phil-GEPS

63. "List of Observers," available at <http://www.gppb.gov.ph/cgi-bin/listings/files/List%20of%20Observers.pdf>.

## 6. Conclusions and Recommendations

### The Legal Framework

The legal review found that, in the various stages of the procurement process, applicable Philippine laws and regulations mandate impartiality, competition, public notification and open access. In respect of the APEC Standards, the legal framework was mostly complete, with the exception of (i) a legal requirement to allow public comment prior to adoption of new legislation or regulations affecting procurement, (ii) the absence of a requirement to notify persons affected by certain administrative proceedings and (iii) the lack of a requirement to debrief losing bidders.

### Implementation of the Legal Framework

The legal analysis and consultation with the business sector highlighted a number of issues regarding government implementation in practice of the GRPA and IRR and business participation in the procurement processes. This included the lack of enforcement authority by the GPPB and its inability to impose sanctions for failure to follow proper procurement procedures. There are no incentives for proper implementation and no consistent government-wide procedures. Differences in procedures and a lack of training are particularly a problem at the regional and local levels. Equally important is the absence of a completely independent grievance or complaint mechanism that protects whistleblowers and can act on anonymous tips

The private sector, however, plays a large role in perpetuating the shortcomings in transparency and integrity of public procurement. Participants expressed doubt that manipulation of tenders, especially for big contracts, would disappear entirely, but noted the importance of companies taking steps to improve their conduct.

### Recommendations

The following are recommendations for government, business sector and civil society organizations:

#### *For the Government*

It is important to note that many of the recommendations for the Government were made independently in the World Bank's 2008 Country Procurement Assessment Report but have not yet been implemented.

- Complete incorporation of the APEC Standards in the legal framework by adopting measures to require (i) notice and an opportunity for public comment prior to adoption of new legislation or regulations, (ii) procuring entities to notify persons affected by bid protests and (iii) procuring entities to debrief losing bidders.
- Require bidders to have in place codes of conduct, training programs and internal controls to detect corruption.



- Strengthen monitoring powers of the Government Procurement Policy Board to monitor the Philippine Government Electronic Procurement System posting compliance and impose sanctions on entities that do not comply
- Develop incentive mechanisms for government entities that promote greater transparency and adherence to the procurement law
- Create an independent review mechanism for bid protests, separate from the procuring entity, and adopt whistle-blower protection
- Adopt a freedom of information act to promote transparency in government processes
- Allow end-to-end procurement monitoring by private sector and civil society monitors, from bid preparation to actual project implementation
- Fund the participation by independent monitors in major procurements either directly or on a shared basis with the winning bidder

*For the Business Sector*

- Improve its own ethical conduct by adopting appropriate codes of conduct, training programs and internal controls to detect, sanction and remediate corruption
- Financially support civil society and private sector monitors in the procurement process
- Work collectively with the Government Procurement Policy Board on how to further increase procurement transparency

*For Civil Society*

- In light of the new procurement regulations, provide retraining for civil society observers and interested private sector observers
- Mobilize resources to create local and grassroots civil society groups to monitor the procurement and delivery of goods and services at the local level
- Adopt end-to-end procurement monitoring, from bid preparation to actual project implementation

# ANNEX 1 – APEC TRANSPARENCY STANDARDS ON GOVERNMENT PROCUREMENT

1. Consistent with paragraph 1 of the Leaders' Statement, each Economy will:
  - (a) ensure that its laws, regulations, and progressively judicial decisions, administrative rulings, policies (including any discriminatory or preferential treatment such as prohibitions against or set asides for certain categories of suppliers), procedures and practices (including procurement methods) related to government procurement (collectively referred to as "procurement rules") are promptly published or otherwise made available, for example, via the Internet, in such a manner as to enable interested persons and other Economies to become acquainted with them;
  - (b) designate an official journal or journals and publish the procurement rules in such journals on a regular basis and make copies of the journals readily available to the public (e.g., via the Internet); and
  - (c) promote observance of the provisions of this paragraph by the regional and local governments and authorities within its customs territory.
2. Each economy will disseminate information on its procurement rules, for example, by:
  - (a) publishing either a positive or negative list of the procuring entities subject to its rules; and
  - (b) providing a description of its procurement rules on the APEC Government Procurement Experts Group Home Page and linking its government procurement Home Page, where available, with the APEC Government Procurement Experts Group Home Page.
3. Consistent with paragraph 2 of the Leaders' Statement, when possible each Economy will publish in advance any procurement rules that it proposes to adopt; and provide, where applicable, interested persons a reasonable opportunity to comment on such proposed procurement rules.
4. Consistent with paragraph 3 of the Leaders' Statement, each Economy will endeavor upon request from an interested person or another Economy to promptly provide information and respond to questions pertaining to any actual or proposed rules. Each Economy will also establish contact points for such inquiries.
5. Consistent with paragraph 4 of the Leaders' Statement, in administrative proceedings applying to any procurement rule, each Economy will ensure that:
  - (a) wherever possible, persons of another Economy that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issues in controversy;
  - (b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding and the public interest permit; and
  - (c) its procedures are in accordance with domestic law.
6. Consistent with paragraph 5 of the Leaders' Statement, where warranted, each Economy will ensure that appropriate domestic procedures are in place to enable prompt review and correction of final administrative actions, other than those taken for sensitive prudential reasons, regarding matters covered by these Standards, that:
  - (a) provide for tribunals or panels that are impartial and independent of any office or authority entrusted with administrative enforcement and have no substantial interest in the outcome of the matter;
  - (b) provide parties to any proceeding with a reasonable opportunity to present their respective positions;

(c) provide parties to any proceeding with a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority; and

(d) ensure, subject to appeal or further review under domestic law, that such decisions are implemented by, and govern the practice of, the offices or authorities regarding the administrative action at issue.

7. Each Economy will endeavour to maximize transparency in access to procurement opportunities. This should be accomplished where possible by:

(a) where open tendering is adopted, publishing procurement opportunities in a medium readily accessible to suppliers (e.g., on the Internet);

(b) making the same information on procurement opportunities available in a timely manner to all potential suppliers;

(c) publishing contact details of purchasers, and their product/ service purchase interests, for suppliers wishing to register their interest in being notified of bidding opportunities that may not be publicly advertised;

(d) making available early advice of complex high-value procurement needs through staged procedures such as public requests for information, requests for proposals and invitations for pre-qualification, and allowing adequate time for interested suppliers to prepare and submit a response;

(e) making publicly available requirements and procedures for pre-qualification of suppliers; and

(f) any time limits established for various stages of the procurement process.

8. Each Economy will make available for suppliers all the information required to prepare a responsive offer. This should include where possible:

(a) providing in procurement notices the following information: the nature of the product or service to be procured; specifications; quantity, where known; time frame for delivery; closing times and dates; where to obtain tender documentation, where to submit bids, and contact details from which further information can be obtained;

(b) providing any changes to participating suppliers; and

(c) providing tender documentation and other information to suppliers promptly on request.

9. Each Economy will maintain transparent criteria for evaluating bids and evaluate bids and award contracts strictly according to these criteria. This should be done where possible by:

(a) specifying in procurement notices or tender documentation all evaluation criteria, including any preferential arrangements; and

(b) maintaining, for a predetermined period proper records of decisions sufficient to justify decisions taken in the procurement process.

10. Each Economy will award contracts in a transparent manner. This should be accomplished where possible by:

(a) publishing the outcome of the tender including the name of the successful supplier and the value of the bid; and

(b) as a minimum promptly notifying unsuccessful suppliers of the outcome of their bids and where and when contract award information is published, and debriefing unsuccessful suppliers on request.

11. Consistent with paragraph 11 of the Leaders' Statement, an Economy does not need to disclose confidential information where such disclosure would impede law enforcement, the enactment of laws, or that would be contrary to the public or national interest, or compromise security of the economy concerned or that would prejudice the legitimate commercial interests of particular persons or enterprises. Each economy will keep commercially sensitive information secure and prevent its use for personal gain by procurement officials or to prejudice fair, open and effective competition.



**Transparency International-USA**

1023 15th St. NW, Suite 300

Washington, DC 20005

[www.transparency-usa.org](http://www.transparency-usa.org)

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**Procurement Watch, Inc.**

Unit 2507, Medical Plaza Ortigas Condominium

San Miguel Avenue, Ortigas center, Pasig City

Metro Manila, Philippines

[www.procurementwatch.org](http://www.procurementwatch.org)