

Contributing Paper

Transparency and Corruption on Building Large Dams

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Regulation, Compliance and Implementation Options**

For further information see <http://www.dams.org/>

This is one of 126 contributing papers to the **World Commission on Dams**. It reflects solely the views of its authors. The views, conclusions, and recommendations are not intended to represent the views of the Commission. The views of the Commission are laid out in the Commission's final report "Dams and Development: A New Framework for Decision-Making".

**Paper for
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Introduction

1. Large dams are probably no more prone to corruption than other large investment projects, but also no less so. Wherever large financial commitments are called for, and especially where there is a high degree of technical complexity and a large number of contracts and parties involved – all characteristics of large dam projects – then it happens frequently that firms will try to influence the decision making in their favor by bribing officials, or by colluding with their competitors, or both. Equally, officials in the decision making structure of the host country may be ready to abuse their position of power and seek to obtain personal gain by simply accepting bribes offered by firms or their agents, or by actively extorting bribes from the bidders. The complexity of large dam projects means that on the host country side, several ministries and departments will be involved (power and energy, agriculture, roads, environment, to name just a few), and even if there are no active rivalries between the various offices, the management of such a project offers numerous opportunities for disconnect, inadequate cooperation and collaboration, confusion, and thus for a serious lack of transparency and undetected and often even undetectable manipulation and abuse. There is a similar complexity of the contracting structures (many different supply, construction and consultancy contracts, often with joint ventures involving several companies, a mix of domestic and foreign-based firms etc) as well as of the financing structures, especially when several outside financiers, including international financial institutions, are involved, each with its own procurement guidelines and preferences. Some host governments (as “principals” of the process) elect to reduce the complexity (as it affects

them) by working through a general contractor; but this does not necessarily lead to cost savings, and it sometimes is not acceptable to financiers, since it restricts the application of “tied procurement” rules which several major financiers still practice.

2. Another reason why large dam projects so often are targets for corruption efforts is the fact that so many economic and social players may benefit, or suffer, from the way the project is carried out, or indeed from the decision whether it is carried out at all or not – such as the people living, or otherwise benefitting from activities going on, in the project area, the beneficiaries of irrigation water or electric power, and many others. A large dam project affects many financial and social interests, and one should not be surprised that normally there will be significant efforts to influence the decision making. Some of these efforts are entirely legitimate, but much is corruption, and it is illegal. Those who plan, administer and implement large dam projects are well advised to guard carefully and systematically against corruption. The prize is valuable, thus keen efforts to circumvent the proper rules can be expected. This paper seeks to help those who wish to reduce the incidence of corruption and the corrosive damage from it to the finances and economy, but equally to the social fabric and ultimately the democratic structure of the host country.

3. Planning, executing, operating and decommissioning a large dam project involves a complex project cycle and requires many decisions which are prone to abuse and which would benefit from more transparency. In order to help the reader of this note, a model project cycle is attached as ANNEX A.

Transparency International and Procurement

4. Transparency International (TI) is a non-governmental organization (NGO) working globally against corruption. TI works through building coalitions among governments, business and Civil Society, and by developing models and ideas for the effective prevention of corruption. TI practices the holistic approach to country-wide integrity systems, it believes strongly in the importance of reestablishing basic values, and it sees a critical role for Civil Society (of which it is itself a proud part) in the global fight against corruption.

5. TI has recognized that official procurement, amounting to somewhere between 10 and 15 percent of global GDP and thus to several trillion US Dollars each year, is a major playground for corruption and has spent much effort on understanding the intricacies of procurement and on developing ideas and models for making procurement less prone to corruption. Even if the “additional” cost of projects due to corruption is estimated at a modest 10-20 percent of contract value on the average, the amounts wasted globally each year are staggering, especially if one considers that it is the poorest people in a society who suffer most from the lack of adequate resources. Such as the mother in Uganda who cannot take her sick child to a hospital for lack of bribe money; or the family in Calcutta who cannot enter their daughter or son in school because teachers expect extra payments; or the farmer in Pakistan who has no school or hospital to go to because the government’s budget is spent on tanks and fighter airplanes (which offer huge margins in corruption payments). Or indeed the poor farmer in India, who loses his meagre plot of land to the developers of a big dam, in exchange for an unproductive plot, unirrigated, far from the nearest village and in a hostile environment.

6. TI has focused its efforts in the first few years after its founding in 1993 on getting a satisfactory international convention against transborder bribery of foreign public officials passed by the OECD, and on getting the tax deductibility of bribe payments abolished in as many countries as possible. That effort has now been largely crowned by success: In December 1997, all 29 member states of the OECD (plus 5 other trading states) signed such a convention, it came into force on February 15, 1999, and as of this writing 18 countries have ratified the convention and thus made it effective in their national legal systems. For the

first time ever (except in the USA, where the Foreign Corrupt Practices Act has brought this change as early as 1977), bribing a foreign public official is now a criminal act in most of the industrial export countries; and there is good progress in abolishing the tax deductibility.

7. A new focus of TI's work now is the effort to force the export credit insurance institutions of the major industrial countries to change their rules and practices so as to deny export insurance to contracts obtained or tainted by corruption. TI has submitted detailed proposals to this end and expects some movement in the next few months. Concurrently TI is working toward the strengthening of financial accounting and auditing rules and practices so as to achieve more transparency of all financial transactions and make it more difficult to hide corrupt payments. In the case of financing for large dams, the export credit insurance institutions should in fact withhold their insurance cover not only if there is suspicion of corruption, but also if important activities designed to mitigate the adverse social and environmental impact are not properly implemented by the host government.

8. TI realizes that repressive measures to contain corruption (such as criminal sanctions) are a necessary part of the fight to get rid of this scourge. But its priority is the development of preventive measures and systems. And it believes firmly that it will take a system of sanctions and rewards, and clear incentives to the perpetrators of bribery for altering their behaviour, if standard behaviour is to be changed. Selected companies have begun to understand that the market is ready and willing to honor business practices that are characterized by integrity and honesty. That recognition will guide our efforts.

Procurement Principles

9. Transparency International (TI) believes firmly that the application of the principles of **integrity, transparency and accountability** to all decision making on major public investments (including large dams) will maximize the economic, financial, social, environmental and political benefits.

10. Integrity means that the best available technical expertise is employed in a non-discriminatory manner, that fair and open competition leads to a quality product at a fair price (value for money), and that the product takes into account the legitimate aspirations and concerns of all the stakeholders.

11. Transparency means that institutions, processes and decisions are made accessible to the public at large or to "representatives" of the public so that processes and decisions can be monitored, reviewed, commented upon and influenced by the stakeholders. It is essential that transparency be created from the very beginning so that potentially every step in the long decision making process related to the construction of a large dam can be influenced in a timely manner, if necessary. In particular the entire process of considering alternative sources of power or water, alternative siting or designs and the environmental and social aspects of the proposed project needs to be carried out in full transparency, for the protection of the people in the project area and of the environment, but also of the integrity and eventual economic justification of the investment. Indeed the assessment should start with questioning the additional power generation capacity or the water flows claimed to be "needed". Often efforts directed at reducing demand (by better transmission and distribution efficiency or better demand management) or by better time management of water flows can be much more economic and profitable than new major investments. Equally worth a thorough investigation and assessment is the choice among various alternatives such as "one major power generation station vs. several smaller or mini- or micro-hydroelectric stations".

12. "Transparency" in this context is not achieved by grudgingly allowing access to some internal documents to selected people. "Transparency" requires that the government or project agency (the "principal") voluntarily and proactively provide full public information

through the print and electronic media about the potential options, plans, designs and programs. Government must also not be allowed to deal separately with individual stakeholder groups, keeping one away from the other.

13. Experience of a few countries demonstrates that a series of well-publicized open hearings is a particularly effective means to spread information and to obtain the stakeholders' commitment, contributions and support for a large project. For the construction of a new subway line in Buenos Aires, for example, three large public hearings were held at which the Mayor of Buenos Aires himself (recently elected as the new President of Argentina – the people reward honesty!) laid out the plans and invited comments and suggestions e.g. on the siting of the line, the location and design of the stations (for example, are they handicapped-friendly?), the process for selecting the construction companies etc.. The Hearings were a huge success; they were broadcast live on local TV and were video-recorded for later reference.

14. Another powerful instrument for achieving transparency is the use of the internet. Against all claims from some quarters that openness of certain procurement process information would undermine and erode the quality of the process and endanger the entire project, several countries (Mexico, Chile, Colombia to some extent et al) and major municipalities (e.g. Seoul, Korea) have recently placed their entire procurement information system on the web and allow free access to everyone to that information. Increasingly, all interaction between the administration and companies doing business with it, or wishing to obtain contracts, and citizens in general, will be handled through this medium. If everybody can check on a real-time basis which contracts are offered by the principal at a given time, under what conditions, and who the competitors are, and what prices they offered, the opportunity for manipulation and thus the temptation to bribe is greatly reduced.

15. “Transparency” also means that the people living in the dam impact area and all the stakeholders in general are fully informed and consulted about all aspects of the project. Especially on large dam projects it is essential that the affected population at large be allowed and encouraged to participate in the process. It may be necessary to reach out to them through visiting teams, and in particular one must not rely on political representatives (who normally were elected or chosen in other contexts and for different purposes). It is also most important that this consultation process is carried out faithfully, with up-to-date and complete information for the stakeholders. For example, if the population in a valley is consulted on the construction of a hydroelectric dam, the people should be told if the project design provides for the transfer of all power generated via high-voltage lines out of the valley, providing no access to power to the people in the valley itself.

16. The projects which were prepared in secrecy, or with severely limited information for the stakeholders, and eventually ran into public resistance and then were held up for years, are legion. This process may appear time-consuming and costly but it is irreplaceable and will in the long run save time as well as costs.

17. While the importance of transparency is publicly accepted by many governments and institutions, most governments and national and international institutions (including the international financing institutions) may pay lip service to it, but in reality still practice a policy of secrecy or a high degree of confidentiality. Change will be hard to achieve, but it will bring untold benefits.

18. **Accountability** means that governments, public (government-owned or –controlled) institutions and individual officials on the one hand, and companies and agents or other individuals acting on behalf of companies on the other hand, must be held strictly accountable for the correct and complete execution of their tasks and duties. Wherever violations of legal or contractual obligations occur, the perpetrator must be taken to task, by

disciplinary, contractual and/or criminal sanctions, as appropriate. Laxness in accountability will quickly erode integrity.

19. The **parties** addressed by the arguments presented in this paper include governments, public institutions and officials, national or international financial institutions, “contractors” in the widest sense (meaning private companies or individuals, or governments or public institutions acting as contractors) offering the supply of goods, contracting, consultancy or other services, stakeholders and Civil Society organizations. The term “stakeholders” should be interpreted in the broadest sense, well beyond the immediate physical-impact zone of the dam and reservoir itself.

20. Thus, when a large dam is planned to be built in a remote area, “stakeholders” includes not only

- the people who will benefit throughout the power grid from the availability of additional power capacity and
- the people who will share the economic and financial benefits from the investment, but will also, as taxpayers, share the responsibility and liability for servicing the investment cost and for maintaining the assets,

but also

- the people to be displaced by the reservoir,
- the people in the area where the displaced people are to be resettled,
- the people economically active in the area upstream of the reservoir (the catchment area), to the extent that their practices need to change to reduce siltation flow into the reservoir and not to interfere with the usual flow patterns,
- the people downstream from the dam whose water flows will change, and who will have to apply much effort to maintaining their irrigation canals and tertiaries if they are to reap any benefit from the new investment,
- the people further downstream who, without proper water management and canal maintenance, may become the victims of over-irrigation (made possible by the abundant availability of water thanks to the dam) and subsequent salinization and loss of fertile land and often their entire existence,
- the people downstream whose fishing activities will be affected,
- the people near the access roads to the dam and powerhouse sites (the siting and location of those access roads near to or afar from the villages will make a major difference for their access to markets, and thus their support or opposition to the project), and
- the environmental community as concerns the direct impact on flora and fauna, but also the increased endangering of remote forest areas through the use of the good access roads to the dam and power station for timber extraction purposes.

21. This paper assumes that objects like “large dams” are the responsibility of governments or public institutions. However most of the same rules should apply (especially as regards the environmental and social impact and the monitoring by Civil Society) when such a project is carried out by a private enterprise. Indeed, the no-bribery pledges and the monitoring arrangements should already apply to the process of selecting the private company or joint venture which will be given the concession or franchise to construct and operate the plant, whether this happens under BOO (build-own-operate) or BOT (build-operate-transfer) principles. Incidentally, experience shows that the number of problems encountered during the validity period of the BOO or BOT franchise is significantly reduced if the franchise holder also owns a financial stake in the company implementing the project.

22. Many, but by no means all, of the decision making points addressed in this paper are covered in part by various “**procurement rules**” such as the “General Procurement Agreement (GPA)” of the World Trade Organization with presently 26 signatories, the “Guide

to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services” issued 1995 by the UN Commission on International Trade Law (UNCITRAL), the World Bank Guidelines for the Selection of Consultants and the Procurement of Goods and Services, and the Manual of Procedural Rules (SCR) of the European Commission. All of these rules of late make an effort to address the issue of corruption prevention. But none of them offer or require a structure of transparency and accountability nearly as comprehensive as TI does in this paper. The existing rules are largely good, but the fact that a high degree of corruption exists worldwide in public procurement suggests that present rules, as good as they may seem to be, are simply not adequate. What is needed is full transparency and reliable assurance of implementation of the rules through efficient inspection, and intensive internal and public monitoring and auditing.

23. If the **WCD** were satisfied with “internationally accepted criteria, guidelines and standards”, it would go for the lowest common denominator and not contribute anything. Instead it is hoped and recommended that the WCD search for a comprehensive set of proven quality criteria, which are likely to make a difference, and then campaign for the widest possible acceptance of those proposals.

24. This paper deals primarily with the decision making processes on **new dams**, but the operation and decommissioning of **existing dams** raises many of the same issues and should be subject, to the extent feasible and appropriate, to the same rules.

25. This paper addresses the traditional procurement decisions (planning - preparation – contracting – implementation – final accounting – operation – decommissioning). However, the “planning and preparation” stage must include the not-yet-traditional environmental and social impact planning and preparation and of course also the needs assessment (comparing the investment proposal to an alternative of achieving more power savings or higher efficiencies) and the weighing of alternative sources of power (mini- or micro-hydroelectric stations, or indeed run-of-the-river installations).

Legal Aspects

26. Preferably all legal aspects of planning, preparing, implementing, operating and decommissioning a major investment project (like a dam or a nuclear power plant) should be set out in laws, regulations and guidelines, all of which should be easily accessible to the public. Modernizing traditional laws can be difficult and time-consuming. Therefore one should remember that innovative changes in procurement practices, at least to the extent that they do not directly contradict existing laws, can be put in place on a **contractual basis** – the government makes the new requirements part of the procurement contract which is accepted by, and thus becomes binding upon, the contractor.

27. Among the **standard rules** on procurement which should be covered by the national jurisprudence are the following:

- open, public competition must be the rule and the actual practice for all procurement decisions above a relatively low value threshold; any exceptions should be possible only in truly exceptional circumstances (e.g. natural disasters), and they should have to be justified in writing to a standard form and available for public examination, so as to avoid the usual practice of claiming a spurious reason (“urgency” – after a project proposal has been allowed or even caused to languish in the planning department for months or years – is the most common argument, that simply should no longer be tolerated);
- a separation of responsibility for planning – designing – contracting – implementing – final accounting – operating a project between several officials should be standard practice, in order to avoid network-building between an official of the principal and consultants, suppliers or contractors;

- officials in posts involved with procurement and other contracting activities should be rotated regularly;
- procurement decisions should not be made by individual officials but at least by two (“four-eyes principle”);
- major decisions (award of contracts, agreement to variation or change orders once the aggregate value of change orders has reached 15% of the original contract value) should be made by a group of officials, such as a central tender board, with clear rules of formality and transparency, but also firm time limits;
- there should be a central national office, independent from the procuring ministries and departments, to which any complaints about procurement decisions, whether corruption is involved or not, can be taken, and which has the power to decide on corrective action; this office should be equipped (in terms of competent staff and financial resources) to act quickly and effectively;
- there should also be a national “Ombudsman”, “Anti-Corruption Commission” or “Inspector General’s Office” which reports directly to Parliament or (less desirable) the President and to whom any allegations about wrongdoing in the administration can be taken in confidence, if necessary;
- all officials should be required/reminded of their duty to report any suspicion of wrongdoing by other officials or contractors to a higher office; “whistleblowers” must be protected against undue retaliation or retribution;
- internal and external auditors should review procurement decisions routinely, and there must be a contractual right to audit the books of “contractors” and their sub-contractors;
- where an audit discloses intentional overcharging by a contractor, the contractor should be required to reimburse to the government the overcharge as well as the cost of the audit.

28. As important as a good set of laws, regulations and guidelines is the existence of an independent, professional and reliable structure of **jurisdiction** in a country. Where this does not yet exist, even the most honest private foreign “contractors” are tempted to build some “insurance coverage” into their tender price, to guard against wrong decisions and untimely delays. This can be avoided and counteracted – while overall administrative and legal reform is underway - by a contractual agreement to resolve any legal issues under the rules of the jurisdiction of another country (this usually is not acceptable to the host government) or under the rules of international arbitration. This contractual agreement would then stipulate the Arbitration Court (such as the International Chamber of Commerce, the London Court of Arbitration, the American Court of Arbitration or others), the place where the court would sit, the applicable law and the number of arbitrators.

Administrative Aspects

29. A government should have clear rules about official conduct as follows:
- officials (and their family members) may not accept anything of value from any individual or company in contractual dealings with the ministry or department for which that official works;
 - “public disclosure rules” regarding the assets, liabilities and income of senior officials should be introduced and enforced; unexplained wealth of officials should lead to an inquiry;
 - any suspicion of wrongdoing by another official must be reported, and officials will be protected in carrying out that duty;
 - officials in posts involved with procurement and other contracting activities should be asked to sign a pledge that they will not demand or accept anything of value that in fact or perception could influence the exercise of governmental discretion; and
 - officials need to be informed and trained about the application of these rules.

30. It is most important that government offices have adequate capacity (competent, well-trained staff, operating resources, knowledge and training) to carry out their duties. Capacity building is a critical aspect of integrity assurance in any country and should receive primary attention by governments, Civil Society and donors alike.

31. It is equally important to recognize that conditions that tend to motivate corruption need to be addressed and incentives and rewards created for good performance. Without decent salary and performance rewards, it will be that much more difficult to curb bribe taking and extortion. Furthermore, officials must be protected and insulated from political pressure to violate the rules or commit unethical behavior in general. A country is well-served by having compelling incentives for doing the right thing.

Dealings with Contractors I - Contracting

32. This section applies to contracts between a government principal and consultants, suppliers, contractors or providers of other services. It is important to establish the principle that the same processes and safeguards should apply across all contracting authorities to all and any procedures by which the government purchases goods or services. The following rules should apply:

- designs and specifications must always be broad enough and non-discriminatory so as to ensure true competition; a consultant engineer in charge of design and specifications, who is not truly independent of suppliers and contractors and who is willing to compromise his position of trust, can easily predetermine or at least influence the outcome of the subsequent bidding processes through small and possibly undetectable special requirements and design features which only one supplier or contractor can meet;
- the additional power generation capacity (or irrigation water requirement) said to be needed and to be met by the proposed project should not be taken for granted but be reassessed, by exploiting first all (economic) opportunities for energy savings or for increasing irrigation efficiencies;
- the assessment of alternative options to the dam must take all relevant aspects of the options into account, including all cost factors such as the cost of resettling and compensating people, assistance to those resettled people for a realistic period of time, environmental protection and restoration measures, siltation control measures in the catchment area, downstream impact of differing water regimes, operating and maintenance costs and the decommissioning costs;
- one should remember that there is a tendency for governments who wish to carry out a dam project, to put the best possible gloss on all cost items, such as underestimating the number of people to be resettled, the cost of the resettlement, the value of the lands to be covered by the reservoir or otherwise lost due to the dam construction or the value of the production being wiped out by the project (and thus the compensation due to the affected families), and overestimating the benefits of the dam as well as of the resettlement; it is critical that these aspects be assessed as carefully and honestly as possible;
- one also needs to remember that irrespective of the cost figures included in the estimates for buying new land for the resettlement of people (once it becomes known that the government will purchase land for resettlement, the prices jump up overnight), often there simply is no adequate land available near the project area; and in any multicultural society resettling farming populations far from home and thus in a different cultural setting will substantially increase the cost and in fact seriously jeopardize the success of the resettlement;
- whenever resettlement of affected people is required, the resettlement should be carried out, and people should be effectively reinstalled on new land, with all the necessary social and productive infrastructure in place, before their previous source of income is destroyed;

- if a dam appears to be the optimal solution, then water flow estimates need to be realistic, so as to avoid a situation where optimistic estimates result in a dam system which frequently is short of water;
- design and preparation work for dams must address the broadest impact of the dam construction, in geographic space (upstream and downstream) and time, including such factors as
 - dam type such as earth fill, concrete or thin-arch,
 - if earth filled, then location and all aspects of borrow areas for rock fill, or aggregate areas for concrete dams, including social and environmental impact in borrow area,
 - access road to all components of dam ensemble,
 - any siltation protection installations upstream,
 - any irrigation water transfer and use installations,
 - maintenance requirements for all parts of the dam ensemble and the downstream irrigation installations;
- prior to the solicitation of tenders, the contracting authority shall prepare or obtain an estimate of project cost, which estimate shall be held strictly confidential;
- decision making criteria must be objective, they must be stated in the bidding document and discretion must be reduced to the minimum; it is not acceptable if during the evaluation and comparison of bids, individual bids are given high or low marks on account of criteria which were not known to all the bidders at the time they prepared their tender;
- all requests from potential bidders for clarifications must be requested and replied to in writing and provided to all bidders; concessions or clarifications provided to one bidder during the evaluation must be provided equally to every other bidder as well;
- the government should introduce mandatory registration and prequalification of any company wishing to submit a competitive tender for goods or services of any kind; registration and prequalification can be done independently of, or as part of, the tendering process for a specific contract;
- registration of suppliers, contractors or consultants as competent to contract with the government should be dependent on the company's establishing (by filling a questionnaire) that it meets minimum standards¹ of : -
 - professional competence
 - relevant experience
 - financial capacity to an appropriate level, and
 - integrity²;
- on integrity, the minimum standard should require something like “no conviction for, or debarment anywhere on account of “bribery, bidrigging, pricefixing or fraud, within the previous 5 years by the company or any predecessor company with essentially the same principals or senior executives” ;
- for consultants, the minimum standard on integrity should require a statement on true independence of the company, a listing of all past or present associations, partnerships or dealings with any of the companies registered and interested to tender for the project in question, and a listing of all professional contracts undertaken in the prior 5 year period (in order to address the Conflict of Interest concern);
- a separate pre-qualification exercise may be carried out for specific large value contracts, subject to open competition for that pre-qualification;
- tenders submitted for supply or service contracts (including consultant contracts) shall contain a statement that the tenderer (i) has not offered or granted, and will not offer or grant, either directly or indirectly through agents or other third parties, any improper

¹ The required minimum standards as to competence, experience and financial capacity (but not integrity) must of necessity vary depending on the size or type of contract, or to accommodate legitimate government objectives of promoting participation by new, small or disadvantaged business enterprises

² The integrity standards will apply to all levels and types of contracting

- inducement or reward to any public official, their relations or business associates, in order to obtain or retain this contract or other improper advantage, and (ii) has not colluded, and will not collude, with others in order to unduly limit competition for this contract;
- tenders or submissions for the award of a consultant contract should in addition contain a statement that the consultant will not demand or accept any payment or other favor in exchange for (i) designing a project or any parts thereof in a manner that it offers undue advantages to one or several bidders, (ii) giving undue advantage to any of the bidders in the evaluation and selection of bidders for a contract award, and (iii) refraining from properly monitoring project implementation, reporting violations of contract specifications or other forms of noncompliance, or holding suppliers or contractors fully to their legal and contractual obligations;
 - a clause should be included in all standard contracts requiring contractual compliance with ethical standards, so as to establish the principle that contracts can be rescinded (terminated) for breach of ethical guidelines (e.g. payment of bribes);
 - all bids should include a full disclosure statement of all commissions, fees etc. paid already or to be paid in the future in connection with the contract to any officials, their relatives or appointees, or to any agent, middleman or other person;
 - bidders should be advised that the winner will be expected to sign and submit a similar disclosure commitment for the entire period of contract implementation;
 - bid opening must be truly open to the public, meaning it must be announced publicly with adequate time allowed, and it must be held in a place where public attendance is really possible;
 - the award decision must be documented and published as being in accord with the criteria published in the invitation to tender, in a standard form that lists, at a minimum, all bids received, major elements of the evaluation process and the specific reasons for selecting the winner;
 - evaluations should be conducted by a group of experts with independence and free from interference from officials or the private sector; and
 - the evaluation and consideration of alternative proposals must be totally transparent and conducted with absolute fairness.

Dealings with Contractors II – Contract Implementation/Execution

33. The opportunity for corruption does not end with the award of the contract. Particularly in the case where a contractor has submitted a low bid to win the contract, he will employ many tactics to raise the value of the contract in execution to increase his profit. The contractor may either already have a criminal deal with one of the inside officials, or he may rely on his skill or on bribery after the award to get away with substandard work or to be allowed price adjustments. A favorite practice here is the “phantom number” where the crooked official – as an example - has included, in the specifications, the need for “heavy rock removal over a stretch of 10 kilometers”, which causes all uninitiated contractors to provide for a big cost item for the removal of the rock, while the crooked, initiated contractor has been told by the official that there is no rock and thus can afford to enter a low bid. Where a criminal deal already exists between contractor and official, the contractor will now do subspecification work (less concrete than specified, or lower quality cement, lesser quality cables, substitution of lower quality materials, shorter time for curing etc) and rely on his “friend” not to question or record these subspecification activities. Or the contractor will submit one price variation (or change) order after another, all small enough that the official “friend” is authorized to approve them without recourse to higher authority, but in the aggregate bringing total project cost to a multiple of the amount originally contracted. If the criminal contractor does not have a deal when he is awarded the contract, he then will be under great pressure to bribe the inspectors or other officials to accept low quality work or components, improper substitution of materials, inclusion of incorrect variations to contract, contract extension, price variation and many other potentially unethical practices.

34. To overcome such practices, strict monitoring and auditing of contract performance by other persons is essential. Such monitoring can be done by one of three actors: Other officials of the principal (from a department other than the one in charge of carrying out the project), independent professional inspectors or members of a Civil Society organization. Our recommendations in this area are :

- compliance with the contract by the selected supplier or contractor must be scrupulously in line with all the specifications which were the subject of the competition;
- all components and works that were part of the assessment of a dam project must then also be fully carried out, e.g. all social, environmental and siltation control measures, or any commitment to supply water to a disadvantaged area etc; too often, such “peripheral” social, environmental and other measures are part of the contract, but they may be given lower or subsidiary priority, funding may be a problem and may in fact not be mobilized in time, or the official in charge of contract implementation is simply not interested in those measures, and since no outside monitoring takes place, the delay and eventual dropping of those activities is never noticed, or not until it is too late;
- there needs to be thorough, competent, continuous supervision of implementation performance, both by department-inside officials and by independent expert outsiders, or by a Panel of Experts as has been used by the World Bank or other IFIs;
- if supervision is carried out on behalf of the principal by a Consultant, rules as above for the selection of consultants must apply;
- for major civil works projects, especially those spread over a large area, there should be checks on quality control by an independent expert body such as a technical university;
- the following four tests must apply to any change order or contract variation :
 - Is it a valid contract variation? (or is by any chance the scope of work in the contract variation already covered within the base contract)
 - Is the contract variation properly priced ?
 - Was the work actually performed ?
 - Is the contract variation appropriately allocated ? (i.e. extra cost due to design defects should be the responsibility of the architect or engineer; approved material substitutions should result in “credit” change orders to the government’s benefit);
- contract variations must be carefully monitored, individually and in the aggregate;
- when a contract variation or change order individually or together with all previous contract variations in the aggregate is in excess of 15% of the original contract value or involves a substantial change to the specifications on which the tender was awarded, approval must be obtained from the same higher authority that awarded the original contract, and NOT just the principal’s site engineer; in the interest of not delaying the construction, such variation may be allowed to proceed once approved on-site by the principal’s engineer, but it should then require confirmation by the higher contract authority within a short period of time, say 15 days, without which work would have to be suspended;
- the transfer or selling of contracts or substitution of contractors and change of domiciliation of payment are discouraged and need the written approval of the original contract award body;
- where a contractor, supplier or consultant has been found to have engaged in materially unethical or illegal conduct, yet compelling justification exists for nevertheless awarding a contract to that contractor or not terminating an existing contract with that contractor (such as long delays and cost increases caused by the process of selecting a new contractor), the government can require the contractor to retain at its own expense an independent monitor (appointed by the government) to monitor the contract performance and compliance with all relevant laws and regulations.

Operations and Decommissioning

35. For any large investment, adequate maintenance of the completed asset is important; maintenance deferred too long can lead to rapid deterioration of the asset and the need for major expensive repairs. For large dams and the associated systems, good maintenance is absolutely essential, for the dam itself and way upstream and downstream, unless one is prepared to accept not only a rapid deterioration of physical assets, but also of the economic benefits expected from this large investment.

36. For example, upstream of any dam one needs to scrupulously carry out the necessary siltation control measures, like afforestation and control of logging and agricultural activities in the run-off area. The economics of a dam depend on the assumed operational life span of the reservoir; if that active life is shortened (or the reservoir capacity more rapidly reduced) by a faster siltation rate than had been assumed, the economic justification can erode quickly, and the need for yet another power generation facility, with all its economic and social problems, will raise its ugly head again. Experience shows that this aspect of asset maintenance often is neglected; it is also not uncommon that those, whose economic activities in the catchment area are restrained by the siltation control and other maintenance requirements, will use bribery and other influence in order to escape the strict application of the rules. Here again, close and regular monitoring is called for.

37. Downstream of any dam, but particularly one designed for irrigation and/or flood control purposes, major investment takes place to reap the full benefits from the dam. Again, these investments need to be fully implemented in order to get the planned benefits. It is quite common that the funding for such downstream activities is not yet available when the dam is built; full implementation must be monitored and insisted upon. Once the irrigation canals and tertiaries have been constructed, continuous maintenance is essential; without it, such systems lose their efficiency and usefulness very rapidly. Maintenance by the actual beneficiaries (the farmers) is often more effective than by government departments. In addition, clogged irrigation systems can cause safety hazards in times of flood. Corruption is often at work in influencing those responsible for maintenance to defer or reduce the needed activities in favor of something else. Only adequate monitoring can prevent this from happening. Other issues one needs to pay attention to are additional projects upstream or downstream, issues of water quality etc.

38. For some major physical investments it is necessary to plan for decommissioning activities from the very outset, and indeed to include the cost of decommissioning in the original cost-benefit calculation. This is true for large dams, as it is for nuclear power plants and other plants dealing with toxic materials. When a dam is taken out of service, one may utilize the lake for recreational purposes, and any additional investments needed for that purpose will be part of the "recreation project". However, the cost of taking down and sealing off the power and irrigation installations, and the cost of making the entire dam ensemble safe and accessible to the public should be part of the original project design, and the contracting for its execution should follow the same rules as apply to all other contracting, including all safeguards against corruption.

Monitoring of Contracting, Implementation and Operations

39. An essential instrument for assuring the propriety and correctness of the contracting and implementation processes is a systematic and reliable internal and external supervision and monitoring process, by people with the necessary expertise and adequate resources to carry out that obligation. Internal supervision and auditing should be done by officials who were not involved in prior stages of the process.

40. Foreign donors and lenders including the International Financial Institutions (IFIs) will normally retain the right to carry out their own supervision. However, this supervision rarely provides the necessary density of monitoring (in space and time) that alone will provide adequate assurance of full compliance with the contract. Host governments cannot hide behind the IFI's supervision rights and argue that the IFI's supervision substitutes for their own obligations. Adequate supervision and monitoring is the full responsibility of the principal.

41. Very effective is the monitoring performed by external monitors, either a Civil Society organization or a professional "Independent Private Sector Inspector General" (IPSIG). TI recommends that Civil Society organizations (including but not necessarily limited to, TI National Chapters or TI-NCs) be invited by government to provide monitoring of the entire process, from planning and preparation of a project to the final decommissioning. Critical in this context is the access by Civil Society to the necessary expertise; this may be available from within the CS organization, or it may have to be contracted from outside.

42. In several documented cases, especially in Argentina, Colombia and Benin, Civil Society and especially TI National Chapters have played critical and highly effective roles in coaxing governments, officials, contractors, the private sector in general and the media into acceptance of a transparent approach and in executing this transparency.

43. Two issues that have plagued TI-NCs in this respect consistently were (i) access to expertise and (ii) funding, for their activities both during the preparatory phase and during the much more involved and staff-intensive implementation phase. As far as the expertise is concerned, TI's group of international Resource Persons is slowly growing, even though still much more effort is needed to accelerate and systematize the development and the broad accessibility to such expertise. But as the use of TI's recommended procurement transparency efforts grows, it is becoming clear that TI itself will not be able to meet all needs in this regard. Both during the contracting phase, and especially during project implementation, TI-NCs may have to call in and rely more and more on technical experts found in the market. This of course further increases the monitoring obligations of the NC. And it exacerbates the second issue, that of funding for these NC activities.

44. In Benin some of the smaller bilateral donors have in the past been highly supportive and most likely will continue to be supportive in covering such expenditures. In more developed countries (such as Argentina and Colombia), the cost of NCs exercising this function may have to be covered at least in part by the governments themselves, although one must take extreme care that reliance on government funding will not undermine or jeopardize the all-important independence.

45. Another issue sometimes encountered is the legitimate confidentiality of proprietary information, to which Civil Society representatives would gain access; however, this can be protected adequately through an appropriate contractual stipulation. TI-COLOMBIA indeed was offered access to some proprietary information; it accepted the right of access, but in the event declined to use it.

46. When designing the monitoring role for Civil Society, one should look at the following criteria (most of which were developed in Panama, Buenos Aires, Colombia and Benin):

- Monitors should be highly respected people of unquestioned integrity;
- Monitors should possess (or have easy access to) the required professional expertise;
- where the local members of Civil Society do not possess the required expertise, they should promptly contract such expertise from outside, including where necessary from overseas; non-availability of expertise means that problems may not be discovered,

convincing professional corrective proposals could not be submitted, and the monitors would not gain the respect of the officials;

- individual Monitors should not be subject to a veto by Government;
- Monitors should have free and unlimited access to all relevant government documents, to all relevant meetings and to all relevant officials;
- Monitors should raise issues and complaints first with the authorities, and only when no corrective action is taken within a reasonable period of time, be free to go public;
- Monitors should be prepared to offer a limited Pledge of Confidentiality regarding certain business type (proprietary) information;
- Monitors will have full access to and review the tender documents, the evaluation reports, the award selection decision and the implementation supervision reports, technical as well as financial; they will participate in meetings and they have the right to ask questions.

47. Where no suitable Civil Society organization exists as yet, or where the government has insurmountable objections to the involvement of Civil Society, it may instead employ what in some US cases has been called an “Independent Private Sector Inspector General” (or IPSIG). The IPSIG, a private sector company or group of individuals, would of course come with the necessary expertise and it would have all the rights listed above for Civil Society organizations; such an arrangement can be acceptable provided the IPSIG is given not only full access but also has the contractual right to seek correction of any procedural problems or improprieties and, if no correction takes place, to inform the public of the impropriety.

Accountability of Consultants, Contractors and Suppliers

48. As indicated earlier, it is essential that the sanctions available to the government when its contracting partners breach ethical and performance standards are implemented without fear or favor:

- anybody found to have bribed, committed price-fixing or bidrigging, or provided sub-standard or subspecification goods or services, whether or not in collusion with any official, should be debarred from future contracts with the government, indefinitely or for an appropriate period of time, and should also be subject to the following contract sanctions:
 - loss or denial of contract;
 - forfeiture of the bid or performance security; and
 - liability for damages, both to the government principal and to competing bidders;
- firms that have been debarred could be re-admitted after complying with certain requirements, such as paying damages, terminating the staff that actually bribed, introducing an effective no-bribery policy in the firm, and systematically implementing that new policy through a compliance program.

49. International Financial Institutions and other donors/aid givers should also be requested to apply sanctions (including debarment) against firms violating the anti-corruption rules.

Problems encountered by Major Investment Projects

50. Even though it may not be possible to demonstrate that all or some of the problems encountered by many major investment projects around the world were due to corruption, there is often a strong presumption that extortion, bribery, collusion or fraud have played a significant role in a decision making process that ended up damaging the host country economically, financially, environmentally, socially and/or politically.

Several major airports constructed or planned in the last two decades in Europe (e.g. Munich, Frankfurt, Berlin) have encountered substantial cost and time overruns. In Munich, an airport with a planning cost figure of DM 1.6 billion was contracted at DM 3.1 billion, and the expenditures reached DM 8.5 billion before several project components had even been started. In Frankfurt, the State charged contractors and officials with collusion (submission fraud), extortion and bribery and it is assumed that the cost of the project was significantly increased as a result of the criminal actions. In Berlin, there is serious suspicion of personnel links between the planning consultant and one of the successful bidders. In the City of Munich, subsoil construction activities over many years were regularly tendered among a limited number of contractors, who had indeed run a well-organized cartell which pre-determined the winner of each new “competitive tendering” and the price to be charged. In this case, the cartell had a city official on its payroll who provided the needed information including the “confidential cost estimate”.

51. In the 1970s and 1980s, large dam projects in many countries ran into difficulties and cost overruns in circumstances which strongly suggest malfeasance along the way. The Mahaweli Ganga multi-dam development in Sri Lanka led to significant competition among major donors (i.a. Canada, Germany, Japan, UK and the World Bank) which in turn made it extremely difficult to achieve technical and economic efficiency and enabled individual politicians to influence the decision making. On the Narmada development in India, the original plans included resettlement schemes (inadequate as they may have been in retrospect), but they were either not carried out at all or at a pace and in a manner which imposed a heavy social cost on the people affected by the construction program. On several dams built in South America, social and environmental concerns were totally neglected, and there is the strong likelihood that corruption was involved in obtaining the political backing for them. On the very large water transfer project in Lesotho, evidence is emerging that several contractors influenced the procurement decisions by bribes. Legal action is presently underway.

52. The long-planned Arun River power development in Nepal was finally abandoned in the early 1990s when the World Bank decided to withdraw from the financing group on the ground that neither the economics nor the resolution of the social and environmental impact of the project had been sufficiently demonstrated. Considering the long preparation phase and the ever-changing fortunes of this project, one must suspect strong political influence-peddling. There also was a question as to whether the people in the project impact area, when asked about their support for the project, were fully and adequately informed regarding their access to power from the project or the location and siting of the access road.

53. In Pakistan, the development – over a period of some thirty years – of the Indus River water resources also has encountered many technical, financial and environmental problems. The major (and very costly) technical problem encountered at the Tarbela Dam soon after commissioning may have been unavoidable. But the long-delayed completion of the downstream irrigation and drainage investments as well as the political inability to agree on a water-sharing formula between the provinces led not only to highly inefficient water use, but to a disastrous overwatering in parts of Pakistan (partly in order to establish “historic” water use rights) and subsequently to highly destructive salinization. Although additional major investments were then made to build massive drainage infrastructure, it is very doubtful that the large area lost to agricultural production due to salinization can ever be reclaimed again. Clearly, political corruption has been a major factor in this unfortunate development.

54. In a celebrated case in Tanzania, bribery seems very much to have been behind a decision of the Government in the early 1990s to contract with private foreign investors for the installation of inefficient oil-fired power generation equipment and the long-term obligation of Tanzania to accept and buy large quantities of power at a price that would have been a

multiple of the cost of power generated by the burning of natural gas. The price to be paid by Tanzania for this blatant misinvestment was so high that a later Government decided, after long hesitation and finally responding to intense pressure by the World Bank and the angry public, to cancel the contract, despite a hefty contractual penalty.

55. Many other investments with a basically adequate degree of economic justification have been adversely affected and made more expensive by corruption. But there are many projects around the world which had no economic or social justification at all, and which were financed and constructed due to political and business corruption, draining the financial resources of the host country first to pay its share of the construction cost and then to operate and maintain a facility which was not needed in the first place. Many of such investments are the result of reckless grant or low-cost credit financing by donors who may have been more interested in creating a business opportunity for their domestic contractors and suppliers than in fostering the development in the host country. Such investments include new power stations in a country with adequate, albeit inefficiently operated, generation capacity, four-lane highways to presidential palaces with little traffic, bridges that lead nowhere and carry no traffic, or high-tech teaching hospitals whose existence forces the host government to shift scarce medical personnel from rural clinics, where they served a basic support function for the population at large, into a facility that serves a few rich people and allows expensive medical research.

56. In stark contrast to these examples stands the Airport Core Programme (ACP) in HongKong, which includes a brand-new airport on reclaimed land, a railway link with the city, a new harbor tunnel and a new town. This massive investment program was completed over about eight years (1991-1999) on schedule and within its budget of about US\$ 21 billion. The most remarkable achievement is that this investment program was carried out with practically no corruption – largely due to the existence of four factors:

- the existence of a clear and strict Prevention of Bribery Ordinance and of a strong, central anti-corruption institution (the Independent Commission against Bribery or ICAC), which has impressive legal powers and adequate (one is tempted to say, generous) staff resources to carry out its tasks and whose track record has led to HongKong's reputation as a low corruption zone backed by vigorous enforcement;
- the existence of clear rules
 - for the selection/procurement of consultant and construction services and of equipment supplies,
 - for the effective supervision and monitoring of the implementation of all contracts,
 - for the enforcement of accountability among the Government's own staff and the consultants and contractors, and
 - for Dispute Resolution;
- the establishment, for ACP purposes, of special institutions such as the New Airport Projects Coordinating Office (NAPCO) and the Engineering and Associated Consultant Selection Board (EACSB); the NAPCO had a flying dispute resolution team, which stepped in whenever a problem occurred; and
- a favorable working environment, including appropriate salary levels among government servants, a high degree of professionalism and pride among the officials, a relatively small society in which businessmen caught bribing or otherwise trying to manipulate the processes find it difficult to obtain other business, making any effort at corruption a high-risk activity.

Some of these factors, especially the first three, can easily be recreated by any government desirous to eliminate corruption in the country. Others may take longer.

Identification of Process-Points which are particularly Corruption-Prone

57. Corruption may happen at any stage of the process cycle and one needs to be watchful at all times. The larger the investment, the higher the temptation to manipulate and influence the process in one's own favor. There are several points in the process which are more likely than others to induce efforts to "corriger la fortune".

58. Consultants have a particularly powerful function in the early stages of a project. Being involved in assessing the basic need for additional power generation, determining the site for a new investment or setting its technical parameters (thin arch, regular concrete or rock fill) involves a significant degree of judgment and discretion. If the consultants are associated in some way with a contractor who has successfully built thin arch dams, it should not surprise anybody if the consultant comes up with the proposal to build a thin arch dam, even though the topographic and rock conditions might favor a rock fill dam; the number of contractors who can build thin arch dams is very limited, and it will take little extra effort to propose special design features which in fact only one or two contractors can meet. Equally, for the decision whether to go for one large dam or a series of smaller dams, a close working relationship of the consultant with a builder of large or smaller dams may well influence the consultant's position as to what to recommend. But the intent to manipulate the process does not necessarily come from the consultant. It is quite conceivable that a politician in the host country strongly prefers a thin arch dam over a rockfill dam design (e.g. he might be bankrolled by the local cement industry) and is prepared to offer some "token of appreciation" to the consultant if he comes up with the "right" design proposal. Or the consultant is torn whether to state that there is little suitable land available for resettlement or that plentiful suitable land is available, albeit at some distance from the project site (where a different tribe happens to be in control, making it highly unlikely that a resettlement scheme will work there). Or the consultant has to choose between saying that going forward with the project will lead to serious environmental problems, or that the environmental concerns are easily dealt with. There always are parties which have a strong economic interest in wanting a particular outcome of a decision, and often they are prepared to try to engage and change a government's decision by influencing a consultant's proposal.

59. The way to deal with this concern is to take great care in the selection of the consultant, having made sure that there are no hidden personnel or personal links between the consultant and any potential contractor or supplier, to require a pledge of integrity and a pledge by the consultant to disclose any factors that would reduce the consultant's independence. Applicants for the consultancy assignment should be required to demonstrate their technical and financial competence, their unblemished record in terms of corruption and fraud (no convictions or investigations), and they should be asked to provide a double pledge – that they will propose a balanced, non-discriminatory design (so as not to favor one contractor or supplier over the others) and that they will not accept any bribe against a promise, that they will steer the decision making process in the bribe giver's direction. At least one international association of consulting engineers (FIDIC) requires of its members a pledge of integrity; as a minimum, consultants applying for an assignment should be asked to state whether they have committed themselves to such a pledge as part of their association membership.

60. Officials or politicians will often come under suspicion – for good reason – that they try to influence the decision making, because one or the other decision will benefit them directly or benefit one of their political supporters. Such suspicions can be laid to rest only if the entire consultant selection process is carried out with full transparency, where the selection criteria are publicly known and are fully applied, where the several proposals are made public, where the application of the published criteria to the proposals is publicly announced, and where an independent checking process to verify the suitability of the consultant and the quality of his proposal is available.

61. Another area where consultants or a government department itself may wish to influence the decision making through bribes is in the establishment or assessment of public opinion or support for a project proposal. If the instrument of a public survey is used, the construction of the survey and the sampling technique used can easily swing the outcome one way or the other. "Buying" public support for a project can be a real temptation and should be guarded against vigorously.

62. Next to the consultants, it is the selection of contractors and suppliers which is particularly prone to corruption. Many contractors or suppliers interested in obtaining a contract will make every effort to influence the decision making, and the more experienced firms will not wait until an invitation to tender has been published, but they will establish and "cultivate" their "contacts" long before that event. They will identify the decision makers and often will not immediately wave the big carrot but will offer small favors, without asking for anything in return, repeat that process with ever larger favors, and finally, when the tendering process is reaching the critical stage, demand inside information that gives them the edge over their competitors, preference in bid evaluation or simply "sole source contracting". The "favors" offered can reach from money deposited into a foreign bank account to jobs for family members, expensive traveling etc. Incidentally, all such offers of "favors" made by firms from countries which have ratified the OECD Convention against Bribery of Foreign Officials are now a criminal act and should be reported to the relevant state prosecutor's office.

63. The most effective barrier against corruption in contracting is the use of open competition (allowing everybody meeting technical, financial and other criteria to submit a bid). Most jurisdictions have this requirement, yet in most jurisdictions the rule is not the practice: Excuses are made for limiting the access to the competition, on the grounds of urgency, protection of domestic jobs etc., with the common result that substantially higher prices are accepted than would have been necessary. Governments should insist on open competition, prescribe the acceptable grounds for exceptions very narrowly, and require a written explanation every time the rule is broken, so as to allow post-checks.

64. Through bribes a firm may try to influence an official to make the award to the briber outright, or to limit the circle of firms allowed to participate in the bidding process, or to release to the briber inside information which would give the briber a clear advantage over the competitors, to release information about the competitors' technical or financial bids, or to enable the briber to change his bid after having received information about the bids of the competitors. Quite frequently several bidders will restrict competition by fixing the price to be bid and determining who the winning bidder will be; this is possible if instead of open competition (free to everybody meeting the technical and financial requirements) there is limited competition and all the bidders acceptable to the government are known in advance. "Submission fraud" is a crime in many countries now. It becomes straight corruption if, as is usually the case, the members of the group (or "cartell") have bribed an inside official and obtain price and technical information from him, giving them an unbeatable advantage over other bidders.

65. One device often used by such firms is that the favor is offered to the official not by a staff member of the firm itself but through a private agent; in many countries such "agents" are a customary instrument for firms to obtain business. If the agent is caught having bribed an official, the firm simply says it paid a traditional commercial "finder's fee" to the agent and had no way of knowing what the agent did with the money (as happened in the celebrated Singapore bribery case in 1995 when five major international exporting companies were caught having bribed a Singaporean power official through a free "agent" and were consequently blacklisted by Singapore for five years). Many such agents carry out entirely legitimate business in assisting firm to obtain business, but many of them use "contacts",

“friends” etc who need to be paid in order to use their influence. The size of the fee often is a good guide to determine whether the agent’s role was legitimate or not. A fee in the amount of 3-5% of the contract value may well be legitimate; a fee in the amount of 20% of the contract value suggests strongly that one is dealing with bribe money. One easy way to deal with this is to require bidders (when the tenders are submitted) to list in detail all fees, commissions etc. paid by them to anybody, at any time, in connection with this contract.

66. One rather unusual manifestation of corruption appears in cases where an exporter of goods or a contractor need special export licenses or permits from their own government: In such cases, the exporter sometimes bribes those officials in his own country to obtain the needed export license (in addition to having bribed the officials in the destination country as well).

67. After a contract has been awarded, the implementation phase also offers many opportunities for corruption and manipulation, through which the corrupt contractor tries to recover the amounts he spent on bribery before, or to make up for the low bid he made to get the contract. This can be in different forms:

- use of sub-specification materials such as cement or steel,
- sub-specification construction such as a highway layer thinner than specified (and required to meet the prescribed lifespan of the road), or
- billing for a larger quantity of materials than actually used (cable etc).

In such situations usually the government’s site engineer or the inspector has been bribed to look the other way. This common practice can be addressed by multi-layered inspection responsibilities including – in certain circumstances – the employment of an independent checking engineer.

68. Another common practice, with the objective to retroactively increase the contract value, is the frequent use of change or variation orders. All civil works contracts may run into unexpected problems and call for legitimate changes to design, quantities or price. But such change orders also invite the corrupt and need to be tightly controlled to avoid abuse and large-scale corruption. If the government’s site engineer has the authority to approve change orders up to a certain limit, it can happen that a continuous string of small changes are put through, with the end-result that the value of the contract may be a multiple of the amount that had been approved by the authorities, without any of the higher officials knowing about the cost escalation. To control such abuse, there should be a multi-layered structure for the approval of such changes; and if such changes, alone or in the aggregate, reach a certain level (say, 15% of the contract value) then the central tender board or similar body, which had to approve the original contract award, should once again be called in to deal with the change orders. The same is true for supply contracts, where often inspectors are sent by the government to inspect the quality and compliance with specifications of the goods being manufactured. Again, the inspector may be bribed and corrupted, and arrangements such as the four-eyes principle or regular rotation to prevent close familiarity need to be put in place.

69. Similar corruption opportunities emerge once a project has been completed and is operated. And the major problems encountered during planning, contracting and construction are all repeated on a large scale when it comes to decommissioning of a large asset such as a dam, a reservoir, a nuclear power station or a toxic plant. Here all the precautions described above are necessary all over again.

70. At all stages of these processes, the best barrier against corruption is a higher degree of transparency: corruption thrives in the dark only. If relevant information is made widely available, then it is much more difficult to manipulate the process. The bids, the evaluations and particularly the reasons for selecting the winner should be made publicly known or accessible.

71. For additional means to reduce or prevent corruption, please refer also to the previous paragraphs on Procurement Principles, Legal Aspects, Administrative Rules and Contracting. One specific concept developed by TI in this context is the Integrity Pact, described in the following paragraphs.

The TI Integrity Pact I – The Concept

72. In order to assist countries, which are prepared to introduce transparency and integrity into their contracting and implementation process overall and wish to set a public precedent of their commitment, TI has developed the Integrity Pact (IP).

73. The concept of the Integrity Pact (IP), originally called the „Islands of Integrity“ concept, was developed by TI in the mid-1990's. The main criteria of the concept have been, and still are

- a pact (contract) among a government office (inviting contractors or suppliers to submit tenders for a public sector project – the „principal“) and those companies submitting a tender for this specific project (the „bidders“);
- an undertaking by the principal that its officials will not demand or accept any bribes, gifts etc., with appropriate disciplinary or criminal sanctions in case of violation;
- a statement by each bidder that it has not paid, and will not pay, any bribes “in order to obtain or retain this contract” (thus excluding facilitation payments),
- an undertaking by each bidder to disclose all payments made in connection with the contract in question to anybody (including agents and other middle men as well as family members etc of officials);
- the explicit acceptance by each bidder that the no-bribery commitment and the disclosure obligation as well as the attendant sanctions remain in force, for the winning bidder, until the contract has been fully executed;
- undertakings on behalf of a bidding company will be made “in the name and on behalf of the company's Chief Executive Officer”;
- bidders are advised to have a company Code of Conduct (clearly rejecting the use of bribes and other unethical behaviour) and a Compliance Program for the implementation of the Code of Conduct throughout the company;
- a pre-announced set of sanctions for any violation, by a bidder, of its statements or undertakings, including (some or all)
 - denial or loss of contract
 - forfeiture of the bid security
 - liability for damages to the principal and the competing bidders and
 - debarment of the violator by the principal for an appropriate period of time.

74. The IP will establish contractual rights and obligations of all the parties to a procurement contract and thus eliminate uncertainties as to the quality, applicability and enforcement of criminal and civil legal provisions in a given country. This means that applying the IP concept can be done anywhere without the normally lengthy process of changing the local laws.

75. The IP is intended to accomplish two primary objectives:

- to enable companies to abstain from bribing by providing assurances to them that
 - (i) their competitors will also refrain from bribing, and
 - (ii) government procurement agencies will undertake to prevent corruption, including extortion, by their officials and to follow transparent procedures; and
- to enable governments to reduce the high cost and the distortionary impact of corruption on public procurement.

76. Beyond the individual contract in question, the IP is of course also intended to create confidence and trust in the public decision making process in general, a more hospitable investment climate and public support – in-country – for the government’s procurement, licensing and privatization programs.

77. From the outset it has been expected that Civil Society in the respective country would play a key role in overseeing and monitoring the correct and full implementation of the IP. Two arguments often raised against such a monitoring role for Civil Society can easily be disarmed:

- Availability of the necessary expertise among the Civil Society monitors, where it does not exist among the regular members, can be assured by contracting genuine experts; and
- the legitimate confidentiality of proprietary information, to which Civil Society representatives would gain access, can be protected adequately through an appropriate contractual stipulation.

There has been no change in these main criteria and objectives. There have only been some broadening of, and refinements to, the concept, as explained below.

The TI Integrity Pact II - The Present Model

78. The latest (and current) model of the IP has been developed in the summer of 1999. It incorporates a number of changes which were made after discussions with various interested parties, including governments, companies, International Financial Institutions (IFIs) including the World Bank and the Asian Development Bank, the Court of Arbitration of the International Chamber of Commerce, lawyers and – last not least – members of TI-S and several TI National Chapters.

79. A copy of the (neutralized) latest Model is attached (as Annex A). It consists of an Explanatory Note, a (draft) Government Communication to Bidders, and (draft) Procedures for Bidding.

80. The “broadening” refers to the suggestion, contained in the “Explanatory Note” to the Model, that the IP concept is suitable not just for construction and supply contracts, but equally for the selection

- of (engineering, architectural or other) consultants,
- of the buyer/recipient of state property as part of a government’s state asset privatization program, or
- of the beneficiary of a state license or concession for oil or gas exploration or production, mining, fishing, logging or other extraction rights, or for government-regulated services such as telecommunications, water supply or garbage collection services.

81. The “refinement” refers to many changes in the original concept document which are too numerous to list; only a few merit mentioning here:

- The “liability for damages” has been modified so as to provide for “liquidated damages”, i.e. a pre-determined level of damages (a certain percentage of the contract value) which will apply unless the principal can demonstrate that the actual damage is higher, or the bidder responsible for damages can demonstrate that the actual damage is lower.
- The venue for collecting damages will be “international arbitration under the rules of the International Chamber of Commerce”. Relying on the jurisdiction of a Northern country is likely to be unacceptable to principals in a Southern country; equally, relying on the national jurisdiction of a Southern country is likely to give little comfort to bidders from Northern countries; thus the consensual choice of arbitration by the ICC Arbitration Court, with place of session, applicable law and number of arbitrators to be agreed between the parties, will give adequate comfort to all participants of the agreement.

- Considering that “agents” and “middlemen” often are used primarily as instruments for paying bribes, the Model contains a stipulation that payments to agents must not exceed “appropriate amounts for legitimate services”. This language stems from the ICC Rules of Conduct (“Extortion and Bribery in International Business Transactions”, 1996 Revision). In fact, many globally active companies have begun to refrain from using such agents or middlemen.
- “Officials” of the principal will be required to disclose their own and their family assets, on a regular basis, so as to offer a handle if such officials acquire wealth the source of which cannot be explained.
- Consultants commit themselves not only not to pay bribes in order to obtain a contract, but also to design the project or project components in a manner that is totally non-discriminatory, assures wide competition and will not offer advantages to a specific bidder.

82. One question very often asked is “what kind of evidence is required to be certain of a violation by a bidder” so as to trigger sanctions? Suspicion alone cannot be enough. Clearly, a criminal conviction for bribery is the most persuasive evidence, but then a criminal conviction is rarely obtained, and if it is obtained, it usually comes much too late to be of any help in administering prompt sanctions. German practice is to treat a no-contest statement or an admission of guilt as equally persuasive, and recently the practice is emerging of considering it as adequate evidence of a violation if “on the basis of the facts available there are no material doubts”. The judgment would be made by the office triggering the sanctions in collaboration with the prosecution or judicial authorities.

83. In judging the suitability of the IP Model one should take into account that since February 15, 1999, the OECD Convention makes bribing a foreign official a criminal act in all states that have ratified the Convention (at this writing, 18 out of 34 signatory states, but all the other signatories are likely to follow soon), and in many of those countries the tax deductibility of bribes, which had been allowed previously, has been abolished. Bidders from many countries thus face a fundamentally different legal situation from the one they had operated under for years, and they should be prepared to enter into agreements designed to provide a “level playing field” for all competitors irrespective of whether they come from countries bound by the OECD Convention or not.

Conclusion

84. Administering the decision making process on large dams requires particularly comprehensive, careful and sensitive behavior by officials, it suggests the full involvement of all the stakeholders in the process from the very beginning, and it calls for the widest kind of transparency of the process to assure that all legitimate aspects of social, environmental, economic, financial and political impact are adequately taken into account. Such transparent processing will also make manipulative and abusive behavior by officials and contractors much more difficult and most likely reduce corruption significantly. Transparency is not in the tradition of most administrations. Recently the call for transparency has entered the jargon employed by officials in governments and international institutions. Civil Society, of which Transparency International is a proud part, is now challenged to help translate the political call for transparency into reality. Believing firmly in the true benefits of transparency, TI submits this set of proposals for serious consideration by the international community.

Planning a Project Cycle

Strategy Planning, Feasibility and Design

If a Government believes that it needs additional power generation capacity

- ideally a power development strategy exists which justifies a new generating facility;
- in the absence of such a strategy, the government needs to explore
 - the scope for savings in present consumption by better demand management and for
 - higher efficiency in present generation, transmission and distribution installations;
- if need for additional capacity is confirmed, government has to consider
 - cost and technical advantages and disadvantages of thermal, wind, solar, nuclear and hydroelectric generating capacity, taking into account
 - whether base or peaking power is needed
 - investment cost vs. long-term running costs
 - whether economy of scale suggests a larger capacity plant, by selling part of the power generated outside the country
- if hydroelectric power is confirmed as desirable, the large dam solution has to be compared to alternatives such as several smaller or many mini-or micro-hydel installations
- in some countries, there is little choice of suitable hydel sites, in others there are choices among several potential sites, which will differ from each other with regard to
 - the water flow and other geographic, topographic and technical characteristics
 - the investment costs (for the project proper and its interconnection with the grid)
 - the operating costs
 - the social and environmental impact (and related costs)
 - the long-term maintenance and operating costs

If a Government decides to build a large dam for irrigation and/or flood control purposes, the site, at least the valley, is predetermined, but for selecting the specific site on the river, the same considerations apply as for hydroelectric dams.

- if the large dam (hydel and/or irrigation/flood control) solution is confirmed as optimal in the circumstances, the government needs to carry out
 - a detailed social and environmental impact analysis
 - a technical analysis
 - an economic/financial analysis

Stakeholder Consultations

- as soon as a dam solution (large dam or mini- or micro-installations) appears desirable, the government needs to bring in, fully inform and consult the stakeholders, in a responsible and systematic manner, by
 - reaching out to the people in the project impact area;
 - providing them with comprehensive and up-to-date information about the project design and all other relevant aspects (including whether or not power will be made available to inhabitants of the valley, whether and where there will be any access roads and whether those access roads will be available to the population at large);
 - requesting the environmental community to address the environmental impact of the project, to evaluate it and if appropriate come up with alternative technical solutions to the project plan;

- provided the dialogue with the stakeholders goes well and it appears that a constructive approach is acceptable to all, or can be fashioned jointly, the government needs to
 - prepare, or get prepared by consultants, a full-scale feasibility study of the project
 - taking into account all necessary upstream and downstream investments as well as all maintenance and decommissioning requirements
 - consult again with the stakeholders on any changes to the project plan suggested by the outcome of the feasibility study
 - once the feasibility study is completed and its recommendations are agreed with the stakeholders,

Detailed Design and Preparation

- the government needs to prepare, or get prepared by consultants,
 - the detailed design for all the necessary project investments, upstream and downstream
 - the final cost estimate for the total project ensemble
 - the maintenance and decommissioning costs, and
 - the final economic justification for the project
- whenever the government employs the services of consultant engineers, architects, accountants or lawyers for any of the preceding steps, it should select its partners on a competitive basis and insist on highest competence (of the firm and the staff assigned to the project), relevant experience, total independence, a pledge of integrity and non-discrimination and full disclosure of all commissions or other payments made in connection with the contract

Contracting

- once the decision has been made to go ahead with the project as designed, the government needs to
 - decide whether it will use a general contractor or individual contractors
 - prepare, or get prepared by consultants, the bidding documents
 - introduce no-bribery pledges (or the TI Integrity Pact) for all supply and services contracts
 - invite bidders to submit tenders
 - open and record the tenders received in a public session (and immediately lock one set of the tenders received in a safe place so as to make manipulation and subsequent changes of the tenders more difficult if not impossible)
 - evaluate (or get consultants to evaluate) the tenders submitted and select the “lowest evaluated tender” (not necessarily the lowest price)
- invite Civil Society organizations to monitor the bid opening and evaluation process
- be responsive to the assessment and recommendations of the monitors
- announce publicly the selection decision together with the criteria employed for the evaluation and selection, the major elements of the evaluation and the reasons for selecting the winner
- if Civil Society monitors identify malpractice, the government will be given an opportunity to correct the malpractice, in the absence of which the Civil Society organization will publish its findings

Final Contract

- when the government signs the contract or contracts for execution of the project investments, it should incorporate no-bribery pledge and commitment to disclose all payments made in connection with the contract

Implementation

- when implementation of supply or construction contracts begins, government should itself make arrangements for close and reliable monitoring by its own staff, it should provide for regular and competent internal and external auditing, and it should invite Civil Society to monitor the implementation, under terms as above
- supervision and verification of contract execution should extend to all aspects of the contract, major as well as minor ones, of the central investment item as well as all upstream and downstream peripheral investments
- supervision should cover compliance with specifications, quality, technical competence, timely execution and appropriate interaction with local stakeholders

Change Orders/Contract Variations

- when suppliers or contractors submit change orders or variations (for specification or price changes) for approval, the government should carefully assess them for legitimacy
- as soon as such price changes reach or exceed 15% of original contract value (alone or in the aggregate), the change order or variation should be resubmitted to the same (central) government decision making body which had to approve the project contract award

Final Accounting

- when the project or free-standing project components are completed, there should be a final verification that all components that were part of the contract have been completed, at the agreed quality, and are properly functioning, by the supervising officials of the government, by auditors and by Civil Society

Operations

- once the construction phase is completed and the investment asset begins to be operated, supervision and auditing need to continue, as well as Civil Society monitoring, to assure that all operational requirements are properly met and that adequate maintenance is performed

Decommissioning

- when the asset (dam) nears the end of its economic life, the government should plan for an orderly decommissioning; it should prepare, or get prepared by consultants, detailed plans for concluding the operational activities of the plant and for decommissioning in a manner which assures restoration to the greatest extent possible of the pre-project state of affairs, maximizes alternative uses of the remaining assets and minimizes the potential adverse technical or environmental impact of the decommissioned plant.

General

- The government should take care that different officials in its administration are given responsibility for the planning and design stage, the contracting, the implementation supervision, the final accounting and the decommissioning. Failing such separation of responsibilities it may be much more difficult to prevent collusion of officials with consultants, suppliers and contractors and to control any form of bribery and other corruption.

Transparency International (TI) Integrity Pact (IP)

Explanatory Note

Background.

1. Corruption can have many manifestations, and countries typically develop a complex set of institutions, laws, rules and regulations (the "integrity system") in order to combat corruption.
2. Bribery and extortion in public sector procurement of goods and services are key manifestations of corruption. "Public sector" in this context includes national or provincial governments, administrations of cities or local communities as well as parastatals and other organizations carrying out public functions.
3. While until now the bribery of public officials of another country has not been a criminal act under the laws of any country (except in the United States under the Foreign Corrupt Practices Act of 1977), the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in December 1997 by the member states of the OECD and five additional countries (Argentina, Brazil, Chile, Bulgaria and Slovakia), which came into force on 15 February 1999, will bring about a major change: Henceforth international bribery of public officials will be a criminal act in all ratifying states. Some of the largest trading nations such as Japan, Germany and the United Kingdom, in addition to the United States, have already ratified the Convention. Also, all signatory states will abolish the tax deductibility of bribe payments. Thus companies doing international business will face a totally new legal situation with regard to their business practices.
4. Many governments and business leaders have recognized the high risk and cost of bribery and extortion and seek ways to curb and eventually eliminate corruption in such transactions. Many business leaders have expressed their desire to stop paying bribes but are held back by the fear of losing orders if their competitors continue to pay bribes.
5. The Government of XYZ (GOX) has embarked on a program to curb corruption, and use of the Integrity Pact (IP) concept for selected contracts will be an important part of that program. Whenever GOX receives assistance from an International Financing Institution (IFI) or another external donor in this program, the IP will be applied to selected IFI/external donor-financed projects as well.

Purpose of the Integrity Pact (IP).

6. The Integrity Pact (IP) is intended to accomplish two objectives:
 - (a) to enable companies to abstain from bribing by providing assurances to them that
 - (i) their competitors will also refrain from bribing, and
 - (ii) government procurement agencies will undertake to prevent corruption, including extortion, by their officials and to follow transparent procedures; and
 - (b) to enable governments to reduce the high cost and the distortionary impact of corruption on public procurement.

7. The IP concept will also be applied in similar situations, e.g. when GOX, as part of its privatization program, invites bidders to tender for the acquisition of government assets, or for the granting of telecommunications, transport, mining, logging or other such licenses.

8. Considering the critical role normally played by consulting engineers (or other consultants) in designing the project, preparing the procurement documents, evaluating the bids and supervising the contract execution, their selection will be subject to the IP concept as well.

9. In XYZ, all forms of domestic corruption are illegal, and GOX will continue to prosecute all offenders.

10. The IP however focuses on *bribery in order to obtain or retain a contract or other improper advantage* (*). This includes any payments or other favors offered or granted in order to (i) win a contract award, (ii) get a contract change order (adjusting the price, the specifications, the time frame for implementation or any other important contract components) approved by the government, (iii) get sub-standard or sub-specification performance approved by a public official or the supervising consultant and their staff, (iv) circumvent tax, duty, license or other legal obligations, or (v) induce an official to breach his/her official duties in any other way. It also includes the demand for, or acceptance of, any payment or other favor by a consultant in exchange for (i) designing a project or parts thereof in a manner that it offers undue advantages to one or several bidders, (ii) giving undue advantage to any of the bidders in the evaluation and selection of bidders for a contract award, or (iii) refraining from properly monitoring project implementation, reporting violations of contract specifications or other forms of non-compliance, or holding suppliers and contractors fully to their legal obligations.

(*) this language is taken from the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, dated 17 December 1997.

Main Features of the IP.

11. The IP is an agreement among the government/government agency and those bidders/companies, who participate in the bidding process for the supply of goods or services for a selected contract/project, *that bribes will not be offered, granted, accepted or sought, both during the bidding/selection process and during implementation of the contract by the successful bidder.* The IP has the following main features:

- a formal no-bribery commitment by the bidder, as part of the signed tender document, [supported by a company Code of Conduct and a Compliance Program];
- a corresponding commitment of the government to prevent extortion and the acceptance of bribes by its officials;
- disclosure of all payments to agents and other third parties;
- sanctions against bidders who violate their no-bribery commitment; and
- an involvement of Civil Society in monitoring the bid evaluation, the award decision process and the implementation of the contract;

alternatively to the involvement of Civil Society, or preferably in addition to it:

- public disclosure of the award decision, including the major elements of the evaluation and the reasons for the selection of the successful bidder.

12. The IP would function as follows:

The appropriate government agency, when inviting contractors or suppliers of goods or services to tender for a specific contract, informs the potential bidders that their tender offer must contain a formal commitment, on behalf and in the name of the bidder's CEO, not to offer or grant any payments or favors in order to obtain or retain this contract or other improper advantage, and not to collude with other actual or potential bidders with the aim of

restricting competition. The bidder's commitment will have to cover all managers and employees of the company as well as agents, consultants, subcontractors and consortium partners of the bidder.

When inviting consultants to submit proposals for any services related to the project, the government agency informs all those invited that their submission must contain a formal commitment not to demand, or accept, any payment or other favor in exchange for (i) designing a project or parts thereof in a manner that it offers undue advantages to one or several bidders, (ii) giving undue advantage to any of the bidders in the evaluation and selection of bidders for a contract award, or (iii) refraining from properly monitoring project implementation, reporting violations of contract specifications or other forms of non-compliance, or holding suppliers and contractors fully to their legal obligations.

GOX on its part has introduced the obligation for all senior officials at the level of Project Manager and above to disclose, on a regular basis, their own and their family's assets and will require each senior official at the level of Project Manager and above associated in some manner with the project to submit a written commitment that he/she has not demanded or accepted, and will not demand or accept, any payment or favor. GOX in general will follow transparent procurement rules.

In substance, these commitments are nothing other than an agreement to respect and apply the existing laws of Indonesia and the other party's country of residence.

13. Because a bidding company acts through many employees and agents, the company's and CEO's commitments should (not least for the CEO's own protection) be supported by a company-wide no-bribery policy (a "Code of Ethics" or "Code of Conduct") and implemented through a compliance program which assures that all employees and agents will be familiar with, and observe, the no-bribery policy and commitment. Where the company already has a written no-bribery policy in effect, it can furnish a copy of that policy together with the compliance program implementing that policy. Where a company does not have such a policy, or does not have a written compliance program, it can prepare a compliance program for the particular contract.

14. A Code of Conduct and compliance program would normally address the following issues:

- an unequivocal statement of the company's policy prohibiting all forms of bribery and collusion;
- the company's policy regarding gifts and entertainment, travel and lodging expenses, political contributions etc;
- distribution of the policy (in appropriate languages) to all managers and employees;
- an acknowledgment of receipt and acceptance by the employees, to be renewed annually;
- training of employees in the application of the policy;
- internal controls, external audit and record keeping; and
- application of appropriate sanctions (including possibly termination of employment) in case of violation.

15. GOX will not evaluate the no-bribery policy/code of conduct and the compliance program adopted by every bidder at the time of bid submission. Only if and when there is cause to suspect malpractice by one of the bidders, that bidder's policy and compliance program will be reviewed and evaluated. Any shortcomings identified then would be relevant to the sanctions, including the length of any period of debarment to be imposed for breach.

16. While it is highly desirable that all companies develop and apply a no-bribery policy and a compliance program, its existence is not mandatory under the IP.

Disclosure of Payments to Agents and other Third Parties.

17. One key lies in transparency relating to payments to agents and other third parties in connection with the contract. There are, of course, good and valid reasons why agents may be engaged to perform legitimate services, and be paid an appropriate amount for such services. However, agents' commissions are a traditional avenue for the concealing of bribes. The IP concept therefore requires that all past and intended future payments to agents and other third parties be disclosed at the bidding stage, and that they be formally recorded and reported during the execution stage by the successful bidder, with certification by an appropriate senior manager. This certification is necessary so that senior managers and the CEO will not be able to disclaim knowledge of malpractice as presently often is the case. This requirement is bolstered by the compliance program which the successful bidder should have in place.

Damages.

18. Bidders who violate their no-bribery commitment during the contract award process, or the successful contractor or supplier who violates the no-bribery commitment during the contract execution phase, or consultants who violate their commitment, will be subject to significant damages.

19. Damages normally will include denial/cancellation of the contract, liability for damages (to the government as well as to the competing bidders), forfeiture of the bid security and debarment of the offender from all business with GOX for an appropriate period of time.

20. In cases where the government debars an offender from government business because of a violation of the no-bribery commitment under an IFI/external donor financed contract, the IFI/external donor should also seriously consider debarring that offender from eligibility for contracts financed by it globally.

21. Damage claims by the government will be in the form of liquidated damages, where an amount equivalent to 8 (eight) percent of the contract value is pre-agreed as "the damage" unless either party can demonstrate and prove that the actual damage is larger or smaller. Damage claims by competitors would also be pre-set at an amount equivalent to 1 (one) percent of the contract value, unless higher or lesser damage can be proven.

Claims related to the contract, including claims for damages, would be resolved by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce.

By empowering unsuccessful bidders to enforce sanctions themselves (through international arbitration), their confidence in the integrity of the process as a whole will be increased.

Role for Civil Society.

22. GOX will make every effort to employ a process which involves consultation among key parties and which leads to the adoption of a methodology which enjoys the confidence of the private sector and civil society. GOX also considers it highly desirable to enlist the support of civil society by providing it access for an effective monitoring role - directly or through expert consultants - and thereby create transparency and credibility for the process. GOX therefore will arrange for prior consultation, possibly in the form of a hearing or hearings with the key actors.

23. GOX is also considering to adopt, either in addition to the involvement of Civil Society, or possibly in its place, a policy of total transparency of the bidding, bid evaluation, award selection and contracting process, through outright publication of all the critical

documents or by giving easy access to relevant documents and information to any interested party.

Concluding Remarks.

24. The IP concept will be presented to the respective bidders as early in the process as possible, so as to assure that the new rules are established before interested parties have had the opportunity to enter into different (traditional) arrangements. This means inter alia that for any contracts with pre-qualification procedures (e.g. major civil works contracts) the bidders will be asked to present their commitment as part of their submission for pre-qualification.

25. The government may begin by testing this IP concept on major contracts for one or several selected projects, or for all projects in a particular sector. Broader application could then follow at a later date when sufficient experience has been gained, and any desirable modifications may have been introduced.

26. The attachments to this memorandum contain:

(a) a model communication from the government to the bidders for the selected contract, which would normally be incorporated into the government's Invitation to Tender; and

(b) a model memorandum by the government entitled "Procedures for Bidding for Public Sector Contracts". These "Procedures" would be attached to the government's invitation to bidders.

These model documents would be adjusted to the specific requirements of the selected contract.

27. Applying the Integrity Pact concept will be one step for the government towards bringing more transparency and integrity into its procurement process. The broader government program to combat corruption will be implemented concurrently as rapidly as possible.

Invitation to Tender for Public Sector Contract

**Model Communication by the Government of XYZ
to all Bidders invited to Tender for the YYY Project
(normally to be inserted in Invitation to Tender)**

1. The Government of XYZ (GOX) is committed to fight corruption in public contracting [and is receiving the assistance of the World Bank and the Asian Development Bank in strengthening its procurement laws and procedures]. As part of this program, GOX has reviewed its arrangements for the letting and implementation of public sector contracts against criteria of transparency and accountability.
2. In an effort to limit the scope for abuse, GOX is introducing new procedures, which GOX is sure your company will wish to support. The objective is to ensure that there is fair competition for government business, and that competition takes place openly and in a manner that provides fair and equal opportunity for all competitors and integrity in contract implementation. The new procedures will also apply to the execution of contracts by the successful bidder/supplier. The new procedures are set out in the attached Memorandum.
3. As part of its confidence building strategy, GOX will treat the oversight and monitoring of the implementation of these new procedures with the highest priority. GOX will pay particularly close attention to the need to prevent any case of extortion, or acceptance of bribes, by GOX officials. We are asking all those bidding for GOX business to assist the government by reporting any instances of this occurring.
4. A special office for the investigation and handling of any reports of extortion or bribery in public procurement has been set up in the [Prime Minister's] Office and can be reached as follows:...
5. GOX hopes to obtain your company's endorsement of these procedures as fair and reasonable, and as having your full support.

Government of XYZ
Procedures for Bidding for Public Sector Contracts:
The Integrity Pact

The following procedures will apply to the letting of contracts for the YYY Project ["Pre-qualification for.....", "Invitation to Tender for....." or "Consultancy Services for....."]. These procedures are in addition to the standard legal and administrative requirements. They will form part of the terms and conditions of each contract and will be actionable, in the event of breach, by the Government of XYZ (GOX) and any of the competing bidders/firms.

1. Each bidder for a supply, construction or other service contract (other than a consultancy) must submit a statement, as integral part of the tender documents, with the following text:

"This Company places importance on competitive tendering taking place on a basis that is free, fair, competitive and not subject to abuse. This Company is pleased to confirm that (i) it has not offered or granted, and will not offer or grant, either directly or indirectly through agents or other third parties, any improper inducement or reward to any public official, their relations or business associates, in order to obtain or retain this contract or other improper advantage, and (ii) it has not colluded, and will not collude, with others in order to unduly limit competition for this contract. The Company understands the material importance of these commitments to the Government and the Government's reliance upon its commitments.

This Company has a No-Bribery Policy/Code of Conduct and a Compliance Program which includes all reasonable steps necessary to assure that the no-bribery commitment given in this statement will be complied with by its managers and employees, as well as by all third parties working with this company on the YYY Project, including agents, consultants, consortium partners, subcontractors and suppliers. Copies of our No-Bribery Policy/Code of Conduct and Compliance Program are attached.

[In cases where companies participate in the bidding which do not yet have a general no-bribery policy/Code of Conduct: "This Company has developed, for the purposes of this tender, a Compliance Program - copy attached - which includes all reasonable steps necessary to assure that the no-bribery commitment given in this statement will be complied with by its managers and employees, as well as by all third parties working with this Company on the YYY Project, including agents, consultants, consortium partners, subcontractors and suppliers."]

[In cases where a government chooses not to require the existence of a no-bribery policy/Code of Conduct: "This Company will make the necessary arrangements so that this no-bribery commitment will be complied with by all its managers and employees as well as by all third parties working with this Company on this project, including agents, consultants, consortium partners and subcontractors."]

This commitment is submitted in the name and on behalf of this Company's Chief Executive Officer.

This Company irrevocably agrees with the GOX to submit to binding arbitration, under the Rules of Arbitration of the International Chamber of Commerce in force at the date of the request for arbitration, any disputes relating to these arrangements."

Note: In the event of an arbitration there are a number of matters which need to be agreed by the parties. The parties should consider including the following clause and reaching agreement on the matters indicated in square brackets: „[The tribunal shall consist

of [one/three] arbitrator[s]. The place of the arbitration shall be [town/city]. The language of the arbitration shall be [English]. Any disputes relating to these arrangements shall be settled in accordance with the laws of [country]].“

2. Each consultant or consultant firm submitting a proposal for a consultancy contract related to the YYY Project must submit a statement, as integral part of its proposal, with the following text:

"This Consultant/ Consultant Firm ("Consultant") places importance on the selection of consultants taking place on a basis that is free, fair, competitive and not subject to abuse. This Consultant is pleased to confirm that (i) it has not offered or granted, and will not offer or grant, either directly or indirectly through agents or other third parties, any improper inducement or reward to any public official, their relations or business associates, in order to obtain or retain this contract or other improper advantage, and (ii) it has not colluded, and will not collude, with others in order to unduly limit competition for this contract. . The Consultant understands the material importance of these commitments to the Government and the Government's reliance upon its commitments.

This Consultant further confirms that it will not demand or accept any payment or other favor in exchange for (i) designing a project or parts thereof in a manner that it offers undue advantages to one or several bidders, (ii) giving undue advantage to any of the bidders in the evaluation and selection of bidders for a contract award, or (iii) refraining from properly monitoring project implementation, reporting violations of contract specifications or other forms of non-compliance, or holding suppliers and contractors fully to their legal obligations.

This Consultant has a No-Bribery Policy/Code of Conduct and a Compliance Program which includes all reasonable steps necessary to assure that the no-bribery commitment given in this statement will be complied with by its managers and employees, as well as by all third parties working with this company on the YYY Project, including agents, consultants, consortium partners, subcontractors and suppliers. Copies of our No-Bribery Policy/Code of Conduct and Compliance Program are attached.

[In cases where Consultants participate in the selection process which do not yet have a general no-bribery policy/Code of Conduct: "This Consultant has developed, for the purposes of this tender, a Compliance Program - copy attached - which includes all reasonable steps necessary to assure that the no-bribery commitment given in this statement will be complied with by its managers and employees, as well as by all third parties working with this Consultant on the YYY Project, including agents, consultants, consortium partners, subcontractors and suppliers."]

[In cases where a government chooses not to require the existence of a no-bribery policy/Code of Conduct: "This Consultant will make the necessary arrangements so that this no-bribery commitment will be complied with by all its managers and employees as well as by all third parties working with this Consultant on this project, including agents, consultants, consortium partners and subcontractors."]

This commitment is submitted in the name and on behalf of this Consultant's Chief Executive Officer.

This Consultant irrevocably agrees with the GOX to submit to binding arbitration, under the Rules of Arbitration of the International Chamber of Commerce in force at the date of the request for arbitration, any disputes relating to these arrangements.“

Note: In the event of an arbitration there are a number of matters which need to be agreed by the parties. The parties should consider including the following clause and reaching agreement on the matters indicated in square brackets: „ [The tribunal shall consist of [one/three] arbitrator[s]. The place of the arbitration shall be [town/city]. The language of the arbitration shall be [English]. Any disputes relating to these arrangements shall be settled in accordance with the laws of [country]].“

3. (a) If a bidding company has a subsidiary in Indonesia, the no-bribery commitment must extend to that subsidiary and its managers and employees as well. If the tender is submitted by the subsidiary in Indonesia, the no-bribery commitment needs to extend also to the parent company and its managers and employees.

(b) Bidders will also be required to submit similar no-bribery commitments from their subcontractors and consortium partners. The bidder may however cover the subcontractors and consortium partners in its own statement, provided the bidder assumes full responsibility.

4. (a) Payments to agents and other third parties shall be limited to appropriate compensation for legitimate services.

(b) Each bidder will make full disclosure in the bid documentation of the beneficiaries and amounts of all payments made, or intended to be made, to agents or other third parties (including political parties or electoral candidates) relating to the bid and, if successful, the implementation of the contract.

(c) The successful bidder will also make full disclosure [quarterly or semi-annually] of all payments to agents and other third parties during the execution of the contract.

(d) Within [one year] of the completion of the performance of the contract, the successful bidder will formally certify that no bribes or other illicit commissions have been paid in order to obtain or retain this contract. The final accounting shall include brief details of the goods and services provided that are sufficient to establish the legitimacy of the payments made.

(e) Statements required according to subparagraphs (b) and (d) of this paragraph will have to be certified by an appropriate senior corporate officer.

5. In XYZ, all forms of corruption are illegal, and the Government will continue to prosecute offenders.

6. The IP however focuses on bribery in order to obtain or retain the contract or other improper advantage, including collusion with others in order to limit competition for this contract. This includes any payments or other favors offered or granted in order to (i) win a contract award, (ii) get a contract change order (adjusting the price, the specifications, the time frame for implementation or any other important contract components) approved by GOX, (iii) get sub-standard or sub-specification performance approved by a public official or the supervising consultant or his staff, (iv) circumvent tax, duty, license or any other legal obligations that should be met, or (v) induce an official to breach his/her official duties in any other way. It also includes the demand for, or acceptance of, any payment or other favor by a consultant in exchange for (i) designing a project or parts thereof in a manner that it offers undue advantages to one or several bidders, (ii) giving undue advantage to any of the bidders in the evaluation and selection of bidders for a contract award, or (iii) refraining from properly monitoring project implementation, reporting violations of contract specifications or other forms of non-compliance, or holding suppliers and contractors fully to their legal obligations.

7. If a bidder or consultant fails to comply with its no-bribery commitment, the following sanctions will apply:

(i) denial or cancellation of the contract;

(ii) liability for damages to GOX, in the amount of 8 (eight) percent of the contract value, unless GOX can demonstrate a higher damage, or the bidder can demonstrate a lesser damage;

(iii) liability for damages to any of the competing bidders, in the amount of 1 (one) percent of the contract value, unless either of the parties can demonstrate a higher or lesser damage;

(iv) forfeiture of the bid security; and

(v) debarment by the Government of Indonesia from bidding or consideration for further public contracts for such period as the Government may deem appropriate.

8. All disputes between GOX and the bidder and/or consultant relating to these arrangements shall be finally resolved under the Rules of Arbitration of the International Chamber of Commerce in force at the date of the request for arbitration.

Note: In the event of an arbitration there are a number of matters which need to be agreed by the parties. The parties should consider including the following clause and reaching agreement on the matters indicated in square brackets: [The tribunal shall consist of [one/three] arbitrator[s]. The place of the arbitration shall be [town/city]. The language of the arbitration shall be [English]. Any disputes relating to these arrangements shall be settled in accordance with the laws of [country]].

9. In cases where GOX debar an offender from GOX business because of violation of the no-bribery commitment or other corrupt practices, the IFI/external donor providing financing will also consider debarring that offender from eligibility for contracts financed by it globally.

10. GOX has made special arrangements for adequate oversight and monitoring of the procurement process and the execution of the contract.

In this regard, GOX has provided for public hearings on the procurement process and for access by Civil Society to meetings of the [Tender Board] and to all documents relating to the evaluation of the competitive tenders, the award decision process and the execution of the project.

11. GOX has also set up a special office in the [Office of the President] for the investigation and handling of any reports of extortion or bribery in public procurement.

12. The Government will publicly disclose the award decision including the major elements of the evaluation and the reasons for the selection of the successful bidder.

13. Bids which do not conform to the requirements of these procedures will not be considered.

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