



APEC Procurement Transparency Standards in Peru

Strengthening the Culture of Integrity



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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 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. www.transparency-usa.org.



The Center for International Private Enterprise (CIPE) strengthens democracy around the globe through private enterprise and market-oriented reform. CIPE is one of the four core institutes of the National Endowment for Democracy. Since 1983, CIPE has worked with business leaders, policymakers, and journalists to build the civic institutions vital to a democratic society in more than 100 countries. CIPE's key program areas include anti-corruption, advocacy, business associations, corporate governance, democratic governance, access to information, the informal sector and property rights, and women and youth. www.cipe.org.



Proética (*Consejo Nacional para la Ética Pública*) was established in 2001 with the purpose to scrutinize the handling of public affairs in Peru, while instilling within the citizenry a culture of respect for the law and the legal and institutional bases that prevent corruption. To that end, Proética participates in various anti-corruption efforts by analyzing, identifying and exposing corruption problems where they occur, influencing public decision-making to combat corruption, and strengthening institutional capacity of state institutions and civil society organizations to fight corruption. In 2003, Proética was accredited as the Peruvian chapter of Transparency International. www.proetica.org.pe.

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Abbreviations and acronyms

AmCham-Peru	American Chamber of Commerce of Peru
APEC	Asia-Pacific Economic Cooperation
APEC Standards	APEC Transparency Standards on Government Procurement
CIPE	Center for International Private Enterprise
GDP	Gross Domestic Product
Information Access Law	Law of Transparency and Access to Public Information
NBPs	Non-Binding Principles on Government Procurement
OSCE	<i>Organismo Supervisor de las Contrataciones del Estado</i> (Supervision Office for Public Procurement)
Proética	Consejo Nacional para la Ética Pública
SEACE	<i>Sistema Electrónico de Adquisiciones y Contrataciones del Estado</i> (Electronic System for Government Acquisitions and Procurement)
SMEs	Small and medium-sized enterprises
SOEs	State-owned enterprises
TI-USA	Transparency International-USA

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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. In 2009, Peru spent about 13.9 percent of its GDP and 25 percent of the public budget on procurement, which is in line with the world average of about 15 percent. Corruption in public procurement remains a serious problem, however, and transparency and integrity of the process is especially important when fighting corruption.

Peru has endorsed a number of multilateral agreements and conventions – including the Inter-American Convention against Corruption and the United Nations Convention against Corruption – as part of its strategies for combating or preventing corruption, as well as to strengthen integrity in numerous government activities. In addition, as a member of the Asia Pacific Economic Cooperation (APEC), Peru agreed to implement the Transparency Standards on Government Procurement (“APEC Standards”) adopted by APEC in 2004.

Transparency International-USA (TI-USA), the Center for International Private Enterprise (CIPE), and Consejo Nacional para la Ética Pública (Proética, the national chapter of Transparency International in Peru) cooperated on a project to assess Peru’s legal and practical implementation of the APEC Standards.

The project analyzed Peru’s legal framework for public procurement and also carried out consultations with the private sector on whether those laws and regulations are implemented in practice and whether the implementation had an impact on corruption.

The results show that Peru has incorporated almost all of the APEC Standards into its legal framework. However, the review of the regulatory framework and the consultation with the private sector highlighted the need on the government side for standardizing procurement procedures, improving planning and monitoring, and adopting stronger sanctions against government officials for failure to comply with procurement rules. The review also showed that greater knowledge of procurement rules and enhanced integrity in procurement is necessary on the side of the private sector.

Participants in the business consultation indicated that many companies do not participate in public procurement because they lack an understanding of the procurement rules or believe that procurement is too complicated and bureaucratic. They also pointed to the absence of strong business ethics and believed that a culture of corruption continues to exist. Administrative and political decentralization is another factor hindering implementation and effectiveness of the APEC Standards. While it helps empower decision-makers in Peru’s provinces, regional governments now have, and will continue to acquire and spend more financial resources without enough trained personnel to ensure compliance with procurement rules.

As a result of the legal review and business consultation, the following recommendations emerged:

- The government should enhance implementation and enforcement of the State Procurement Law in a number of ways. For example, the government should standardize procurement procedures; improve procurement planning and monitoring; adopt sanctions for failure to follow procurement procedures, protect confidential information and provide access to information; require bidders to have a code of ethics, training programs, and internal controls to reduce corruption; provide better training to regional and local procurement officials; and encourage civil society monitoring of procurements.
- The private sector needs to strengthen its integrity in public procurement by taking action to improve its knowledge of the State Procurement Law and adopting codes of conduct and anti-corruption initiatives.
- Civil society organizations should work with the private sector to design and carry out anti-corruption programs and conduct public awareness campaigns on the detrimental consequences of corruption in public procurement.

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 would be between \$8.16 trillion and \$11.65 trillion annually.¹ 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, and in some cases even 40 to 50 percent, the potential financial and social costs are staggering.²

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.³

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 for the private sector, permits public oversight, and provides greater assurance of the effective use of public resources. It also leads to greater government accountability, thereby 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.

1. The World Bank estimates global GDP as US\$58.26 trillion in 2009. See <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>. The figure of 14-20 percent comes from the other 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.

3. TI has developed the Integrity Pact, a tool aimed at preventing corruption in public procurement. See http://www.transparency.org/global_priorities/public_contracting/integrity_pacts. It has also produced "Business Principles for Countering Bribery" in cooperation with Social Accountability International and support of a Steering Committee drawn from international business, academia, trade unions, and other non-governmental bodies, including CIPE. These principles provide a framework for ethical business practices. Available at http://www.transparency.org/global_priorities/private_sector/business_principles.

This report is one in a series initiated by TI-USA to assess and promote implementation by APEC economies of the APEC Standards. Section 1 outlines the background of the APEC Standards. Section 2 presents information on Peru's economic situation and the context for public procurement. Section 3 includes an overview of the government procurement system. Section 4 details the key results of Proética's study of the legal framework in Peru governing public procurement. Section 5 focuses on the consultation held with American Chamber of Commerce of Peru member firms to gauge the business community's views on Peru's implementation of the APEC Standards and private sector participation in strengthening the integrity of public procurement. Finally, Section 6 presents the conclusions and recommendations for strengthening the transparency of public procurement in general and Peru's implementation of the APEC Standards in particular.

This report is intended to provide useful guidance to: (i) the government of Peru on gaps in the legal framework and implementation; (ii) the business community on how the procurement process works, its vulnerabilities and the role of the private sector; and (iii) civil society on areas for potential reform.

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.⁴ 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.⁵ In 2004, APEC members incorporated transparency NBPs into the area-specific Transparency Standards on Government Procurement.⁶ The complete text is set forth in Annex 1.

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.

4. APEC Government Procurement Experts Group Non-Binding Principles on Government Procurement, available at <http://www.abanet.org/intlaw/committees/corporate/procurement/APEC%20Gov%20Proc.pdf>.

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 (November 17-18, 2004), available at http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2004/2004_amm.aspx.

The APEC Standards represent a political commitment by APEC members to transparency and integrity in government procurement. Implementation is crucial for spurring economic growth, facilitating financial stability, 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. However, they did not provide a full picture since they were written by the respective APEC economies without involving non-governmental stakeholders. Moreover, the reports focused on the harmonization of national laws and regulations with the APEC Standards rather than the examination of how those laws and regulations are implemented in practice.

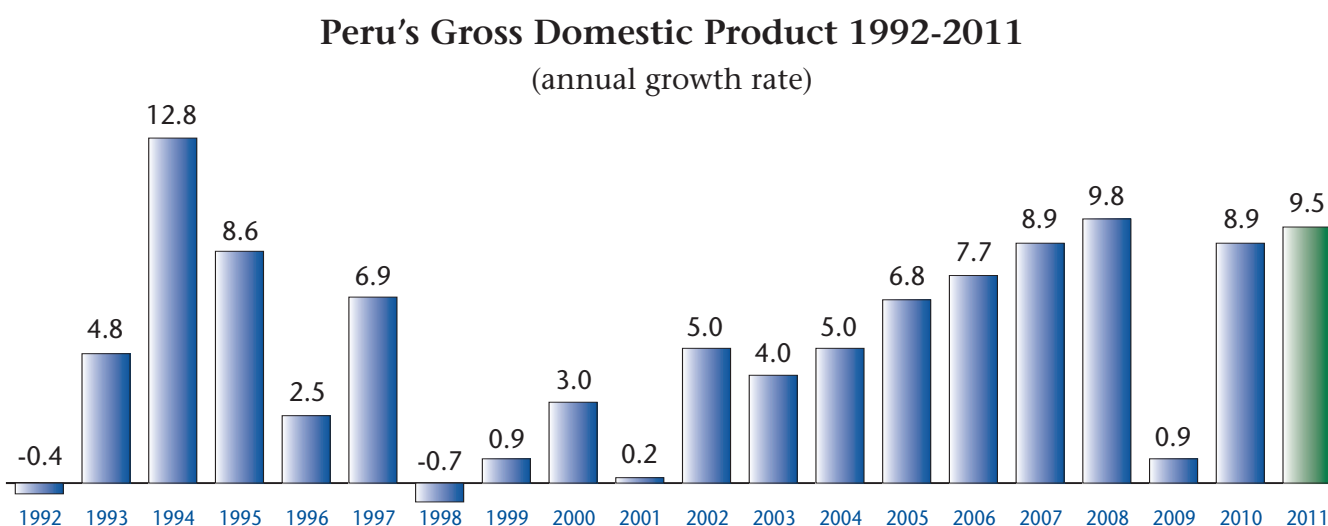
The goal of this joint report is to provide private sector and civil society input into the degree to which the APEC Standards have been implemented in both law and practice in Peru, and to produce recommendations on ways to improve implementation. Adding this new perspective widens the discussion on the implementation of the APEC Standards from an inter-governmental exercise to a broader multi-stakeholder effort that promotes concrete anti-corruption reforms. TI-USA, CIPE, and local TI affiliates conducted such evaluations of the implementation of the APEC Standards in three other APEC countries – Mexico, Indonesia, and Vietnam – in order to compare the levels of implementation and determine whether there are common issues that can be addressed through additional action in APEC or other international fora. TI-USA also carried out a similar project in the Philippines as part of this series.

2. Peru's Economic and Governance Context

Country Profile

Peru is one of the few countries that maintained a positive growth rate during the recent global economic crisis. Data provided by the National Institute of Statistics show that even though economic growth in 2009 was the lowest in a decade, it remained positive at about one percent.⁷ Peru entered the global crisis in a solid economic position and managed the challenges well by implementing a fiscal stimulus plan, cutting interest rates and injecting substantial liquidity into the banking system.⁸ At the same time, Peru has taken a number of actions to facilitate business and international trade, attract foreign investment, and mitigate the economic impact of the crisis.

Increasing prices for Peru's natural resource exports, such as silver, copper, gold, and lead, have also supported a positive growth rate.⁹



Source: INEI (National Institute of Statistics and Information)

According to the 2011 Doing Business report, Peru ranks 36th out of 183 countries surveyed by the International Finance Corporation and the World Bank with respect to its business climate, an improvement of ten places from the 2010 survey.¹⁰ Peru improved in five categories, including a dramatic jump of 49 places in terms of the ease of starting a business.¹¹ Yet it still ranks in the lower half of countries in two categories that are prone to corruption: dealing with construction permits and enforcing contracts.

7. Gross Domestic Product 1992-2011 from the National Production Monthly Index, National Institute of Statistics, available at <http://www1.inei.gov.pe/perucifrasHTML/inf-eco/cuadro.asp?cod=3842&name=pr01&ext=gif>; see also Peru: Staff Report for the 2010 Article IV Consultation, IMF Country Report No. 10/98 (April 2010) ("IMF Country Report"), available at <http://www.imf.org/external/pubs/ft/scr/2010/cr1098.pdf>.

8. IMF Country Report at 4.

9. From 2000-2006, annual income tax revenue from the oil and gas industry in Peru rose from \$35 million to \$296 million, corresponding to 5-7 percent of total government revenue. UNCTAD, "World Investment Report: Transnational Corporations, Extractive Industries and Development" at 138, available at http://www.unctad.org/en/docs/wir2007_en.pdf.

10. International Finance Corporation and World Bank, "Doing Business 2011," *Rankings*, available at <http://www.doingbusiness.org/rankings>.

11. International Finance Corporation and World Bank, "Doing Business 2011," *Country Data Report for Peru, 1996-2009*, available at <http://www.doingbusiness.org/data/exploreconomies/peru>.

Components of Peru's Doing Business Ranking

Category	2011 rank	2010 rank	Change
Starting a business	54	103	49 up
Dealing with construction permits	97	103	6 up
Registering property	24	28	4 up
Getting credit	15	14	1 down
Protecting investors	20	20	Unchanged
Paying taxes	86	85	1 down
Trading across borders	53	80	27 up
Enforcing contracts	110	108	2 down
Closing a business	86	99	3 up

Peru has a central government and 25 regions (similar to provinces or states) subdivided into provinces and districts, and the special Lima region. In 2002, Peru adopted a Basic Law on Decentralization, which gave the regions significant power that had previously been wielded by the central government.¹² The following year, citizens of Peru elected 25 Regional Presidents. The process of decentralization has been slow and more than 90 percent of revenues and 80 percent of expenditures are still controlled by the central government.¹³ Nonetheless, by law much of the power to raise revenue and spend it resides with the regional governments. Many of the regions have significant revenues coming from natural resources, such as silver, zinc, lead, copper, gold, and natural gas.¹⁴

Peru suffers from a reputation for corruption, in part a legacy of the systematic looting of public resources by former President Alberto Fujimori and his intelligence advisor, Vladimiro Montesinos.¹⁵ A survey in 2010 concluded that more than half of the heads of households see corruption of officials as a major problem and the majority of people interviewed considered that the government and other institutions of the state are not committed to combating corruption.¹⁶ The perception of corruption, measured by Transparency International's annual Corruption Perceptions Index (CPI), shows only a slight decrease in the perception of corruption between 2010 and the public exposure in 2000 of the notorious "Vladi-videos" implicating Montesinos in grand-scale bribery. This scandal precipitated Mr. Fujimori's fall from power and solidified the public's perception of widespread corruption within the central government.

12. Ley 27783, Ley de bases de la descentralización, available at <http://www.congreso.gob.pe/ntley/Imagenes/Leyes/27783.pdf>.

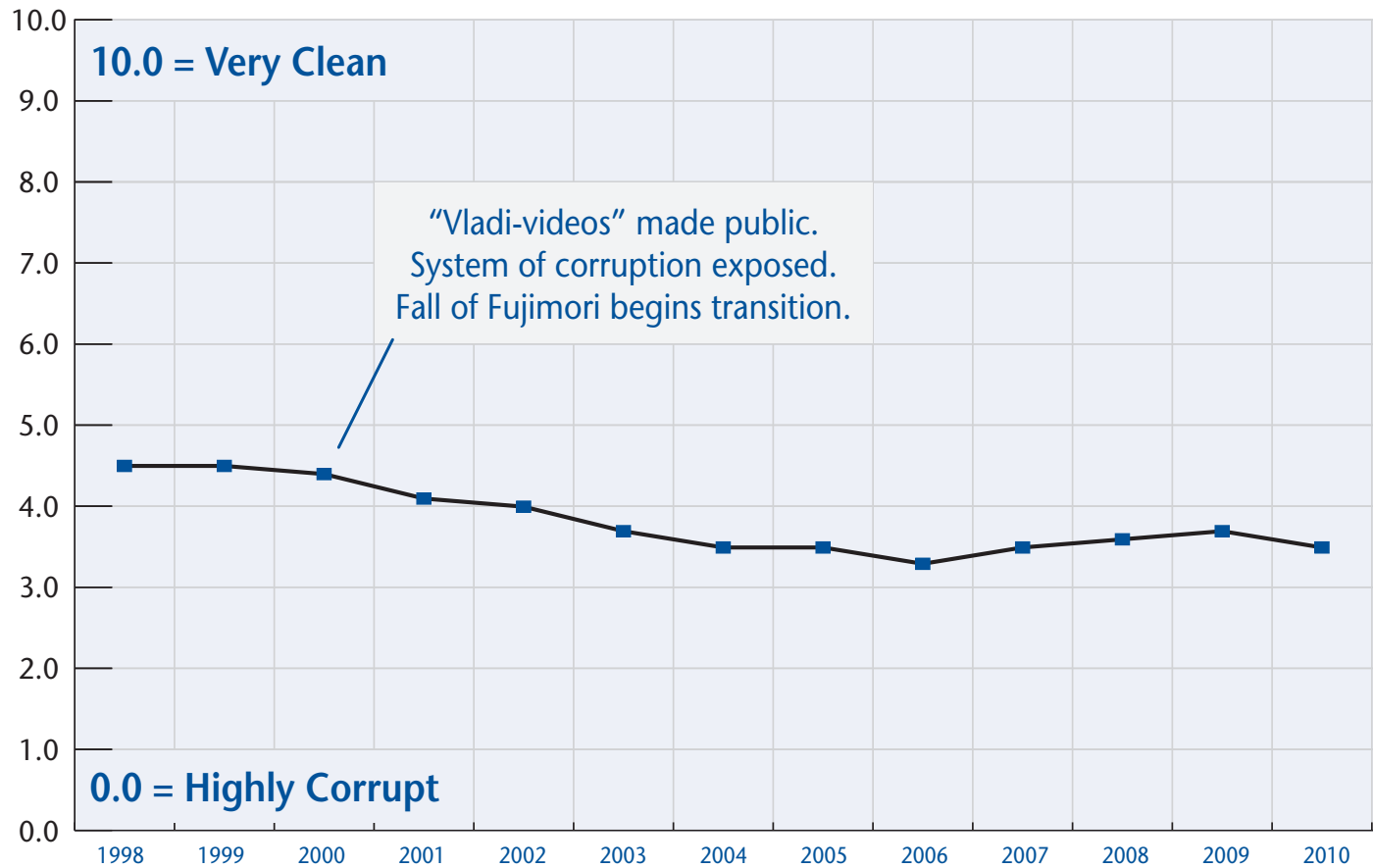
13. Carlos Salazar, "Building Democracy: Decentralization Growing Pains in Peru," *Public Sector Management*, vol. 20, Issue/November 3, 2009, at 2, available at http://www.democraticdevelopment.ca/documents/PSM_p30-331.pdf.

14. World Bank, *Wealth and Sustainability: The Environmental and Social Dimensions of the Mining Sector in Peru*, Report No. 38044-PE (May 2005), at 10, available at <http://siteresources.worldbank.org/INTPERU/SPANISH/Resources/TheEnvironmentalandSocialDimensionsoftheMiningSectorinPeru.pdf>.

15. Transparency International's Global Corruption Report 2004 identified Fujimori as one of the top ten global leaders in terms of funds allegedly embezzled during his government tenure.

16. PROÉTICA (2010). *Sexta Encuesta Nacional sobre Corrupción*, survey by Ipsos APOYO Opinion y Mercado S.A., available at http://www.Proetica.org.pe/Descargas/sexta_encuesta.ppt.

Evolution of the Corruption Perceptions Index in Peru 1998-2010



Source: Prepared by Proética from Transparency International Corruption Perception Indexes

In fact, in the latest Transparency International's CPI, Peru fell in the country rankings from 75th a year earlier to 78th and its score regarding the perceptions of corruption worsened from 3.7 to 3.5.¹⁷

The World Bank's Worldwide Governance Indicators for the variable "Control of Corruption" puts Peru in the 25th to 50th percentile, meaning that at least half of the 213 countries surveyed are better at controlling corruption than Peru.¹⁸ Both Transparency International's CPI and the World Bank's Indicators show that Peru has moved within a very small range with respect to the perception of corruption and control of corruption over the past 10 years. Finally, the Freedom House's 2010 Freedom in the World report states that "corruption is a serious problem" in Peru. The report notes that even though public officials and judges are often dismissed or prosecuted for graft, 20 percent of Peruvians reported that they or a family member had paid a bribe in the previous year.¹⁹

17. Corruption Perceptions Index 2010 at 8, available at http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

18. The variable captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as "capture" of the state by elites and private interests. The scale is from zero to 100 percent with the higher the percentage the less the corruption. See World Bank Worldwide Governance Indicators, Country Data Report for Peru, 1996-2009 available at http://info.worldbank.org/governance/wgi/mc_chart.asp.

19. Peru Country Report, 2010 edition, *Freedom in the World*, available at <http://www.freedomhouse.org/template.cfm?page=22&year=2010&country=7898>.

Anti-Corruption Efforts

Despite persistent problems, Peru has taken many steps to combat corruption. In 2007, the country adopted a National Plan to Combat Corruption,²⁰ which led to the adoption of many new laws, including legislation on procurement, government transparency, ethics, and nepotism.²¹ In February 2010, Peru also created a High Level Commission for Anti-Corruption. The Commission includes the presidents of the Constitutional Tribunal, the National Council of the Magistracy, and the Presidential Cabinet. It also includes Peru's Attorney General, the National Ombudsman, the Mayor of Lima, the Minister of Justice, the Coordinator of the National Assembly of Regional Governments, the President of the National Confederation of Private Business Institutions, and the Executive Director of Proética.²²

The Commission was created as a coordinating body to promote concerted action in the fight against corruption.²³ Its focus has been to design strategies and policies aimed at promoting ethics, transparency, and anti-corruption in the civil service and among private citizens. In January 2011, the Commission submitted a report to Peru's Executive and Congress recommending five anti-corruption policies:

- Provide information on ethics to civil servants, companies, and the general public
- Ensure compliance with regulations related to transparency and good governance
- Develop mechanisms for citizens to participate in the vigilance and control of public management
- Promote efficiency in institutions in charge of dealing with corruption
- Improve the control of high-risk areas in public management.²⁴

Importance of Public Procurement

Government procurement is key to fulfilling the development objectives of Peru. Transparent and honest public procurement means that government monies provided by the citizens or derived from natural resources are not wasted but instead are spent on the intended purposes for the benefit of the community.²⁵ Public procurement has become part of the current political agenda in Peru and is discussed increasingly in public fora and the media.

20. Approved by the Working Group established by Supreme Decree No. 004-2006-JUS (Jan. 25, 2006), available at http://www.pcm.gob.pe/Prensa/ActividadesPCM/2008/Noviembre08/Plan_MINJUS_Anticorrupcion.pdf.

21. See discussion in "Collusion and Corruption in Public Procurement – Contribution from Peru," OECD DAF/COMP/GF/WD(2010)37 ("Peru Report to OECD"), at 5-7, available at <http://www.oecd.org/dataoecd/39/13/44512105.pdf>.

22. *Peruvian Times*, "Peru government announces creation of anti-corruption commission," (Feb. 2, 2010), available at <http://www.peruviantimes.com/peru-government-announces-creation-of-anti-corruption-commission/024745>.

23. *Peruvian Times*, "High level commission to promote anti-corruption pact," (May 22, 2010), available at <http://www.peruviantimes.com/high-level-commission-to-promote-anti-corruption-pact/226143>.

24. "Anti-Corruption Commission Presents Recommendations to Executive, Congress." *Andean Air Mail and Peruvian Times*, (Jan 3, 2011), available at <http://www.peruviantimes.com/anti-corruption-commission-presents-recommendations-to-executive-congress/0310376>.

25. OSCE Strategic Plan 2009 at 3, available at <http://www.osce.gob.pe/consucode/userfiles/image/Plan%20Estrategico.pdf>.

According to the Supervision Office for Public Procurement (OSCE), the total annual amount of public procurement in Peru in 2009 was approximately S/. 50 billion (US\$18 billion), which is 13.9 percent of the GDP and 25 percent of the public budget.²⁶ In 2009, there were 138,000 public procurements, carried out by 2,730 public agencies and state-owned enterprises (SOEs).²⁷ During the last three years, the volume of public procurement increased as the government undertook a fiscal stimulus policy in reaction to the global economic crisis.²⁸

The top procuring agencies in Peru are those involved in health, education, energy, and construction.²⁹ In 2009, 51 percent of public expenditures was spent on the purchase of goods, 27.7 percent on construction and public works, 20 percent on services, and 0.9 percent on consulting services.³⁰ As a result of the decentralization process, regional and local governments conducted a significant number of procurements, as illustrated in the chart below.³¹ The central government and SOEs had fewer procurements of greater value than those of the regional and local governments.

	Number of Procuring Entities	Share of Procurement Value	Share of Number of Procurements
Central government	545	29%	38%
Regional government	342	6%	15%
Local government	1835	15%	42%
State-owned enterprises	39	50%	5%

Contracted suppliers are mainly Peruvian companies. However, there has been an increase in the participation of foreign companies in the larger public procurements, either alone or as part of a consortium with local companies.³² In 2003, 30,000 suppliers participated in public procurement; in 2006, the number was 70,000. The number of foreign participants rose from 315 in 2003 to 487 in 2006, still a relatively small number.³³

26. Ricardo Salazar, OSCE, "La Agenda de la Modernización de la Contratación Pública en el Perú" (October 2010) ("Salazar 2010 Presentation"), Slide 3, available at [http://www.osce.gob.pe/consuocode/userfiles/image/IV%20-%20Ricardo%20Salazar%20-%20Peru\(2\).pdf](http://www.osce.gob.pe/consuocode/userfiles/image/IV%20-%20Ricardo%20Salazar%20-%20Peru(2).pdf). US\$ figures in this report are converted at one nuevo sol = US\$0.03565, the rate applicable on January 1, 2011, and are approximate. According to OECD, public procurement worldwide accounts for an estimated 15 percent of GDP worldwide on average, <http://www.oecd.org/dataoecd/45/63/41505296.pdf>.

27. Ibid.

28. IMF Country Report at 4.

29. Ricardo Salazar, OSCE, "Peru's experience in the implementation of the Evaluation Methodology from the OECD/DAC" ("Salazar OECD Presentation"), Slide 3, available at <http://unpcdc.org/media/137387/peru%20-%20ricardo%20salazar%20-%20ingl%C3%A9s.pdf>.

30. Ibid.

31. Ibid.

32. Procurement Annual Report 2009, according to the Supervision Office of Procurement and Studies of the Office for Supervision for Public Procurement, available at <http://www.osce.gob.pe/userfiles/archivos/Reporte%20Anual%20Contrataciones%20Publicas%20Definitivo.pdf>.

33. Ibid.

The Role of the Media and Civil Society

As procurement is quite technical, few media outlets and journalists in Peru report about it in depth. Nonetheless, some stories have appeared and had an impact on public opinion and the government. One of the first scandals of the current government started when a journalist alleged that in a procurement process for police vehicles, the winning bid had overestimated the price of the 496 units by thousands of dollars each.³⁴ The publicity resulted in the resignation of the head of the Ministry of Internal Affairs, Pilar Mazzetti. A new procurement for the same kinds of vehicles also appeared to involve severe irregularities, which were discovered and publicized by the press.³⁵ There have also been some stories covering procurement in regional and local governments, but not in as great detail or with as much effect.

There are a few NGOs that address public procurement issues and those that do lack funding and expertise needed to uncover irregularities in the process. Ciudadanos al Día³⁶ focuses on improving government practices and did a review of procurement practices in 2002. It occasionally publishes information and analysis regarding procurement in its weekly bulletins. Governa, a Peruvian think tank, also addresses procurement issues occasionally in its periodic e-bulletins.³⁷ Propuesta Ciudadana, as part of its actions at the level of sub-national governments, also addresses procurement by reporting on selected indicators³⁸ and training public officials and social actors to act as local watchdogs.³⁹ Instituto de Defensa Legal (IDL), an NGO focused in security and defense, also became involved in monitoring procurement in these sectors due to the focus of its work.⁴⁰ Proética has participated in monitoring public procurement through the implementation of integrity pacts and worked to enhance transparency in procurement through public hearings and online discussions about specific procurement projects.⁴¹

34. See <http://agenciaperu.com/investigacion/2007/feb/patrulleros.html>.

35. See <http://desdeeltercerpiso.blogspot.com/2007/07/patrulleros-otra-vez.html>. The original note in *La República* is no longer available in the newspaper's online archive. See also <http://www.seguridadidl.org.pe/destacados/2007/26-07/texto.htm>.

36. See www.ciudadanosaldia.com.

37. See www.governa.com.pe.

38. See for example: http://www.participaperu.org.pe/apc-aa/archivos-aa/3c6bb51ada688b58c57cb18308d59d73/rn_vigilancia_descentralizacion17.pdf at 61-72.

39. See www.descentralizacion.org.pe/n-vigilaperu.shtml.

40. See www.idl.org.pe.

41. An integrity pact is a written agreement between the government department and all bidders to refrain from bribery and collusion, which is monitored by civil society to ensure that the pact is implemented and the obligations of the parties are fulfilled. See http://www.transparency.org/global_priorities/public_contracting/integrity_pacts.

3. Legal Framework for Public Procurement

2008 Legislative Changes

Peru made significant legislative changes to its public procurement regime in 2008, adopting three major laws and their companion implementing regulations.

- Law of Transparency and Access to Public Information (“Information Access Law”)⁴²
- Regulations Implementing the Information Access Law⁴³
- General Administrative Procedure Act⁴⁴
- State Procurement Law⁴⁵
- Regulations Implementing the State Procurement Law (“Procurement Regulations”)⁴⁶
- Regulations Governing Electronic Procurement System⁴⁷

As part of the implementation of the State Procurement Law, in June 2008, Peru established the Office for the Supervision of State Procurement, replacing the former central procurement office, the Supreme Council on Government Procurement.⁴⁸ OSCE is responsible for regulating public procurement and has full technical, administrative, financial, and economic autonomy.⁴⁹ The State Procurement Law, applies the same procedures to procurement at all levels of government and by almost all state-owned enterprises. There are 2,761 government entities and SOEs covered by the State Procurement Law. Each government entity and SOE has a management unit in charge of procurement.

There are certain exceptions to the countrywide application of the State Procurement Law procedures. Procurement that is funded by international organizations like the Inter-American Development Bank, World Bank, Japan Bank for International Cooperation, U.S. Agency for International Development, UN Office for Project Services, the International Organization for Migration, and the Organization of Ibero-American States for Education, Science, and Culture is presently governed by the procurement rules of the funding organization. In cases where a government entity provides the funding but the project is carried out by the international organization, the international organization’s rules apply.

42. Supreme Decree 043-2003-PCM, which is the complete and updated version of Law No. 27806, available at <http://transparencia-economica.mef.gob.pe/normas/tuo.php>.

43. Supreme Decree 072-2003-PCM, available at http://transparencia-economica.mef.gob.pe/normas/DS072_2003PCM.php.

44. Law 27444, available at http://transparencia-economica.mef.gob.pe/normas/Ley_27444.php and in English at http://www.unesco.org/culture/natlaws/media/pdf/peru/per_law27444_engtof.pdf.

45. La Ley de Contrataciones del Estado, available at http://www.peru.gob.pe/docs/PLANES/10029/PLAN_10029_2009.pdf and Legislative Decree 1017 that approved that law, available at <http://www.congreso.gob.pe/ntley/Imagenes/DecretosLegislativos/01017.pdf>.

46. Supreme Decree 184-2008-EF, available at http://www.mpfm.gob.pe/distrito_judicial/documentos/1384418REGLAMENTO%20NUEVA%20LEY%20DE%20CONTRATACIONES%20DEL%20ESTADO.pdf.

47. Supreme Decree No. 031-2002-PCM, available at http://www.ongei.gob.pe/Bancos/banco_normas/archivos/ConstituyeCom-Multisec-SEACE.pdf.

48. See <http://www.osce.gob.pe/opcion.asp?ids=1&ido=3>.

49. Jaime Gray, “Peru,” in Roberto Hernández García, “International Public Procurement: A Guide to Best Practice,” *Globe Law and Business* (2009) (“Gray Article”) at 316.

The State Procurement Law also does not apply to procurements by the state-owned energy company, Petroleos del Peru S.A., or military equipment or products required for national security.⁵⁰ Finally, there are grounds for exemption from certain bidding requirements in emergencies; for example, the State Procurement Law is waived for an impending shortage of supplies or irreplaceable goods or services.

OSCE's Strategic Plan

OSCE's Strategic Plan for Public Procurement 2009, titled "A system for public procurement that is efficient, free of corruption and promotes development," strongly supports transparency and anti-corruption efforts.⁵¹ The plan states that: "the government's vision is to establish a public procurement system that not only benefits the citizens by providing high-quality performances, but also guarantees integrity, ethics and impartiality."⁵²

To achieve that goal, the Strategic Plan sets out key principles for public procurement:⁵³

- Competition – the process should be open to all possible participants
- Effectiveness – procurements must be managed to achieve results
- Efficiency – procurements should achieve the best result within a reasonable period of time for the greater good of citizens
- Equality – procurement decisions cannot be prejudicial or based on favoritism
- Integrity – the procurement system should eliminate all possible conflicts of interests among participants
- Value for money – procurements should obtain the best value possible with the resources at hand
- Accountability – the government provides information, the citizens monitor
- Transparency – all relevant information can be available to everyone at all times and in real time without infringing on the rights of bidders

The OSCE evaluation methodology for the public procurement system takes into consideration indicators regarding integrity and transparency:⁵⁴

50. Ibid. at 317.

51. OSCE Strategic Plan (April 2009), available at <http://www.osce.gob.pe/consucode/userfiles/image/Plan%20Estrategico.pdf>.

52. Ibid. at 3.

53. Ibid. at 6.

54. This chart is based on data taken from Salazar 2010 Presentation, slide 43.

Indicator	Sub-indicator
Access to information	a) Information is made public through available communication channels, supported by technology when possible
Ethics and fight against corruption	a) Measures against corruption
	b) Responsibilities, accountability, and sanctions
	c) Confirmation of bid submissions
	d) Special measures to prevent and detect corruption
	e) Stakeholders support ethical market
	f) Safe channel to denounce violations
	g) Ethics code for stakeholders

Electronic Procurement

One of the most important achievements for transparency and access to information in public procurement was the implementation of the e-procurement system, SEACE. The SEACE website, www.seace.gob.pe, managed by the OSCE, was created in 2004.⁵⁵ Interested suppliers can register on the National Register of Suppliers, which is maintained on SEACE, and receive electronic notice of procurement information. All procuring entities must publish their procurement plans on an annual basis on their own websites and in the official newspaper, *El Peruano*, and send a copy to OSCE, which publishes the plans on SEACE.⁵⁶ Procuring entities are also required to publish all bids on SEACE, including the schedule, the bidding documents, any requests or queries received from potential bidders, and the entity's responses. Thus information provided to one bidder is available to all who are interested. SEACE contains evaluation criteria for bids and a list of contract awards that can be searched by entity and type of procurement. SEACE also contains records of past procurements, progress of implementation of procurement plans, levels of purchases by goods or by sector, and awards relating to procurement disputes settled by arbitration.

The number of procuring entities required to make their procurements electronically is increasing. According to the OSCE, their number increased from 153 to 281 between June 2010 and October 2010.⁵⁷

Currently, OSCE is in the process of improving SEACE to make it more user-friendly and provide better reporting of procurement information. In addition, OSCE is developing a way to allow bids to be submitted electronically, something that cannot be done yet, except for reverse auctions, in a way that protects confidential business information. This project is scheduled to conclude in three to five years.

55. D.S. No. 083-2004-PCM, available at http://www.osce.gob.pe/consucode/userfiles/file/DDA%20-%20NORMAS%20APLICABLES/DS.%20N%20083-2004-PCM%20-%20TUO%20de%20la%20Ley%20de%20Contrataciones%20y%20Adquisiciones%20del%20Estado%20_Derogado_.pdf.

56. Gray Article at 326.

57. *Ibid.* at 44.

Types of Procurement

The State Procurement Law establishes different ways to procure, depending on the amount and kind of procurement. The thresholds change annually. As of 2011, the thresholds are listed below:⁵⁸

Method of Selection	Goods	Services	Construction
Public Bidding	≥S.400,000 (US\$143,000)		≥S.1,800,000 (US\$642,000)
Open Request for Tender		≥S.400,000 (US\$143,000)	
Direct Contract – Public	<S.400,000 (US\$143,000) >S.200,000 (US\$71,000)	<S.400,000 (US\$143,000) >S.200,000 (US\$71,000)	<S1,800,000 (US\$642,000) >S.900,000 (US\$321,000)
Direct Contract – Selective	<S.200,000 (US\$71,000) >S.40,000 (US\$14,000)	<S.200,000 (US\$71,000) >S.40,000 (US\$14,000)	<S.900,000 (US\$321,000) >S.180,000 (US\$64,000)
Minor Contracts	<S.40,000 (US\$14,000)	<S.40,000 (US\$14,000)	<S.180,000 (US\$64,000)

Direct contract awards and minor contracts comprise 94 percent of all contract awards, totaling 37 percent of total procurement expenditures. The remaining six percent of contracts, comprising 63 percent of total procurement expenditures, are referred to as “major” contracts and awarded through public bidding and open requests for tender.⁵⁹

Peru uses three other types of procurement in order to speed the procurement process and obtain lower prices through aggregate purchasing.⁶⁰ Corporate purchases refer to tenders issued jointly by two or more government entities. This practice allows a larger quantity of goods or services to be purchased at lower prices. It also standardizes the goods or services used by different government entities, which contributes to efficiency. Examples are purchases of cars or office supplies. Secondly, framework agreements are agreements entered into by OSCE with providers of goods and services for defined categories at set prices; they are listed on OSCE’s website. A procuring entity must purchase from suppliers with framework agreements unless it can prove that it can obtain better terms and conditions from someone else.

58. OSCE, available at <http://www.seace.gob.pe/Documentos/18991230858521rad13067.pdf>.

59. The description of the number of minor and major contracts and expenditure percentages comes from Salazar OECD Presentation. Another source states that direct contracts and minor contracts account for 99 percent of all procurements, equal to 40 percent of procurement value, while public bidding and open request for tender account for one percent of procurement, equal to 60 percent in value. Gonzalo de la Cruz Salas, “Public Procurement: The Peruvian Experience,” www.icgfm.org/documents/DeLaCruz.ppt, (“De la Cruz Salas Presentation”) at slide 12.

60. The description of the three methods comes from Gray Article at 322-333.

The third method is a reverse auction and applies to purchase of commodities that are subject to standardization, such as pharmaceuticals, paper, and office supplies. A reverse auction operates similar to an online auction: a government entity advertises a need to purchase a certain good or service, and interested qualified vendors have the opportunity to bid and re-bid on the contract to provide the good or service. At the end of the specific time limit, the lowest bidder is awarded the contract.

Tendering Procedures

All entities publish annual procurement plans and, except under special circumstances, can only issue tenders that are included in the annual plan.⁶¹ Prior to issuing an open request for tender, a procuring entity undertakes market research, establishes specifications and a budget, develops evaluation criteria, and creates a reviewing committee. This committee is responsible for conducting and executing public bidding and open tenders. A standing committee is in charge of public direct contract awards and selective direct contract awards.

The procurement regulations set forth timeframes for tender submissions, depending primarily on the amount of the acquisition. Higher value contracts generally involve more complexity and require a longer response time. The time between the call and presentation of offers varies from two to 22 working days, depending on the type of procurement.

In order to bid for any contract, a supplier must be registered on the National Register of Suppliers. Registration requires a supplier to provide information about its financial condition, board of directors, shareholders, share capital, and other items. The National Register also contains information about a supplier's prior performance on government contracts and lists suppliers who are barred from procurements.

Under the State Procurement Law, a bidder is not required to certify that it has not bribed and will not bribe an official during the procurement process.⁶² A bidder is required, however, to submit a statement under oath that it:

- is not prevented from participating in public procurement processes according to the criteria established in Article 10 of the Public Procurement Law;⁶³
- knows, accepts, and submits to the terms, conditions, and procedures of the selection process;
- is responsible for the veracity of the documents and information presented in the selection process;
- promises to maintain its bid during the selection process and to sign the contract in case the bid wins the process; and
- knows and understands the sanctions contained in the Public Procurement Law, its Regulations, and Law N° 27444 (General Administrative Procedure Law).

61. De la Cruz Salas Presentation at slide 7.

62. This paragraph is taken from the Peru OECD Report at 8.

63. Article 10 precludes former government officials from taking part in procurement for a period of twelve months after leaving office.

The steps involved in a tender vary depending on the method chosen. The table below sets out the steps once a tender has been published on SEACE.⁶⁴

Selection Procedure	Calls	Queries from bidders	Responses from procuring entities	Proposal presentation by bidder	Proposal evaluation	Contract award	Contract signing
Open Competitive Tender	X	X	X	X	X	X	X
Reverse Auction	X			X		X	X
Framework Agreement						X	X

Currently, bids are still presented in hard copy to the procuring entity.⁶⁵ The contents of the bid are reviewed at a meeting open to the public and advertised in advance to determine if the bid package is complete and the formal legal requirements have been met. The bids that are complete and meet the legal requirements are then evaluated for their technical merit. The final step is the opening and review of the financial proposals, which again takes place at a meeting open to the public and advertised in advance. The technical and financial aspects of a proposal are evaluated against the published criteria and the criteria set out in the State Procurement Law.

Enforcement Authority

OSCE has authority to randomly review procurements by procuring entities, impose penalties on entities that do not comply with the proper procedures, and pass evidence of possible crimes or financial harm to the government on to the Office of the Comptroller General (Contraloría General de la República). Reviews are conducted by the Administrative Tribunal of OSCE, which publishes its decisions on the Tribunal website.⁶⁶

The Office of the Comptroller General has functional, economic, and financial autonomy and its mission is to efficiently and effectively direct and supervise governmental oversight. It has the authority to carry out financial audits and to review the procurement procedures of all procuring entities. In June 2010, the Peruvian Parliament approved law 29555, which directed internal control offices of government agencies and ministries to report directly to the national office.⁶⁷ This is a positive development because it strengthens the individual internal control offices that previously had little independence, feared retaliation, and had weak incentives to report irregularities and violations to the head of each government entity.

64. The table is derived from the Salazar 2010 Presentation at slide 6.

65. This description of the procurement process comes from the Gray Article at 320.

66. The Tribunal website is <http://www.osce.gob.pe/subportal.asp?ids=9>. Resolutions are published by year at <http://www.osce.gob.pe/opcion.asp?ids=9&ido=172>. Appeals are published by date and name of the enterprise at http://www.osce.gob.pe/xportal/openasportlet.asp?portletid=89&scriptdo=usp_consulta_recurtos.

67. Law 29555, "Ley que implementa la incorporación de las plazas y presupuesto de los Órganos de Control Institucional a la Contraloría General de la República" (July 13, 2010), available at <http://www.glin.gov>.

4. Findings of the Legal Assessment

Peru has made significant changes that largely bring its legal framework for public procurement in line with the APEC Standards for Government Procurement.

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

OSCE maintains on its website all primary and supplementary laws and regulations regarding procurement by government entities, as well as any policies and administrative records on procurement. The State Procurement Law and implementing regulations describe any preference programs, such as programs to benefit small and medium-sized enterprises or under-served areas. Laws and regulations are also published in the Official Gazette.

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

Peru effectively publishes a list of procuring entities because the State Procurement Law makes it clear which government entities (central, sub-central, and SOEs (other than PetroPerú) are subject to the Law.

3. Publication in advance of any procurement rules the government proposes to adopt and providing a reasonable opportunity for the public to comment on such changes

On the legislative side, the regulations governing the operation of Congress mandate that all proposed bills be published on the Congressional website prior to consideration by the relevant Committees.⁶⁸ However, there is no law requiring pre-publication or a comment period for legal documents adopted by the executive branch (either at the central and sub-central level), such as regulations or procurement proposals.

4. Providing information and responding to questions about actual or proposed procurement rules

The State Procurement Law and the Procurement Regulations require procuring entities to respond to questions or requests for clarification on requests for bids and to post their responses on their home website and SEACE. Moreover, every public entity, including SOEs and private companies providing services on behalf of the government, is subject to the Information Access Law. Information pertaining to public procurement is also subject to this Law. Requests for information must be answered within 12 business days. The OSCE website provides contact information for inquiries.

68. Available at <http://www2.congreso.gob.pe/sicr/RelatAgenda/reglamento.nsf/regla>.

In Peru – unlike in Mexico, for instance, where the Federal Institute for Access to Public Information (IFAI) exists – there is no special commission to promote and help to enforce the Information Access Law. In practice, OSCE has assumed the responsibility for implementation of this law for information relating to procurements.

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

The General Administrative Procedure Act sets out the requirements for administrative proceedings which are binding on all government entities. If there is an appeal of a procurement decision, the procuring entity is required to notify all bidders that might be affected by the outcome of the appeal.

The General Administrative Procedure Act and the implementing regulations provide for due process in administrative proceedings and do not distinguish citizens from non-citizens in application of the procedures. Participants have the right to present their case, produce evidence and obtain a reasoned decision based on law. Each government agency establishes the time frames and details for its own administrative proceedings.

Although the legal framework complies with this Standard, procuring agencies often do not observe the regulations regarding administrative proceedings and often take a very long time to reach decisions. Sometimes, the procuring agency is not fully versed in the applicable law. This is particularly the case in regional and local governments.

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

The requirements relating to dispute settlement are included in the legal framework. Article 148 of the Constitution of Peru states that administrative decisions can be appealed to a court, in a procedure called “Proceso Contencioso Administrativo.” The law on that procedure provides that parties must be treated equally through the process.

If a dispute arises during the bidding or after the award of a contract, a bidder may request a review of the bidding process by the Administrative Tribunal of OSCE if the value of the procurement is greater than 600 UITs (US\$770,000).⁶⁹ The Administrative Tribunal sets a hearing date at which the procuring entity and the aggrieved bidder are given an opportunity to defend their positions. The Tribunal must issue its decision between three weeks to two months after the hearing. A final decision by the Tribunal can be appealed to the courts. Since awards and evaluation notes must be published on SEACE, there is a record to review the award decision of a procuring entity.

69. UIT (Unidad Impositiva Tributaria) is a unit used to determine tax rates, which is given an official value. Currently, one UIT equals 3,600 soles (about US\$1,283) but it varies every year. See <http://www.universidadperu.com/uit-2010-unidad-impositiva-tributaria-blog.php>.

The bidder contesting a given procurement must deposit a cash guarantee with the National Bank of three percent of the stated value of the procurement. This requirement is placed to avoid frivolous appeals. At the same time it discourages bidders from appealing because the deposit is lost if the bidder does not prevail on appeal. An appeal suspends the bidding process until the procedure is completed.

The law sets timeframes for presenting a claim and different procedural routes depending on the urgency of the case. According to the State Procurement Regulations, a procuring entity must include in any decision a description of the background giving rise to the complaint and the basis for each decision that is reached. A judicial decision is binding on the government agency involved and officials from that agency are compelled to comply with the court ruling. In many cases, however, administrative and court deadlines are not met, cases are seriously delayed and the quality of the judges is subject to question. This diminishes the effectiveness of the appeals procedures and makes companies reluctant to pursue their complaints.

After a contract is awarded, the Public Procurement Law provides for conciliation or arbitration to resolve disputes regarding performance, contract interpretation, termination and other contract issues between the procuring entity and the provider who won the contract. A successful bidder cannot challenge any aspect of an award before the Administrative Tribunal. Arbitrations are governed by the Arbitration Law, which prohibits a government entity from using its prerogative as a state entity to avoid the arbitration or arbitral award.⁷⁰ Peru is in the process of defining arbitration regulations specifically for procurement disputes, a new Code of Ethics for Arbitration in State Contracting, and Regulations on Small Claims Arbitration.

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

Except with respect to public consultation prior to issuance of a notice of tender, the legal framework complies with this Standard. All laws and regulations pertaining to government procurement are published in the Official Gazette and on the website of OSCE. Each public entity in Peru is subject to the Information Transparency Law and the State Procurement Law. Together, they impose a requirement for publication on a readily available website of all public procurement information so that the information is available to all interested parties. The State Procurement Law requires all procuring entities to publish on their home website and SEACE all calls for tenders, information about the selection process and contracts awarded. SEACE maintains a National Register of Suppliers through which suppliers can register their interests in certain types of procurements.

The State Procurement Act requires all purchasing entities to develop and post on SEACE an annual plan for procurements, including a description of the kinds of intended purchases. This gives suppliers advance notice of tender opportunities. However, there is no formal mechanism for public consultation prior to the issuance of a formal notice of tender, which is especially significant with complex high value procurements.

70. Legislative Decree N° 1071: Arbitration Law, available at <http://www.congreso.gob.pe/ntley/Imagenes/DecretosLegislativos/01071.pdf>.

As far as publishing requirements and procedures for pre-qualification, under the State Procurement Law and Procurement Regulations information on pre-qualification of bidders must be published on SEACE so that all parties have the same information. In addition, according to the Information Access Law, this information must be shown in the web sites of each procuring entity.

The State Procurement Law and Procurement Regulations set out the different deadlines for each type of procurement procedure. Documents related to procurements that are underway must be made available to a requestor as soon as the deadline for submission of bids has passed.

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

The legal framework complies with this Standard. The Procurement Regulations set forth the requirement for advertisement and dissemination of calls to tender with respect to each kind of procurement. The regulations require publication of all of the information set forth in this APEC principle (specifications of the product or service to be procured, quantity, time frame for delivery, closing times and dates, and where and how to submit a bid). If the procurement is covered by an international agreement, such as a free trade agreement, the publication will also be made in English.

The Procurement Regulations require that all questions and comments from bidders and all responses from government entities be posted on SEACE. If the procuring entity on its own modifies a tender, the modification must be posted on SEACE. All tender documentation is posted on SEACE. In addition, if bidders request additional information, that information must also be posted on SEACE so that all suppliers have access to it.

Most of the procurement notices posted on SEACE contain the required information. There has been an effort among procuring entities to improve the speed and substance of responses to bidders' inquiries for clarification. However, a lot of work remains to be done in this area to make responses both timely and substantive.

9. Maintaining transparent criteria for evaluating bids; evaluating bids and awarding contracts strictly in accordance with the criteria

The State Procurement Law complies with this Standard. It requires that all procurement notices must specify the technical characteristics of the goods, service or works, the execution time and the evaluation criteria and manner of rating proposals. Furthermore, it requires retention of records pertaining to procurements for a period of time.

10. Awarding contracts in a transparent manner

The State Procurement Law and Procurement Regulations require that once a contract is awarded, the name and amount of the winning bid will be published on SEACE. If a contract is not awarded, that information is also required to be published on SEACE.

Technical proposals are opened at public events for public bidding, open request for tenders, and direct awards. The evaluation committee meets to evaluate and then holds another public event to open the financial proposals and award the bid. An announcement of bid winners is published in SEACE. However, there is no requirement to specifically notify the losing bidders and provide a debriefing.

11. Treatment of confidential information

The Information Access Law requires government agencies to protect proprietary and confidential information. The Procurement Regulations recognize that access to information contained in a contract dossier is regulated by the Information Access Law. The General Administrative Procedure Act establishes the same principle of confidentiality as the Transparency Information Law.

However, while the principle of protection of confidential information is contained in law, there are no effective sanctions against non-compliance with the Information Access Law.

5. Results of the Private Sector Consultation

Proética, TI-USA, and CIPE conducted a consultation with private sector firms affiliated with the American Chamber of Commerce of Peru (AmCham-Peru) in Lima to obtain the business community's perspective on whether the APEC Standards are implemented in practice and their impact on improving the integrity of procurement. The consultation also sought to gather recommendations from the private sector on what the Peruvian Government and the companies themselves can do to improve compliance with the APEC Standards and integrity in public procurement. Participants included representatives from companies in diverse sectors: publishing, legal services, construction and industrial equipment, pharmaceuticals, laboratory equipment and health supplies, mining, and consulting.

The extent of corruption in public procurement

Consensus among participants in the consultation was that corruption is a fundamental issue in public procurement in Peru, notwithstanding all the government efforts to tackle the problem. Decentralization has contributed to the problem as regional and local governments are less capable of implementing the State Procurement Law. Improving the pay and status of civil servants is imperative and professionalizing the procurement officials. Most educated and trained Peruvians do not want to work in the judiciary or the executive agencies given that salaries are low in comparison with the private sector. This makes government service unappealing and bribe-taking widespread.

Participants perceived that there have not been many prosecutions of large-scale corruption or many big cases brought by the inspection bodies created to root out corruption. These bodies seem to concentrate on small cases, leaving the big cases to be discovered only by the press.

Adding to the problem is the sense that strong business ethics are lacking and there is a pervasive culture of corruption. There was a general feeling that corruption is not a crime, whether it involves buying a pirated disc, giving a bribe to a policeman, running a red light, or paying a judge or prosecutor. They believed that this attitude toward the acceptability of corruption too often extends to public procurement. Most companies do not have codes of conduct, ethics training, or internal controls that would prevent and uncover improper corporate actions.

Quality of the legal framework

Participants felt that procurement regulations are too complicated and bureaucratic, requiring great efforts to fulfill the requirements of the procuring entity. A lot of information that must be provided is irrelevant to the procurement process. Too much record-keeping is required and cannot realistically be provided by small and medium enterprises, which account for the great majority of the companies involved in public procurement.

Decentralization is seen to have harmed transparency and the integrity of the procurement process. Officials in charge at regional and local levels are not well trained and do not have adequate backgrounds in procurement. The regional and local officials are frequently unaware of procurement regulations and carry out procurements in an inconsistent and subjective manner. In fact, the representatives saw the most corruption in the medium and small purchases, which are mostly at the regional and local level. Many of the bidders for these contracts are small and medium-sized businesses that may not be fully knowledgeable about procurement rules, are not inclined to follow the rules for the fear of losing competitiveness, and lack a code of ethics or a policy against paying bribes.

The participants also perceived little enforcement of the procurement rules and a lack of sanctions imposed on violators.

Access to procurement information

There was consensus that access to information about procurement regulations and tenders by the central government had significantly improved. The establishment of SEACE has been very helpful in increasing transparency. However, in and of itself SEACE is not enough. While the system did make procurement information more transparent, it does not have the capacity to detect and stop irregularities.

According to participants, procuring entities at the national level appear to be complying with the requirement to respond to bidder inquiries and post their responses on their home webpage and on SEACE. They noted there seems to be less compliance with the Information Access Law. There is no enforcement mechanism to compel the release of information and often, the information provided is incomplete and delayed beyond the statutory time.

Bidding process

The participants felt that government purchases were not sufficiently standardized and complained that the procuring entities do not require quality certification from suppliers. Procurement decisions are often based on previous purchases or simply left up to various procurement officials. An example was given of the purchase of equipment for state-owned hospitals: there is no standard process for such procurement and no uniform technical specifications for equipment. As a result, each hospital obtains its own procurements, allowing them to be sole-sourced. This fragmentation reduces the value of each procurement, thereby reducing efficiency and value for money.

This lack of consistent standards creates an unhealthy dependency on past suppliers. Additionally, the lower value of contracts creates opportunities for corruption because they are not subject to open bidding. Participants felt that procuring officials fail to take advantage of the most competitive products or services on the market. This problem is particularly exacerbated when it comes to small procurements where the government routinely overpays for substandard quality items.

Participants stressed a related issue that contributes to the prevalence of low quality, overpriced government purchases and potential for corruption – the lack of or lax internal ethics guidelines in many companies. Some companies maintain a code of ethics but there is no way to know which ones do, or whether the code is followed. Having a code of ethics is not a requirement to bid and information about internal company codes is not publicly available.

Open participation and fair competition

The participants identified two key problems with equal participation in public procurement. The first concerns large contracts that involve state monopolies such as the army, police, and health care system. There is little competition in the procurement of those large contracts because incumbents enjoy significant advantages and the same companies always win. Consequently, many companies that could increase the competitiveness of bids for these types of contracts do not bother to participate.

The second problem has to do with smaller value contracts, which account for a large percentage of public tenders by number in Peru. As noted above, most bidders on such smaller government purchases are small or medium-sized companies. They feel that they are not prepared to deal with the complexities of the procurement laws and do not believe that those laws are intended to protect them.

Dispute resolution

Several participating companies complained that it is hard for bidders to obtain the information necessary to seek redress. Bids are often rejected on technicalities and losing companies have a hard time obtaining an explanation as to why they lost the bid. Moreover, due to the weakness of the judiciary, corruption problems are rarely discovered through the official channels. In practice, the investigation of major wrongdoings relies just on the media. Thus the risk of detection for violators is very low.

The usefulness and effectiveness of any dispute resolution system depends on whether appropriate sanctions follow violations. In the opinion of the participants, the enforcement of public procurement rulings in Peru is largely lacking, which encourages improper behavior. Due to weak enforcement, violators – which can include bidders, procurement officials, or intermediaries such as lawyers – go unpunished. Many simply cannot see how transparent procurement benefits them.

Participants agreed that the signing of the Free Trade Agreement with the United States in 2006 brought a set of new rules that give businesses access to international tribunals if domestic judiciary fails them. Yet better enforcement from the outside does not solve the problem. Ultimately, the Peruvian administrative review process and judicial system must improve in order to effectively support transparency and integrity in public procurement and many other areas of doing business.

6. Conclusions and Recommendations

The Legal Framework

Following the 2008 legislative reforms, Peru's legal framework conforms to the APEC Standards with some exceptions. The areas that could still be improved include a law requiring pre-publication or a comment period for procurement regulations and tender specifications adopted by the executive branch; finalization of the regulations of arbitration specifically for procurement disputes; advance notice requirements for suppliers of tender opportunities in complex high value procurements; and a stronger legal protection of the losing bidder's right to debriefing. Transparency in public procurement and government operations in general can also be improved by the creation of an independent body to promote and help to enforce the Information Access Law.

Implementation of the Legal Framework

Effective implementation of the State Procurement Law is still lacking. On the government side, there is the problem of insufficient training and capacity of public officials at regional and local levels, magnified by the process of decentralization. In many cases too much discretion is given to individual officials who may not be fully familiar with the relevant laws or simply rely too much on repeated sole-source contracting with previous suppliers. That leads to inefficient and expensive procurement of goods and services that often are of substandard quality. Additionally, offending officials do not face effective sanctions when they fail to meet legal requirements for transparent procurement and inadequate administrative and judicial review processes make correcting flawed procurement decisions difficult.

Problems with the integrity of public procurement also result from actions of the private sector. Most large, long-term contracts are awarded to influential incumbent suppliers, limiting the overall competitiveness of the procurement process. At the same time, many of smaller companies that account for the bulk of firms participating in procurement are unable or unwilling to comply with all the legal requirements, fearing loss of competitiveness of their bids. Weak or absent anti-bribery policies in many companies – such as a code of conduct, training programs and internal controls to reduce corruption – contribute to this situation and reinforce a general culture of corruption.

Recommendations

To address the shortcomings in implementing the APEC Standards, Peru should incorporate the few outstanding issues into domestic law and address the overriding problems related to practical implementation of the Standards and business integrity. The following recommendations emerged from the legal review and business consultation:

Private Sector Actions to Enhance Integrity

In order to participate in public procurement with greater integrity, the private sector – particularly small and medium-sized enterprises – must increase its knowledge of the State Procurement Law, work together to demand greater transparency and accountability from public officials, and build its own culture of integrity. The private sector should take the following actions:

- Trade associations, sectoral organizations, and chambers of commerce should be used as business fora to raise awareness of ethical issues, discuss the problem of corruption in public procurement, and engage public officials in this debate in order to seek concrete improvements.
- Private sector organizations should organize training programs, particularly for SMEs, on bidders' rights and obligations under the State Procurement Law.
- All companies, regardless of size, should be encouraged to adopt codes of ethics such as those set out in the TI Business Principles for Countering Bribery or the APEC Code of Conduct for Business⁷¹ and provide training through trade associations, chambers of commerce and civil society organizations on drafting, implementation, and enforcement of codes of ethics and internal controls appropriate to the size and risk of improper conduct.
- The private sector should take greater advantage of the opportunities provided by the OSCE Administrative Tribunal and the Office of the Comptroller General to report non-compliance with the State Procurement Law and seek redress.

Government Actions to Enhance Implementation and Enforcement of the State Procurement Law

To deal with issues regarding implementation of the legal framework at all government levels, OSCE should:

- Implement a requirement to publish in advance and seek public comment on procurement-related regulations and tender specifications.
- Implement procedures to notify losing bidders and provide a debriefing.
- Standardize procurement procedures and minimum quality requirements, so there is less discretion, particularly at the regional and local levels. Standard procedures should be created for:
 - preparation of goods/service requirements;
 - terms of reference for open bidding, public tenders, and direct awards;
 - pre-qualification requirements;
 - time frames and scheduling of the procurement process;
 - professional audits; and
 - timeframes to settle disputes.

71. "Complementary Anti-Corruption Principles for the Public and Private Sectors," available at <http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/Anti-Corruption-and-Transparency-Experts-Task-Force.aspx>.

- Improve the procurement planning and monitoring process. Provide formal channels for gathering feedback from the implementation of previous bids so that past experiences may better inform the decisions on new procurements.
- Simplify procurement procedures for SMEs to improve their competitiveness and limit incentives for corruption.
- Provide better training for members of Special Committees and judges who review cases relating to violations of procurement.
- Adopt sanctions for government officials, bidding businesses, and legal intermediaries who do not follow procurement procedures.
- Establish an independent body to enforce the Information Access Law and adopt sanctions for government officials who do not comply with its provisions.
- Publish summaries of OSCE Administrative Tribunal decisions and decisions of the Office of the Comptroller General in both Spanish and English on SEACE.
- Require all bidders to have in place an anti-corruption program, codes of conduct and internal controls to mitigate risk of corruption, commensurate with their size and risk of corruption.
- Expand the role of civil society and procurement experts as process monitors.

Civil Society Actions to Promote Transparency in Public Procurement

Civil society has a vital role to play in improving both government and private sector transparency and integrity in public procurement. Civil society organizations that are focused on anti-corruption in procurement should:

- Conduct a public awareness campaign on the corruption problem in public procurement and its detrimental consequences for Peru's governance and economy.
- Work with business organizations to encourage companies to adopt codes of conduct, training programs, and internal controls.
- Develop civil society groups specialized in monitoring implementation of the State Procurement Law.
- Train journalists on the importance and methods of covering corruption in public procurement.

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.

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