Improving Transparency within Government Procurement Procedures in Iraq

OECD Benchmark Report
The Organization for Economic Cooperation and Development (OECD) is a unique forum where the governments of 30 market democracies work together to address the economic, social, environmental and governance challenges of globalization and development. The OECD provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.

The Initiative on Governance and Investment for Development is a regional effort, initiated and led by countries in the Middle East and North Africa (MENA). It promotes broad reforms to enhance the investment climate, modernise governance structures and operations, strengthen regional and international partnerships, and promote sustainable economic growth throughout the MENA region.

The Initiative aims at strengthening countries’ capacity to design and implement policy reforms. It facilitates policy dialogue and sharing of experience on public governance and investment policies among policy makers from MENA countries and their OECD counterparts.
ACKNOWLEDGMENTS

The report was prepared by Mr. Jean-Pierre Bueb, Former Counsellor of the French Corruption Prevention Agency (Service Central de Prévention de la corruption) and Ms. Anikó Hrubi, Administrator, Innovation and Integrity Division, OECD, under the supervision of Mr. János Bertók, Head of the Integrity Unit and Mr. Christian Vergez, Head of the Innovation and Integrity Division of the Public Governance and Territorial Development Directorate, OECD. Julie Harris edited the final report.

The authors would like to thank the representatives of the Government of Iraq who made contributions to the report and who were willing to share their experiences throughout the entire project, at the occasion of organised meetings and bilateral discussions as well as through their responses to the OECD Survey on Current Public Procurement Legislation in Iraq. In particular, we are grateful for the important contributions made by civil society and private sector representatives to the OECD Survey.

Special thanks go to Mr. Ibrahim Sirwan, Chief of Staff, Deputy Prime Minister’s Office of the Republic of Iraq, for his support during the entire project.

The report has benefited from valuable information provided during the course of its preparation from colleagues in the Public Governance and Territorial Development Directorate and in partner Directorates. The authors would like to thank all these colleagues for their precious comments in finalising the report.

Special thanks are also extended to Mr. George E. Adair for his commitment and for ensuring co-ordination in Iraq during the project.
## TABLE OF CONTENTS

**FOREWORD** .................................................................................................................. 2

**ACKNOWLEDGMENTS** ................................................................................................. 3

**EXECUTIVE SUMMARY** ............................................................................................... 6

**BACKGROUND** ............................................................................................................ 10

The request made by the Iraqi authorities ................................................................. 10
Methodology used for the preparation of the report .............................................. 10
Analytical framework of the report ..................................................................... 12
Objectives and scope of the report ..................................................................... 13
Structure and graphic presentation of the report .............................................. 14

**HISTORICAL OVERVIEW OF IRAQI PUBLIC PROCUREMENT AND ITS ACTORS** ............ 17

The 2004 Law on Public Contracts ....................................................................... 17
The 2007 procurement regulations ................................................................... 18
The 2008 Instructions for Government Contracts’ Execution ...................... 18
The 2008 Regulation of Governmental Contracts Implementation ............. 18

**PART I APPLICATION OF THE OECD PRINCIPLES FOR ENHANCING INTEGRITY IN PUBLIC PROCUREMENT TO IRAQI PROCUREMENT REGULATIONS** .................................................. 20

I. ELEMENTS OF TRANSPARENCY ............................................................................ 22

1. Principle 1 ................................................................................................................. 22
2. Principle 2 ................................................................................................................. 41

II. ELEMENTS OF MANAGEMENT .............................................................................. 48

3. Principle 3 ................................................................................................................. 48
4. Principle 4 ................................................................................................................. 55

III. PREVENTION OF MISCONDUCT .......................................................................... 58

5. Principle 5 ................................................................................................................. 58
6. Principle 6 ................................................................................................................. 62
7. Principle 7 ................................................................................................................. 65

IV. ELEMENTS OF ACCOUNTABILITY AND CONTROL .............................................. 67
PART II  ANALYSIS OF THE REGULATION N°1 OF 2008 OF GOVERNMENTAL CONTRACTS IMPLEMENTATION, ARTICLE BY ARTICLE ................................................................. 74

PART III  PROPOSALS FOR ACTION AND PRACTICAL TOOLS TO SUPPORT IMPLEMENTATION ........................................................................................................ 88

PROPOSALS FOR ACTION .................................................................................................................................................. 89

Proposal No. 1: Make procurement procedures more open and efficient in order to increase competition ........................................................................................................... 90
Proposal No. 2: Set clear rules for the evaluation of bids ........................................................................................................ 91
Proposal No. 3: Make contract execution more transparent .................................................................................................................. 92
Proposal No. 4: Ensure effective financial guarantees and their timely reimbursement ................................................................................................................ 94
Proposal No. 5: Enhance civil servants’ capacities ................................................................................................................... 94
Proposal No. 6: Ensure co-ordinated control mechanisms ............................................................................................................ 95
Proposal No. 7: Ensure timely functioning of the dispute resolution system ..................................................................................... 97
Proposal No. 8: Develop specific tools to fight corruption in procurement .................................................................................. 98

PRACTICAL TOOLS TO SUPPORT IMPLEMENTATION ........................................................................................................ 100

Risk mapping .................................................................................................................................................. 100
Benchmarks .................................................................................................................................................. 100
Control of assets ........................................................................................................................................... 100
Responsibility ........................................................................................................................................... 100
Ethics .......................................................................................................................................................... 101
Training for investigators ........................................................................................................................................... 101
Strategy and action plans ........................................................................................................................................... 101

ANNEX A   OECD RECOMMENDATION ON ENHANCING INTEGRITY IN PUBLIC PROCUREMENT ............................................................................................................. 102

ANNEX B   IRAQI REGULATION N°1 OF 2008 OF GOVERNMENTAL CONTRACTS IMPLEMENTATION ............................................................................................................. 105

ANNEX C   SURVEY ON CURRENT PUBLIC PROCUREMENT LEGISLATION IN IRAQ TO BE COMPLETED BY MINISTRIES AND REGIONAL AUTHORITIES ................. 138
EXECUTIVE SUMMARY

Government procurement\(^1\) is an important economic activity involving large amounts of public money in most countries around the globe. In Iraq, government procurement plays an even more important role in supporting the reconstruction and rehabilitation of the national economy as well providing the necessary infrastructure for the development of the private sector. The principles of transparency, good management, accountability and control as well as the prevention of fraud and corruption could provide standards by which public officials set the basis for clean and accountable government procurement. In a rapidly changing context, institutions need to remain dynamic to adapt; therefore the continuous modernisation of the legal and institutional frameworks for procurement is a priority for the Government of Iraq.

The Coalition Provisional Authority’s (CPA) Order N° (87) of 2004 on Public Contracts is the last issued public procurement law that regulates government procurement procedures in the Republic of Iraq. In a period of only two years, from 2007-2008, the Government of Iraq has issued three regulations and a Contracting Guide for procurement officials to support the implementation of the procurement law.

The OECD Benchmark Report analyses the government procurement regulations and practices of the Republic of Iraq. It examines the coherence of this framework with international instruments. The analytical framework of the report is based on the *OECD Principles for Integrity in Public Procurement*, that provide 10 guiding principles for enhancing integrity throughout the entire procurement cycle from needs assessment through tendering to contract management and payment. The analysis of the report also builds on international legal instruments and good practices including the United Nations Convention against Corruption, the Agreement on Government Procurement of the WTO, the Model Law of the United Nations Commission on International Trade Law and the European Commission Directives.

\(^1\) *Government procurement* is defined in the Public Procurement Law N° (87) of 2007 of Iraq as « procurement of goods, services and construction services by the State of Iraq acting through Ministries or federal agencies, governmental units including Regions, Governorates; and all other subdivisions of the State of Iraq that may commit public funds ». 
The Benchmark Report acknowledges the strengths of Iraq’s public procurement system. The procurement law and supporting regulations span the entire procurement cycle from pre-tender preparations, the tender and evaluation process and post-award contract management. For instance, the law and regulations stress the importance of conducting a comprehensive feasibility study before launching a specific tender. Regulations also stipulate in great detail the creation of specific committees dedicated to the reception and evaluation of bids. The contract execution phase is also covered by the regulations. As common practice in most countries, financial guarantees for procurement are required by the Iraqi regulations, inspired by international trade transaction guarantees.

According to the legal framework, control and authorisation procedures are also stipulated by the regulations. As an important step in managing conflict of interest, there is a ban on government and public sector employees responsible for managing the procurement tender, to participate as a potential bidder in that tender either directly or indirectly. The regulations also prohibit the disclosure of information to persons not involved in the procurement process. In order to mitigate corruption in public procurement, Iraq’s anti-corruption agency, the Commission on Integrity, employs officials specifically in charge of inspecting irregularities relating to public spending through procurement.

Moreover, although Iraq’s developing infrastructure means that the country is not yet ready to develop an e-procurement system, there is an understanding by the government of the potential benefits of information and communications technologies in procurement.

While there have been positive gains in Iraq’s current institutional frameworks for public procurement, the Benchmark Report also identifies a number of weaknesses that deserve the attention of the government. It points out the lack of public procurement planning that is linked to the more general problem of planning, and can partly be justified by the current Iraqi context.

There is also a lack of harmonisation of procurement practices across government organisations. For example, procurement methods, information contained in tender documents, advertising periods and document management practices vary between government contracting entities. Furthermore, the definition and publication of the tender evaluation criteria is not legally required, leaving place to subjectivity in the tender award process.
Although recognised as good practice elsewhere, open competitive tender is not stipulated as a general rule in Iraq. The use of direct invitation and the single source method is widespread and may, if not properly controlled, give room to bias, fraud and corruption.

Limited coordination is observed between Iraqi’s control institutions: the Inspector General (internal audit), the Board of Supreme Audit (external audit) and the Commission on Integrity (anti-corruption agency). Responsibilities may overlap on the one hand, while loopholes remain in the control system on the other hand. Little information is publicly available about the results of these institutions’ investigations. Other control mechanisms, such as citizen oversight are also weak.

Red tape hinders efficiency in public procurement and can be burdensome for private sector representatives that are, for instance, required to submit a long list of documents in limited timeframes when doing procurement business with the government. On the other hand, because of the rapidly changing and abundant rules and regulations, public servants are reluctant to take part in tender processes, particularly in bid evaluation and analysis committees. Fearing that they are not aware of all rules and regulations, many wait for written feedback from the hierarchy thus paralysing everyday operations. Although the government pays particular attention to providing training to develop capacities, not all government procurement officials are sufficiently qualified to deal with their assignments.

The report underlines that the execution of public contracts in Iraq is not transparent nor even completed in some instances. Practice shows that some companies happen to be awarded again and again with public contracts even if they are non-performing in previously awarded projects. This can draw attention to the risk of subjectivity and favouritism in the selection process. A significant problem is subcontracting; the company awarded for the tender regularly contracts out the execution of the tender to an Iraqi or a foreign company resulting in fuzzy accountability chains and a final tender output of poor quality.

Official consultations with private sector tenderers are limited, while the role of “informal relations” – such as acquaintances inside ministries and public institutions – is important and gives to some privileged actors the possibility to be better informed about procurement opportunities.

The Benchmark Report highlights that private sector tenderers do not apply the complaint and recourse system as there is limited awareness and little confidence in its functioning. However, the complaint and recourse system could contribute to the
rebuilding of trust in the fairness of procurement decisions made by the government.

Based on its analysis, this report provides Proposals for Action to modernise Iraq’s procurement system. Based on consultations with national and international stakeholders in Iraq, the Proposals focus on enhancing the transparency, integrity and accountability of the public procurement system in Iraq, and in particular:

- Making procurement procedures more open and efficient in order to increase competition;
- Setting clear rules for the evaluation of bids;
- Making contract execution more transparent;
- Ensuring effective financial guarantees and their timely reimbursement;
- Enhancing civil servants’ capacities to manage the procurement process;
- Ensuring co-ordinated control mechanisms;
- Ensuring timely functioning of the dispute resolution system; and
- Developing specific practical tools to fight corruption in procurement.

These Proposals for Action were acknowledged by the Iraqi government and Iraqi stakeholders highly committed to improving government procurement in the Republic of Iraq in line with international standards and good practices.
BACKGROUND

The request made by the Iraqi authorities

Public procurement is a government activity particularly vulnerable to corruption. Given the importance of public procurement, in economic terms (representing 10-15% of the gross domestic product [GDP]\(^2\)) and in strategic terms (procuring the goods and providing the services that administrations need), governments around the globe have grown increasingly alert to the risk of corruption in public procurement, and to the importance of preventing it by increasing transparency and accountability.

Representatives from various agencies and institutions of the Government of Iraq (GoI) demonstrated their awareness of the problem of corruption in procurement during discussions at the OECD Workshop on Enhancing Transparency in Public Procurement Procedures, held in Amman, Jordan on 24 January 2008. A major recommendation of the workshop, based on the expressed interest of Iraqi participants, was to have the OECD examine the public procurement regulations and procedures and provide policy recommendations for improvement. Iraqi officials also asked for the identification of good international practices to help Iraq fight corruption and promote integrity in public procurement.

Following this specific demand from the GoI, the preparation of the present Benchmark Report on Improving Transparency in Government Procurement Procedures in Iraq (“Benchmark Report”) became a top priority.

Methodology used for the preparation of the report

Several possible ways were considered to find the best method to gather information to ensure that the Benchmark Report provided value added in the Iraqi context. Information gathering started on the basis of materials received from Iraqi ministries – in particular from the Ministry of Planning and Development Cooperation – as well as from the Council of Ministers, and various international agencies.

\(^2\) Reliable and punctual data related to Iraqi spending through public procurement is difficult to find. The US Government Accountability Office identified wide discrepancies between international and Iraqi reported amounts related to Iraqi budget spending. For further details, please see US Government Accountability Office (2008), “Iraq Reconstruction: Better Data Needed to Assess Iraq’s Budget Execution”, Report to Congressional Committees, January.
organisations working in Iraq. Additional documents were added from preliminary research carried out by the OECD Secretariat.

Building on identified working contacts with key stakeholders, the OECD Secretariat carried out a consultation to understand the expectations of Iraqi delegates about the Benchmark Report and on how the OECD could best contribute to their objectives. On the basis of the outputs of these interviews, the OECD developed a draft questionnaire to support data collection. The draft questionnaire, entitled the “Survey on Current Public Procurement Legislation in Iraq”, was sent to major stakeholders and leading experts, and was translated into Arabic in order to reach a wide pool of Iraqi experts.

The OECD Secretariat, with the agreement of GoI officials during the Preparatory Meeting with the Government of Iraq on the Paris Declaration on Aid Effectiveness, held in Paris, France, on 26-27 May 2008, developed four specifically tailored versions of the survey, to be completed by the following stakeholder groups:

1. ministries and regional authorities,
2. members of the Joint Anti-Corruption Council,
3. members of the Iraqi Parliament,
4. private sector representatives.

The four versions of the survey, based on the previously mentioned draft questionnaire, aimed to collect firsthand information on the implementation of current public procurement legislation in Iraq. In the first round, with the support of the Deputy of the Secretary General of the General Secretariat for the Council of Ministers, the survey questionnaire was distributed to senior experts in the procurement units of key spending Iraqi ministries – such as the Ministry of Trade, Industry and Minerals, the Ministry of Electricity, the Ministry of Oil and the Ministry of Health – and members of the Joint Anti-Corruption Council. In the second round, the questionnaire also requested the views of representatives of the Iraqi Parliament as well as local and international private sector representatives conducting business with the Iraqi Government. The second round of the survey process was highly dependent on the help of the Deputy Prime Minister’s Office.

Although prior concerns were raised related to the application of OECD methodology to gather non-biased information from the field, consultations and face-to-face discussions with GoI officials generated understanding and overall support for using a survey questionnaire on public procurement in line with OECD
methodology. As a result of such stakeholder support, the OECD Secretariat received 40 responses to the questionnaire from the four main stakeholder groups. With the help of this unique, firsthand information, and based on preliminary documentary research carried out by the OECD Secretariat, a “Discussion Paper – Improving Transparency in Government Procurement Procedures in Iraq” was prepared to present preliminary findings of the OECD procurement survey. The Discussion Paper was translated into Arabic and distributed prior to the 8–10 July 2008 Paris meeting as a key background document to support discussions and exchange of views in the Workshop on Enhancing Transparency in Public Procurement.

Analytical framework of the report

Analysis of the documents made available and the Iraqi replies to the survey questionnaire were benchmarked with procurement procedures recommended by international organisations – the World Bank, International Monetary Fund and European Union in particular – and were reviewed in light of international legal instruments and good practices, including:

- The Agreement on Government Procurement (GPA) of the World Trade Organization (WTO);
- The Model Law of the United Nations Commission on International Trade Law (UNCITRAL);
- Main policy instruments drawn up by the OECD, in particular the OECD Recommendations for Enhancing Integrity in Public Procurement, that builds on good international practices and the OECD Principles for Enhancing Integrity in Public Procurement (“OECD Principles”);
- the European Commission Directives.

The OECD Principles provide policy guidance for governments to enhance integrity throughout the entire public procurement cycle, from needs assessment to contract management. The Principles are based on applying a good governance approach, that is, transparency, good management, prevention of misconduct, accountability and control to enhance integrity in public procurement. The overall aim is to enhance integrity efforts so that they are fully part of an efficient and effective management of public resources.

Integrity can be defined as the use of funds, resources, assets, and authority, for the official purposes for which they are intended, in line with public interest. A “negative” approach to defining integrity is also useful in determining an effective
strategy to prevent “integrity violations” in the field of public procurement. These include:

- corruption, including bribery, “kickbacks”, nepotism, cronyism and patronage, e.g. through appointments of individuals to governmental or political positions;
- fraud and theft of resources, e.g. through product substitution during delivery which results in lower quality materials;
- conflict of interest;
- collusion;
- abuse and manipulation of information;
- discriminatory treatment;
- waste and abuse of organisational resources.\(^3\)

**Objectives and scope of the report**

When OECD started analysing the Iraqi government procurement procedures, the 2007 Implementing Regulations for Governmental Contracts (“2007 Procurement Regulations”) were in place, with the 2007 Iraq Quick Start Contracting Guide (“2007 Contracting Guide”) for supporting their implementation. The 2008 Instructions for Government Contracts’ Execution (the detailed and explanatory version of the 2007 Procurement Regulations) had also already been issued.

During the completion of the Benchmark Report, the Regulation N° 1 of 2008 of Governmental Contracts Implementation (“2008 Regulation”) was approved and published in the Iraqi official Gazette in May 2008.

Therefore, throughout this Benchmark Report, the authors make their analysis based on the following presumptions (and officially received documents from the Government of Iraq):

- The Public Procurement Law N° (87) of 2004 issued by the Coalition Provisional Authority is the last issued procurement law applied in the

---

Republic of Iraq. A new draft procurement law is under preparation (as of September 2008).

- The procurement regulations currently in force in Iraq are the *Regulation N° 1 of 2008 of Governmental Contracts Implementation* (see Annex B of this report), in accordance with the above-mentioned Public Procurement Law.

- The Regulation N° 1 of 2008 of Governmental Contracts Implementation cancels and replaces the 2007 Implementing Regulations for Governmental Contracts.

- The 2007 *Iraq Quick Start Contracting Guide* was prepared to help implement the 2007 Procurement Regulations. To our knowledge, no such implementation guide has been published to support the implementation of the *Regulation N° 1 of 2008 of Governmental Contracts Implementation*.

The Benchmark Report supports the review of the existing and updated public procurement regulations by providing an objective and independent assessment. The analysis of the Benchmark Report focuses on the provisions of the above-mentioned 2008 Regulation. The Report also aims at presenting the progress that has been observed in the 2008 Regulation compared to past government procurement provisions, in particular those included in the 2007 Procurement Regulations. Moreover, the Report provides guidance to further improve Iraqi procurement provisions. It is important to note that Iraqi officials indicated in the 8-10 July 2008 meeting in Paris that a new law on government procurement was in the process of being prepared for legislative approval.

The ultimate objective of this Benchmark Report is not to provide a “model law” that could be drawn up based on the practices OECD considers best. The objective is to help the Iraqi authorities to introduce and/or modernise and update regulations that suit their specific country context and situation as it currently stands. Therefore, the Benchmark Report aims at presenting, on the basis of experience gained in other countries, the identified risks, costs, advantages and drawbacks of different solutions and practices that the Iraqi authorities may envisage adopting. Implementing the proposals of the Benchmark Report will then be up to the Iraqi authorities to decide, on the basis of their short- and medium-term objectives, what the most appropriate solutions would be for their country.

**Structure and graphic presentation of the report**

The Benchmark Report is composed of three parts:
Part I. Reviewing the 2008 Regulation, in light of international rules and good practices, while showing areas of improvement compared to past government procurement provisions, and in particular those included in the 2007 Procurement Regulations.

The analysis of the first part puts the provisions on transparency and integrity of the current Iraqi Procurement Regulations in an international context (e.g. WTO GPA, UNCITRAL Model Law, OECD Principles). The first part of the Benchmark Report follows the structure of the OECD Principles for Enhancing Integrity in Public Procurement. The rationale behind this is that the OECD Principles are an internationally tested practical instrument that draws from experiences that have proved effective for enhancing integrity in public procurement in countries all around the globe. It reflects various legal and administrative systems from developed and developing countries.

Part II. Critical review of the 2008 Regulation analysed article by article

On the basis of international legal instruments and standards (such as the WTO GPA; UNCITRAL Model Law, UNCAC, etc.), the second part of the Benchmark Report takes a critical review of the provisions of the current procurement legislation, and provides an article-by-article analysis.

Part III. Proposals for Action and Practical Tools to Support Implementation

The third part of the Benchmark Report provides Iraqi officials with Proposals for Action to improve their procurement legislation and its implementation. These proposals are based on the analysis provided in Parts I and II, and were discussed with Iraqi delegates before the finalisation of the Report. The Proposals for Action are accompanied by the tools necessary to support the implementation of the Benchmark Report proposals in daily practice.

As far as the graphic presentation of the Benchmark Report is concerned, it contains positive comments in bold when the provisions of the 2008 Regulation are considered consistent with good international practices. Requests for clarification – in italics and underlined – are used whenever the proposals made in the legislative or regulatory requirements do not exactly comply with practices used in other countries or procedures recommended by international organisations, and therefore need to be explained, updated or justified. The Report also contains, in boxes, some country-specific examples to show the variety of possible solutions adopted by different countries. The aim of these case studies is to illustrate, and not to directly recommend policy options to the Government of Iraq.
All statements, comments and requests for improvement written in this Benchmark Report relate to the English translations of the above-listed regulations, received from the Iraqi national authorities. All interpretations of the Benchmark Report must be therefore made with regard to the English versions of the 2007 Procurement Regulations, the 2007 Contracting Guide and the 2008 Regulation.
HISTORICAL OVERVIEW OF IRAQI PUBLIC PROCUREMENT 
AND ITS ACTORS

The 2004 Law on Public Contracts

The Coalition Provisional Authority (CPA) Order N° (87) of 2004 on Public Contracts (“2004 Law on Public Contracts”) is the last issued procurement law in Iraq, approved as part of the CPA efforts to rebuild public governance frameworks and capacities in Iraq. It suspended the application of the previous 2001 Tender Instructions for State Agencies and the Social Sector and the 1988 Instructions for Implementation and Follow up of Projects and Works of National Development Plan.

The 2004 Law on Public Contracts promulgated the creation of the Office of Government Public Contract Policy (OGPCP), within the Ministry of Planning and Development Cooperation (MoPDC), to be in charge of the implementation of the 2004 Law, and vested with the following responsibilities:

- co-ordination of government public contract policy for all ministries and public entities of the government;
- establishment of an independent Administrative Tribunal to handle procurement complaints and disputes;
- provision of expertise and recommendations for improving regulations and instructions as they relate to government procurement;
- development and adoption of standard government public contract provisions;
- training of government public contracting personnel.

The 2004 Law on Public Contracts contains several sections, including details on the principles for government procurement in general, as well as for open competition and negotiated procedures in particular; description of the contracting authority; the standard public contract provisions and contract specifications; the financial requirements and the dispute resolution system and procurement integrity and conflict of interest principles.
The 2007 procurement regulations

In order to support implementation of the 2004 Law on Public Contracts, the N° (1) 2007 Implementing Regulations for Governmental Contracts (“2007 Procurement Regulations”) were issued under the authority of the OGPCP in 2007 with the signature of H.E. the Minister of Planning and Development Cooperation. The 2007 Procurement Regulations were prepared with the contribution of the Procurement Assistance Center (PAC). PAC, through its consultancy engagement, developed also the 2007 Iraq Quick Starting Guide (“2007 Contracting Guide”) with the aim of better disseminating and explaining the procurement provisions set out in the 2007 Procurement Regulations. The 2007 Contracting Guide addresses Iraqi public procurement practitioners as its primary audience.

The 2008 Instructions for Government Contracts’ Execution

In 2008, new procurement instructions, entitled 2008 Instructions for Government Contracts’ Execution (“2008 Instructions”) were issued based on the CPA 2004 Law on Public Contracts. The 2008 Instructions contained no fundamental changes in their approach or their philosophy compared to the 2007 Procurement Regulations, but the style was more explanatory and detailed.

The 2008 Regulation of Governmental Contracts Implementation

Shortly thereafter, the OGPCP issued Regulation N° (1) of 2008 of Governmental Contracts Implementation, which, published in May 2008 in the Iraqi Official Gazette, cancelled and replaced the above-mentioned 2007 Procurement Regulations.

By the end of 2008, the MoPDC prepared a draft Public Procurement Law, which was sent to the Government for approval.

As the above description shows, Iraqi procurement regulations are changing rapidly and not always in a transparent manner. The coexistence of the above-mentioned rules, instructions and regulations as well as the unclear responsibility sharing as it relates to the procurement processes and their control result in confusion in the daily work of Iraqi public procurement officials, and contributes to its limited efficiency. In addition, responses to the OECD survey questionnaire show that different ministries follow different procurement rules.

Institutionally, the issuance and implementation of government procurement regulations currently belong to the MoPDC. In order to create better awareness and more efficient dissemination and enforcement of public procurement regulations in a quickly changing legal framework, it might be considered beneficial to transfer the
responsibility of the supervision of the overall contracting process from a ministry level to a higher authority level, such as the Council of Ministers.
PART I

APPLICATION OF THE OECD PRINCIPLES FOR ENHANCING INTEGRITY IN PUBLIC PROCUREMENT TO IRAQI PROCUREMENT REGULATIONS
In order to provide an objective and independent assessment of Regulation N° 1 of 2008 of Governmental Contracts Implementation (“2008 Regulation”), Part I of the Benchmark Report follows the structure of the OECD Principles for Enhancing Integrity in Public Procurement. This internationally recognised framework specifically focuses on ten key recommendations to reinforce transparency, integrity and public trust in how public funds are managed, namely:

- Principle 1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.

- Principle 2. Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

- Principle 3. Ensure that public funds are used in public procurement according to the purposes intended.

- Principle 4. Ensure that procurement officials meet high professional standards of knowledge, skills and integrity.

- Principle 5. Put mechanisms in place to prevent risks to integrity in public procurement.

- Principle 6. Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.

- Principle 7. Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly.

- Principle 8. Establish a clear chain of responsibility together with effective control mechanisms.

- Principle 9. Handle complaints from potential suppliers in a fair and timely manner.

- Principle 10. Empower civil society organisations, media and the wider public to scrutinise public procurement.
I. ELEMENTS OF TRANSPARENCY

1. Principle 1

Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.

An important aspect of transparency in public procurement is the overarching obligation to treat potential suppliers as equitably as possible. Ensuring an adequate degree of transparency is a pre-condition for the procurement process to be considered open, well understood and applied equitably to all parties throughout the whole process, from needs assessment to contract management and execution.

Transparency must be real and effective, not only in the preparation of the tender documents and the choice of the contractor as successful bidder, but also in the contract execution and the final delivery of supplies, services or work.

1.1. General comments on the 2008 Regulation

1.1.1. Scope

The 2008 Regulation provides numerous guarantees of transparency throughout the procurement process and thus its provisions partially meet the above-mentioned transparency requirements. Provisions of the 2008 Regulation also cover the procurement cycle from the preparation of the tenders until the payment phase through the bid evaluation and award process.

Amongst the main reservations is the fact that the provisions of the 2008 Regulation are not applied to projects and public contracts financed by international and regional organisations (Article-2-Second). For these contracts, particular rules are established in the form of specific agreements or protocols. This therefore means that no coherent and systematic rules apply to this type of contract for any amounts involved. This provision needs justification as procurement rules applied by international organisations are often quite similar to those laid down in the Iraqi Regulation. If, despite this similarity, international actors continue to apply their procurement rules instead of using the national procurement system to Iraqi procurement, a number of problems are raised:
1. It establishes a relative degree of inequality between domestic actors and international actors not subject to the same rules.

2. The same control mechanisms are not applied across cases using national or international procurement rules (e.g. large amounts of international funds may not be registered in the Iraqi national federal budget; and may therefore not be subject to the Iraqi Parliament’s oversight).

3. As phrased, this provision may open the door to possible corruption and, at the very least, to suspicions of corruption.

1.1.2. Volume and style

It is important to mention that the 2008 Regulation, covering the procurement cycle from the preparation of the tenders through the payment of the contract, is neither too complex nor too voluminous. Compared, for instance, to the European Union Directives, the 2008 Regulation is relatively short.

This being said, in some instances, mechanisms in place could be further simplified and indicated more precisely. Further suggestions in terms of administrative simplification will be detailed throughout this report.

The written style used in the 2008 Regulation shows improvement compared to the 2007 Procurement Regulations’ wording for various reasons. First, it seems to be better structured with clear objectives fixed from the beginning of the document. Second, the style of the document is clear, concise and user-friendly. However, the style of the 2008 Regulation gives the impression that it was prepared more for international transactions than for small- and middle-value national procurement contracts.

1.1.3. Coexistence of regulations

Another relevant general point concerns the coexistence of different procurement procedures with the 2008 Regulation. As the replies to the survey questionnaire show, this is a non-negligible risk factor: it involves a lack of legal security for public buyers. Some private sector representatives, in response to the questionnaire, stated that, in the same entity, certain civil servants are still using the former procurement procedures (e.g. from the CPA period) and others are using the 2007 Procurement Regulations.
The coexistence of several sets of Iraqi procurement regulations was one major concern of the 2006 World Bank report. Since this latter report was published, two new procurement regulations have been issued in the Republic of Iraq. Responses from ministries to the OECD survey questionnaire in 2008 confirm that procurement procedures are composed of a mixture of regulations and instructions including the Coalition Provisional Authority Order (CPA) N°(87) on Public Contracts of May 2004, the 2007 Implementing Regulations for Governmental Contracts and the Regulation N°1 of 2008 of Governmental Contracts Implementation. Consequently, there has been no significant improvement in clarifying the regulations and rules currently in use in Iraqi procurement.

Awareness of the 2008 Regulation appeared to be very limited. This can be partially explained by the fact that the 2008 Regulation was published very recently (May 2008) in the Iraqi Official Gazette.

The case of frequently changing procurement regulations also exists in developed countries, as the following case study indicates.

<table>
<thead>
<tr>
<th>Country example</th>
</tr>
</thead>
<tbody>
<tr>
<td>In France, for example, three new Public Procurement Codes have been adopted over the last five years (2004-08). Public purchasers had real difficulties following the quick change of regulations that at times significantly differed from those they had used previously (in force for nearly 20 years). This situation has resulted in an increased number of appeals and disputes often lost by the government because public purchasers had not always been informed of the latest laws and were using procedures that did not comply with the new regulations. This situation also seriously complicated the work of those responsible for investigating fraud and corruption in public contracts to examine them according to the law in force at the time when they were signed.</td>
</tr>
</tbody>
</table>

1.2. Preparing the invitation to tender

The 2008 Regulation requires all government contracting entities in ministries, non-ministerial agencies, provinces and regions (“government contracting entities”) to carry out a comprehensive technical and economic feasibility study of the project before the launch of the procurement procedure (Article-3-First-a). According to this specific provision, the technical and economic feasibility study must be pre-approved by the Ministry of Planning and Development Cooperation. With reference to several past discussions with Iraqi delegates, this latter obligation

---

seems very difficult to put into practice, as communication and information exchange among different ministries and governmental entities was observed to be limited in the Iraqi administration.

The 2008 Regulation also emphasises that the authorities should make sure that they have the necessary allocated funds to implement the contract before initiating the tender (Article-3-First-c). All the information contained in Article-3-First should result in ensuring a maximum amount of guarantees for the public buyers and for the contractors – under the condition of proper implementation of these provisions.

Verifying that the public purchasing project corresponds to a real and justified need of the contracting entity is of utmost importance to avoid any waste of public funds. To ensure objectiveness, this verification should be undertaken by an institution or entity separate from the contracting entity. This verification is not stipulated in the 2008 Regulation.

As part of the tender preparation, the government contracting entities calculate an “estimated cost” for every project – according to the 2008 Regulation. The method or formula for calculating the estimated cost is not explicit in the provisions, nor is who is responsible for calculating it. The estimated cost calculated by the contracting entity plays a significant role in the procurement process as it:

- Can eliminate submitted bids with prices that exceed 15% of the estimated cost of the project (Article-5-Fourth). An important improvement compared to the 2007 Procurement Regulations is that the bids submitted with prices significantly lower than the estimation of the contracting entity are not automatically eliminated anymore. International good practice show that particular reasons can justify these lower prices, such as new technical solutions or a company’s particular situation.  

- Can cancel the procedure and launch a new call for tender (Article-5-Fifth-b and c). In the case of re-announcement, the submitted price may have a larger 30% margin to exceed the estimated cost but requires special

5. In the 1990s, the French Ministry of Public Works had a project on more than 100 kilometres of national road reconstruction. The administration kept its price estimation secret. Following an open tender process, one offer represented only 50% of the Ministry’s calculation. The offer was not eliminated automatically, but the contractor was asked to justify his price. The company had won the bid of another contract which was to be launched two months later. The company, based 800 kilometres away, decided not to transfer its employees and construction materials during such a short period, but remain in the region. It resulted in a very attractive price for the Ministry, and the company carried out a very good job.
approval from the Central Contracting Committee (CCC)\textsuperscript{6} of the General Secretariat of the Council of Ministers.

- Can allow the intended project to be postponed or cancelled while its allocated amount can be used for other purposes and other projects (Article-5-Sixth-f 3).

According to the survey questionnaire, price seems to be the principal and decisive evaluation criteria, although the estimated cost of the project is not communicated in the tender notice. According to some of the participants at the 8-10 July 2008 meeting in Paris, the estimated cost could be published in the tender notice – except in cases of some commodities.\textsuperscript{7}

In every case, the government contracting entity has to estimate the project costs first, and then decide whether or not to publish its estimation in the tender notice. In most countries, the estimated cost remains secret, and publishing it is equal to a criminal offence. Other countries, such as Greece, decide to publish the estimated cost in the procurement notice. By publishing this information, the Greek authorities have decided to limit collusion amongst companies. Each option has its advantages and disadvantages.

\textbf{1.3. Publication of procurement notices}

\textit{1.3.1. Means of publication}

Publication of procurement notices is essential to create the proper conditions for open and fair competition. Publication is always mandatory and can take various forms: the press, specialised newspapers and freely accessible web portals. Mandatory publication concerns every procurement notice. Moreover, as recommended, for example by the European Union and the World Bank, it can also concern projects that a contracting authority only considers launching in the coming year or period. Even if the latter is not mandatory, it is a provision that can be advantageous both for the purchaser – those who publish this list benefit from

\textsuperscript{6} The CCC is a sub-committee of the High Economic Committee, responsible for making strategic decisions related to high-value procurement contracts that exceed the contracting entities’ scope of authority.

\textsuperscript{7} We use here and throughout the Benchmark Report the expression “commodities” for standardised and homogenous products that are generally purchased in big quantities by an administration. Commodities have well-developed markets characterised by high price volatility. Such commodities are, for example, grain products.
shortened deadlines for publication of the procurement notice – and the suppliers, who can better plan their production.

In Iraq, neither the 2007 Procurement Regulations, nor the 2008 Regulation contain specific measures requiring the government contracting entities to publish their procurement plans for the year ahead. Transparency in government procurement procedures in Iraq could be enhanced by supporting the institutionalisation of procurement plans that give candidates advance information about procurement opportunities coming up over a predetermined period. The absence of pre-information requires potential suppliers to submit tenders on an ad hoc basis as and when they are published, and with deadlines which in many cases leave insufficient time to prepare the tender. The lack of these procurement plans is part of the more general problem of planning, and can partly be justified by the current Iraqi context.

Contracts are not advertised in the same way for all tender announcements (Article-3-Third-a and b). Advertising methods vary from ministry to ministry. For instance, some ministries use the Internet to publish tenders, while others use announcement boards and newspapers. International tenders are also published by Iraqi embassies outside Iraq. Contractors with local agent(s) based in Iraq have the clear advantage of receiving timely information when tenders are not published via Internet portals and websites. On the other hand, foreign companies have an advantage when tenders are published via Internet portals and websites or by the Iraqi embassies. Private sector representative replies to the survey questionnaire shed light on the importance of informal relations – such as acquaintances inside ministries – to be better informed about procurement opportunities.

A new provision in the 2008 Regulation is the requirement that the selected bidder is the one “responsible for bearing the costs of publishing and advertising the tender” (Article-3-Third). Consequently, the advertising costs will correspond to a reduction of the benefits for the selected contractor. One risk is that contractors increase their submitted price by including the advertising costs; this may lead to an overall increase in the submitted pricing. Moreover, the advertising cost is calculated and communicated by the contracting authority unilaterally without providing the company with any means to verify that the amount imposed is correct. For these reasons, in general, the contracting authority is responsible for paying the advertising costs in other countries.

A controversial provision of the 2008 Regulation is the Article-5-Second-I that allows the government contracting entity to “cancel the tender, paying no compensation to the bidders, with the exception of the tender’s documentation
purchasing price only”. The reasons for the unilateral cancellation of projects may require clear justification.

1.3.2. Advertising periods

Experience shows that the deadlines for responding to calls for tender have to leave suppliers sufficient time to prepare their tender offers. This is vital to increasing both the number of bidders and competitiveness. International organisations usually set thresholds corresponding to minimum periods of time for each of the procedures that can be used – periods that the contracting authority can (and sometimes does) increase in accordance with the complexity of the project.

In Iraq, depending on the “importance of the contract”, advertising periods range from 15-60 days for procurement and consultancy services; and from 21 to 60 days for public works (Article-5-First-c).

To put these deadlines in context, the minimum advertising period in countries in the European Union is 52 days for open tenders and 37 days for restricted tenders. These advertising periods may be reduced in case of emergency.

The advertising deadlines in Iraq might need to be reviewed for several reasons, in particular:

- **Procurement advertising periods may be arbitrary** as the instructions and criteria on how to fix deadlines between the minimum and maximum days of advertising are too vague in the 2008 Regulation.

- Except for commodities, **the minimum advertising periods seem too short** compared to international practice. Minimum deadlines for public works was even shortened compared to the 2007 Procurement Regulations from 28 days to 21 days, which may be the result of Iraq’s current context. However, these deadlines may be insufficient for a contractor to prepare a bid.

- **Advertising periods do not take account of the nature of the procedure** chosen for the consultation and advertising, and do not therefore offer the guarantees of transparency. Minimal deadlines, depending on the procedure chosen, may be proposed. This is even more important, as according to the private sector representative replies to the survey questionnaire, tight advertising periods do not always allow enough time to prepare all the documentation required to attach to the submitted tender offer – such as catalogues or technical details for complex
procurement; bank guarantees including performance bonds and bid bonds – nor to send samples and have them received in a timely manner.

A new element of the 2008 Regulation specifies that the *advertising period starts with the date of the last advertisement of the procurement project*. This may cause problems, as a potential contractor will not always be able to follow the latest advertisement of the project in every means. From the contracting authority’s point of view, this provision may open the door to arbitrary decisions and strategies to postpone the implementation of certain projects.

**Remark**

In order to help potential bidders follow procurement advertisements and notices, contracting authorities may consider developing and updating a central registry that indicates the dates and means of advertisements of procurement opportunities.

1.3.3. *Information published in the procurement notice*

Contrary to the 2007 Procurement Regulations, the 2008 Regulation clearly differentiates between elements to be included and published in the advertising notice and elements to be included in the tender documentation (Article 5-First and Second). Information published in the procurement notice is freely accessible to those potential contractors who are aware of the tender announcement (information such as the nature and description of the project, its advertising period and tender closing date, the tender’s purchasing price and the website reference for further information). However, for all public procurement in Iraq, tender documentation also has a so-called non-refundable purchasing price. Access to the information included in the tender documentation (such as the time and place of the opening of the tenders, the date for a special conference to answer contractors’ inquiries, etc.) is limited to those who pay this purchasing price.

Despite the specific description of the information required to be published in the tender notice and in the tender documentation, a sample of Iraqi tender announcements and documentation showed a *lack of harmonisation in the information items of tender announcements*. Ministries with more capacity and/or experience in tendering (such as the Ministry of Trade, the Ministry of Industry and Minerals and the Ministry of Electricity) publish tender notices that contain a wider range of information compared to less equipped governmental contracting entities. Moreover, according to the private sector representative responses to the survey questionnaire, the lack of clear and unambiguous description of the procurement
project might be considered intentional in order to favour specific contractors. Poor tender description data therefore contribute to discriminatory treatment, nepotism and non-objective, even corrupt practices.

Remark

Contracting authorities may want to ensure consistency across the whole of government and publish the same required type of information in the procurement notice.

Procurement notices do not indicate what **evaluation criteria will be used to choose the "most economically advantageous" offer** – as confirmed by the private sector representative responses to the survey questionnaire. This differs from the practice in European countries, for example, where evaluation criteria has to be published in advance; otherwise the call for tender will be cancelled by the courts. The Iraqi 2008 Regulation specifies only that the price of each tender will be calculated on a uniform basis (Article-7-Seventh). This may inevitably cause firms to question the impartiality of the decision maker. The lack of pre-defined evaluation criteria, on the one hand, hampers contractors’ preparation in submitting their bids. On the other hand, non-defined bid evaluation criteria may lead to subjectivity, favouritism and unequal treatment of candidates – which most countries seek to avoid. In this regard, it would be useful to apply the recommendations made by the European Commission in 1994 or the United Nations Convention against Corruption in 2003 to the Iraqi procurement regulations.

Internationally speaking, the information to be published in the procurement notice varies from country to country: some information being obligatory, as stipulated by the procurement law/regulations or by other local regulations and; sometimes, the judicially imposed publication of non-obligatory additional information. The country example on France’s procurement notices below illustrates this point.

Country example

In France, the judicial power continually adds new information to the list of obligatory elements of information to be published in the tender. This is done to avoid tender cancellations resulting from missing information. Information to be published, currently, are: quantity and extent of the contract, conditions for taking part in the tender process, evaluation and selection criteria, documents to be submitted to verify the financial guarantees of the companies, date of opening the tenders submitted by the candidates, and deadline for obtaining the specifications document.
1.4. Tender reception and evaluation

1.4.1. Reception of tenders and bid opening committees

The 2008 Regulation pays significant attention to meeting stringent conditions regarding the reception and filing of contractors’ bids (Article-6-Fifth) before being opened. These measures could prevent a certain amount of fraud, e.g. informing a competitor of the proposals made by another candidate or substituting price quotations. A new element in the 2008 Regulation is the repeated prohibition to reveal any information related to the tenders already received during the announcement period in order to maintain the secrecy of the procedures (Article-6-Fifth-a 7).

The prohibition to take into consideration bids submitted in an electronic format has been deleted from the 2008 Regulation. This is another improvement compared to the 2007 Procurement Regulations. A related challenge is to secure the data received by electronic channels.

The bid opening committee in ministries, non-ministerial government entities, both at national and regional/provincial levels, is made up of experts and specialists headed by a high-level civil servant such as a Director or a Chief Engineer (Article-6). The committee’s tasks are very clearly set out by the 2008 Regulation, which should ensure, formally, uniform treatment of files as far as their reception, registration and filing are concerned. A question does remain with regard to who nominates the president of the committee and its members, as the provisions are vague in this regard.

1.4.2. Bid evaluation and analysis committee

The bid evaluation procedure is entrusted to another, more technical committee which is also composed of specialised civil servants (Article-7). The bid evaluation and analysis committee has an advisory role only; it submits its final report on the evaluation process and recommendations concerning the award of the procurement contract to the head of the contracting entity that makes the final decision (Article-7-Nineteenth). An important change in the 2008 Regulation compared to the 2007 Procurement Regulations is that the committee’s final report is not submitted to the minister concerned, but to the head of the contracting entity (Article-7-Nineteenth).
The obligation set out in the 2007 Procurement Regulations to renew the members of the bid evaluation and analysis committee at least every six months has been eliminated in the 2008 Regulation (see also § 5.2). As with the bid opening committee, there is no reference to who is in charge of selecting the president and the other members of the bid evaluation and analysis committee in the 2008 Regulation.

**Remark**

Although the 2008 Regulation does not provide proper guidance, the selection of the members of the committees should follow professional criteria such as competency and technical experience. The bid evaluation and analysis committee members’ free right to express their independent decisions resulting from their objective assessments must be ensured during the entire evaluation/analysis process.

In Iraq, public servants seem reluctant to take part in such committees. This reluctance stems from the confusion that results from a large number of “internal regulations and instructions coming from higher authorities” that they should be aware of and follow; and is related to what they can be questioned and controlled afterwards. Survey responses from ministries confirm that institutions such as the Council of Ministers, the Inspectors General, the State Commission of Taxes, the State Commission of Customs, the Ministry of Planning and Development Cooperation or the Ministry of Finance can issue these regulations and instructions.

The same idea formulated by a private sector representative was: “Iraqi officials frequently fail to act for fear of violating new rules and procedures which they either don’t understand or are scared of. In many cases this fear leads to reluctance to exercise practical judgement.”

**Remark**

Possible solutions to curb public servant resistance could be either to better disseminate and raise awareness of the instructions and regulations issued by the mentioned institutions; or involve representatives from institutions – such as the Inspectors General, the Board of Supreme Audit or the Commission on Public Integrity – in the bid opening, evaluation and analysis process.

---

8. Quotation from a high-spending ministry’s response to the OECD survey questionnaire.
1.4.3. Bid evaluation and analysis process

The responsibilities of the bid evaluation committee are very specifically set out in the 2008 Regulation (Article-7). While specific details do guarantee that the committee treats all candidates equally – especially with regard to applying the strict conditions imposed by the Regulation with respect to accepting or rejecting certain submitted offers – they do not guarantee that all candidates are assessed according to the same criteria (see also the comments made in § 1.3.3. above).

The evaluation process is kept secret (Article-7-Third), which is the general rule in the majority of countries. However, an independent court system is a vital criterion for this secrecy; independent and effective courts can easily have access to the whole decision-making process, enabling them to subsequently verify the level of transparency throughout the process.

As previously mentioned (§ 1.3.4), neither the bid evaluation criteria nor the indicative price is published in the tender notice. The 2008 Regulation stipulates only that the tender documentation shall include information on “the applied method for measuring the evaluation ratios for the awarding purposes” (Article-5-Second-p). Although this is a real improvement over the 2007 Procurement Regulations, the obligation to publish clear and detailed bid evaluation criteria in the tender notice is still missing from the 2008 provisions. It is important to note that in European Union (EU) member countries, not publishing clear evaluation criteria in the procurement notice is considered a penal offense, as well as not applying the published criteria during the entire evaluation process.

All member and candidate countries of the European Union reiterated this obligation in their national public procurement regulations. The provisions envisaged by the European Directives on Public Procurement largely concern transpositions in national legislation. Accordingly, the institutions in charge of monitoring the regularity of the public procurement process, the entities responsible for the application of the anti-corruption rules as well as the judiciary have the right to cancel any procedure which does not comply with these conditions. It is important to emphasise that for criminal justice, in particular, not publishing the tender evaluation and selection criteria constitutes a proof of favouritism, which is sanctioned in line with the national penal codes of all these countries.

The 2008 Regulation clearly prohibits any negotiation on prices with the bidders (Article-7-Fifteenth). However, it authorises bidders to complete or correct any data in their submitted bids, except those affecting the submitted price (Article-7-Sixteenth). The possibility to add or update details and documents that have simply been forgotten in the submission process is an often-used good practice in
many countries, including the MENA region (e.g. in Morocco). Missing documents and non-specific submitted data could also be a consequence of ambiguous tender description; a major problem already mentioned under § 1.3.4.

A new element in the 2008 Regulation is the provision of guarantees to the contracting authorities before they sign the contract with the selected bidder (Article-7-Twentieth). These guarantees are:

- The head of the contracting entity cannot sign contracts over specific thresholds without the approval of the Central Contracting Committee.
- The award decision is valid starting from the date of notification.
- If the company awarded the tender refuses to sign the contract, legal procedures are applied (Article-16-First).

Once the bid award decision is made, the winning bidder must be announced to the other bidders as soon as possible. In order to give unselected bidders sufficient time to file their protests and complaints, the 14-day period indicated in the 2008 Regulation should be fully respected (Article-7-Twentieth-b).

With regard to thresholds, Iraqi public officials involved in procurement agreed – during a procurement workshop conducted by the Procurement Assistance Centre – that the ministerial contract thresholds as stipulated in the 2007 Procurement Regulations were an obstacle to efficient public procurements in Iraq. The report of the US Government Accountability Office complemented this information in 2008 by stating that above the ministerial thresholds, when decisions have to be made by the High Contracting Committee, a dozen signatures are required for the approval, which significantly slows the process. (See also § 3.3).

In response to these concerns, the 2008 Regulation raised the existing thresholds, leaving a wider margin to ministerial/contracting entities’ discretion to decide on public funds. For “key-spending” ministries, the threshold was raised to USD 50 million from USD 20 million in 2007; for “other” ministries, the thresholds were raised to USD 30 million from USD 10 million in 2007. The respective threshold applied to provinces was raised to USD 10 million from USD 5 million in 2007.

---

11. Data received from the Procurement Assistance Centre, 2008.
1.4.4. Rejection of bids

Unlike the 2007 Procurement Regulations, the 2008 Regulation does not automatically eliminate submitted offers which are 25% less than the estimated cost.

**Remark**

The new regulation could be improved by adding a specific article on “abnormally low offers”. This could specify that candidates should not be eliminated on the sole basis of having submitted a very low estimate, if the candidate were not given the opportunity to explain the price. The example in Footnote 4 (p. 15) shows that sometimes, companies have reasons for proposing very low prices. Moreover, such a provision could reduce the risk that a contracting authority is accused of favouritism after eliminating low price offers without explanation.

A provision of the 2008 Regulation requires eliminating “the inefficient” contractor, vendor and consultant “based on the Government’s previous experience with the contractor in executing previous contracts” (Article-7-Tenth-b).

This provision, a highly sensitive one, needs to be spelt out more explicitly since, at the moment, it applies equally to firms which:

- did not perform satisfactorily in the context of previous contracts – though it needs to said on what objective factors the public buyer’s dissatisfaction is based;
- have just been set up, and thus could be the subject of a special measure;
- have never been awarded government contracts by which to be judged under this provision.

Applied injudiciously, this provision may encourage corruption or the awarding of contracts to the same firms each time, which greatly restricts competition and equals favouritism.

Private sector representative responses to the questionnaire indicated that in a certain number of cases inefficient contractors cannot be eliminated. This is the case when a procurement contract is awarded to an international company that works in Iraq only through its subcontractors (who are not mentioned in the submitted tender offer). Such a company cannot be eliminated from the execution of the contract, even if they prove to be inefficient – if the contracting authority is not in a
position to accept or refuse subcontractors (that would require contractors to declare subcontractors in their submitted offer). The question of subcontracting is further detailed under § 1.5.6.

1.5. Contract execution

Experience shows that in many countries, most fraud occurs during contract execution and is often facilitated by the absence of effective controls. Opportunities are extremely numerous and need constant surveillance by reliable and honest professionals.

1.5.1. Preparing the contracts

Article-8 indicates all the information that should be included in the contract (such as the name and address of both parties authorised to sign the contract and the document of authorisation). It also specifies that the draft contract is to be included in the tender conditions or in the invitation. Among the different conditions to be respected, the prohibition of transferring the whole contract to another contractor or subcontractor is essential (Article-8-Fourth).

Standard Bidding Documents (SBDs) are being finalised to facilitate harmonised contract preparation. At the moment, these samples are included in the Contracting Guide, which was prepared to support the implementation of the 2007 Procurement Regulations. As the latter has been cancelled and replaced, the Contracting Guide should also be updated in accordance with the new 2008 Regulation. Four types of SBDs, prepared by the Procurement Assistance Center and approved by the Ministry of Planning and Development Cooperation, will be ready to use for procurement contracts by the end of 2008 for supplies, public works, consultancy and service contracts.

1.5.2. Contract amendments

The 2008 Regulation prohibits contract amendments — such as new quantities, additional work or other alterations in the contracted work — and price amendments once the contract has been awarded (Article-15). It lists possible exceptions, such as if an amendment eliminates usefulness, results in savings, or where alterations “do not cause a basic change” in the contracted service or public work. These exceptions provide certain flexibility to the system, although it is important to ensure checks to avoid abuses of contract amendments.

The 2008 Regulation introduces a strict control and authorisation system in cases where amendments are necessary to change the length of time needed to
carry out the contract. It is well known that amendments are a particularly vulnerable point of contract execution; however, sometimes they have to be authorised due to unforeseeable circumstances arising during the execution of the contract. Rather than banning them, the regulations may consider making them subject to pre-defined and extremely strict conditions.

1.5.3. Price adjustments during the contract execution

The 2008 Regulation does not mention the possibility of adjusting and/or modifying the price of the offer during the execution of the contract. However, sometimes, independently from the company that executes the contract, prices of raw materials or of supplies can increase or decrease. These specific circumstances might be taken into consideration.

<table>
<thead>
<tr>
<th>Remark</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iraqi procurement regulation may consider better reflecting the price evolution of markets and allow provisions for price revision and price actualisation.</td>
</tr>
</tbody>
</table>

When the duration of a contract exceeds a three-month period, prices could be modified to take into account the price evolution trends in the country (price actualisation). In case of modification of the costs of specific elements included in the calculation of the contractor’s bid – e.g. for external reasons, such as an increase in the price of steel or gas in the country or on international markets – the submitted price of the company should be modified (price revision). These modifications based on official indicators may increase or reduce the price indicated in the contract.

In many countries, specific formulas exist for price actualisation and price revision, based on regularly updated indicators published by the government. The existence and the exact use of such formulas could be indicated in the procurement regulation. If particular formulas and indicators are needed for specific procurement contracts, they could be indicated in the tender documentation.

These specific provisions would diminish the risk of reducing either the quality or the quantity of the work or supplies that automatically occurs when the price of the contract is a fixed price without possibility of revision or actualisation.

1.5.4. Deadlines

The 2008 Regulation imposes heavy penalties for not respecting deadlines (Article-16-Second) and provides a formula to calculate the delay charges. As far as
sanctions are concerned, it is not clear \textit{who applies sanctions or who checks that these sanctions were indeed imposed}.

Responses from both private sector representatives and ministries to the survey questionnaire confirm that important delays and postponements often happen in the processes of contract attribution and execution in Iraq. While the ministry responses mainly highlight the challenges of rapid bid evaluation and analysis and complain about slow contract execution by contractors, the private sector mainly criticises the delays pertaining to contract signature, contract notification and payment procedures. One of the key critical points highlighted by the private sector relates to the delays in issuance of “Certificate of Final Acceptance” by the purchasing administration. Private sector representative responses to the survey questionnaire showed that, in numerous instances, the approval of the administration was delayed or was not forthcoming even though the supplier had fulfilled their contractual obligation. Eliminating the uncertainty of payment would ultimately lead to better prices for Iraqi procurement.

Increased and repetitive delays throughout the procurement process can partly be justified by the current situation of the country with fragile institutions; including violence, sectarian strives and the high percentage of skilled labour leaving Iraq.\footnote{US Government Accountability Office (2008), “Iraq Reconstruction: Better Data Needed to Assess Iraq’s Budget Execution”, Report to Congressional Committees, January.} Other reasons include:

\begin{itemize}
  \item Possible abuse of postponement of a tender’s closing date (as an advertising period “starts with the date of the last advertisement” of the tender \[\text{Article-5-First-c 1}\], nothing prevents constant repeat advertising of the same project).
  \item Long authorisation processes requiring numerous signatures from high-level public servants and ministers.
  \item Involvement in the procurement process economic committees with non-regular meetings\footnote{For details, please see Procurement Assistance Center (2007), “Procurement Workshop for Iraqi Ministries, 8-13 December 2007”, Ministry of Planning and Development Cooperation, Iraq.} (\textit{e.g.} for high-value contract decisions).
  \item Lack of responsibility taken by operational-level public officials fearful of making decisions without explicit written instruction from their hierarchy.
  \item Reluctance of delegated public servants in inspecting and approving required supplies manufactured and delivered by the contractors.
\end{itemize}
• Myriad of regulations, instructions and rules that should be understood and applied (see also § 1.4.2.).

1.5.5. Monitoring contract execution

The legal consequences of contractors’ violations of their contractual obligations were not explicitly mentioned in the 2007 Procurement Regulations. In the 2008 Regulation, these consequences are developed and clearly explained under Article 17.

While penalties are mentioned in 2008 for overshooting contract deadlines, no similar provisions appear to exist in case of failure to deliver what is stipulated in the contract specifications. The 2008 Regulation does not indicate which organisation or agency is in charge of controlling the conformity of the delivery with the specifications of the tender. This might need further specification in the Regulation to facilitate the tasks of the services in charge of procurement control and to fight corruption.

Remark

Payment is made after certification of the delivery of goods, works or services. Clear indications in the 2008 Regulation may be needed to determine the person responsible for signing the document indicating that the delivery has been made in conformity with the specifications. Similarly, clear indications could be required to appoint who is responsible for monitoring and evaluating the work in progress and what the modalities of that monitoring are to ensure timely delivery of defined quality.

Although the 2008 Regulation may not be detailed about procurement controls and their execution, other countries’ experience show that, in general, procurement regulations refer to other regulations or laws indicating how these necessary controls are regulated.

1.5.6. Subcontracting

Subcontracting was signalled as a real problem in Iraq during meetings with Iraqi delegates and according to the responses to the survey questionnaire. One of the most important difficulties encountered by the contracting authorities is the fact that the company awarded the tender, for different reasons, does not itself execute the contract, but subcontracts the execution to an Iraqi or a foreign company. In this case, the contracting authority is generally obliged to accept the subcontractor even if it considered to be a non-performing company.
Legally, the 2008 Regulation allows for the possibility to subcontract certain parts of a contract after receiving the approval of the contracting entity (Article-8-Fourth). It is prohibited to transfer the whole contract to another contractor or subcontractor. **Provisions regulating subcontracting are more severe** in 2008 than in the 2007 Procurement Regulations.

**Remark**

Propositions that might be considered to overcome subcontracting problems in Iraq include:

- As the part of the contract that can be subcontracted is not indicated in the 2008 Regulation, a contractor may subcontract up to 99% of the original contract – after receiving the approval of the contracting authority. In order to improve the efficiency and responsibility of the contractors, subcontracting limitations – for example, 50% of the original contract – could be introduced. Similar limitations exist in other countries.

- The 2008 Regulation does not mention whether the subcontractors are known before, or after, signing the contract. Regular declaration of possible subcontractors prior to the bid evaluation could help the bid evaluation and analysis committee to reject those bids where subcontractors are inefficient or non-performing, based on previous contracting experience. Therefore, information on the subcontractors as provided to the contracting entity may help achieve better performance in procurement.

- After approving the subcontractors, the contracting authority may agree to pay them directly when the subcontract represents, for example, more than 5% of the total original contract. This practice, which exists in most other countries, would give the subcontractor official guarantees of payment.

- Additional problems occur when the subcontractor itself is subcontracting, as it has no obligation to declare its subcontractors to the contracting entity. This practice, not legally permitted, is extremely harmful as it creates a “chain” of subcontractors trying to deliver the original project for less and less prices. It will reduce the quality of the work performed and services delivered. This practice, highlighted by the OECD survey questionnaire, has to be eliminated.

**Country example**

In a number of European countries, such as in France and the United Kingdom, the subcontractor, declared and agreed by the contracting authority, can be paid directly by the contracting authority for the part of the job it executes. This option provides subcontractors with guarantees – in terms of security and delay – to be paid after executing their part of the contract.
1.5.7. Blacklisting

A new provision in the 2008 Regulation is the introduction of the practice of blacklisting contractors that violate their contractual obligations (Article-18). Blacklisting is a severe measure to be used with caution. Therefore Article-18 refers to necessary controls to undertake before blacklisting either Iraqi or foreign companies.

In order to limit the discretionary power of the contracting entity and the possibility of “abuse of power”, companies should have the right to defend themselves. Consequently, the decision to blacklist could be proposed by the contracting authority and decided by the administrative court, after reviewing the arguments from the accuser and the defendant.

As the practice of blacklisting is recent, information is still missing on its application and how it works.

2. Principle 2

Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

The choice of procurement method is crucial to ensuring competition. Although open and competitive bidding enhances transparency in public procurement, the choice of the method could be governed primarily by the value and nature of the contract. In practice, suppliers are consulted either by an open or restricted tender. Other methods are used for very low-value contracts or if the open or restricted tenders fail. The European Union, the World Bank and the United Nations insist on systematic use of open tenders; they have been recognised by international bodies as providing the best guarantees of transparency and competitiveness.

In the Iraqi 2008 Regulation, the two recommendations – transparency and competitiveness – are partially applied. It provides six different tendering methods for public procurement, including open and competitive tenders, and non-competitive ones. One of these methods, the so-called “two-phase tender”, is a new method in 2008, compared to the 2007 Procurement Regulations. The 2008 Regulation includes provisions for enhancing integrity in non-competitive tendering methods as they offer a choice between three different procedures to be used, and forbid negotiated procedures.
Promoting transparency and corruption prevention in government procurement procedures also requires supporting the selection of the most adequate, non-competitive method. Due to the *lack of criteria provided for the selection of the tender method*, it appears easy to use direct procurement procedures, such as direct invitations or single source methods. These non-competitive procedures, according to the United Nations Convention against Corruption and the World Bank procedures, can be used solely in exceptional situations, *e.g.* the absence of submitted bids to a specific tender, the existence of special and sole property rights, emergency situations, etc.

**Remark**

The wording of the 2008 Regulation – “contract of a special characteristic” or “with monopolised characteristic” – could require further clarification to ensure conformity with international standards (Article 4-Forth and Fifth). Also, the non-competitive procedures, as stipulated in the procurement regulations, do not seem to require additional measures to be taken to ensure their effectiveness and integrity; adjustments in this regard may be necessary.

To date, non-competitive methods are not seen as procedures to be used only in exceptional circumstances in Iraq.

**Remark**

International instruments, such as the procurement procedures of the GPA, the World Bank and of the International Monetary Fund as well as the European Directives on public works, supplies and services contracts, could provide reference to change this approach by identifying conditions for the use of the various procedures. Adjustments to local conditions are of course important, keeping in mind that non-competitive tender methods concern only a limited number of contracts (that can nevertheless result in high amounts of public money).

### 2.1. The public tender

International organisations have proposed to adopt the open call for tender (*public tender*) procedure as the “basic option” for any competitive call for tender. According to international standards, all other procedures should be viewed as exceptions to this general rule. The following country example of Turkey illustrates this point.
Country example

In the 2007 annual report of the Council of Europe, one of the main observations concerning the Turkish public procurement procedures was that Turkey had to withdraw its “non-transparent and discriminatory procedures in use.” This meant to state that open tender is the general way for contracting, while other tendering methods remain exceptional.

In Iraq, the use of public tenders (Article-4-First) is limited solely to calls for tender worth more than 50 million Iraqi dinars (IQD). This article means that open tendering is not stipulated in the 2008 Regulation as the general rule to apply to all procurement contracts. According to the responses to the survey questionnaire, however, this is the generally used procurement method – with the exceptions of highly sophisticated and technical procurement areas, as indicated, for instance, in the European Directives and in the United Nations Convention against Corruption (Article 9.1 of the UNCAC).

2.2. The limited tender

The use of restricted tendering (Article-4-Second) is also limited to contracts worth more than IQD 50 million.

According to the 2008 Regulation, the number of candidates required to be invited to submit a bid for restricted tenders should be no fewer than six. This number seems very high for a procedure that in principle is reserved for highly specialised suppliers. Looking at this number of invited bidders from a European perspective, it would be difficult, for example, to find six independent firms specialised in highway construction in France, Germany or the United Kingdom.

Similarly, it might be difficult to find six contractors to execute public works in Iraq, in special cases where this procedure is to be used – such as renovation or reconstruction of highways or refineries, for instance. The absence of specialised contractors may lead to the re-announcement of the tender and might likely end up in a direct invitation, five or six months later.

---

14. IQD 50 million represents USD 42 800 (equivalent to EUR 32 000) (December 2008).
2.3. The two-phase tender

The two-phase tender is a new tendering method introduced by the 2008 Regulation. The main difference between it and the restricted procedure is that it is applicable for contracts with intricate technical specifications or for goods, works and services whereby the details of the technical specifications for the products of the works are not available at the beginning of the project.

This method which applies to contracts of any value – i.e. to contracts of more or less than IQD 50 million – is similar to the procedure in use in European countries which relates to the design and construction of public equipment. However, the use of this procedure should remain exceptional.

2.4. Direct invitation

This is a procedure (Article-4-Forth) which applies to all contracts regardless of their value, and thus may also apply to high-value ones. Direct invitation is an alternative to an open or restricted tendering procedure.

However, this procedure does not seem to offer sufficient guarantees of integrity of the procurement process for several reasons:

1. Direct invitation requires consultations with no less than five suppliers, from which one will eventually be chosen. The 2008 Regulation does not specify the criteria for selecting the five suppliers – who will be asked to submit a bid. The number of contractors to be consulted has risen from three to five in 2008, an important change compared to the 2007 Procurement Regulations.

2. The use of this procedure may be justified for reasons explained in three main points (Article-4-Fourth-a). Two of them – namely the “lack of interest from bidders to participate” and “cases of emergency, natural disasters, supplying of medicaments and life-saving necessities” – are completely in line with international practice. It is more difficult to agree with the point on “contracts of special characteristics”, however. This wording may result in a high risk of a range of abuses. This specific point would be necessary to be better explained by clearly stating what it means.

The 2008 Regulation indicates that the use of the direct invitation procedure has to be approved where appropriate. However, the Regulation provides no details on who approves the use of the direct invitation method.
Once the application of the direct invitation method is decided, the bid documentation provided to the invited bidders is free of charge (Article-4-Forth-b). Moreover, bidders are exempted from the bid bond requirements (Article-4-Forth-c). Both provisions aim at accelerating the procurement process (justified by the nature of this procurement method).

2.5. Single/sole source method

The description of the single source method has significantly improved in the 2008 Regulation compared to the 2007 Procurement Regulations. The single source method (Article-4-Fifth) is used for contracts awarded to a company that holds a monopoly on the supply of specific goods or work or which is required to provide a specific type of consultancy or maintenance service.

The recourse to the single source method requires proper authorisation from the Central Contracting Committee at the General Secretariat of the Council of Ministers that has the right to make its decision in 14 days. Similarly to the direct invitation, the single source method does not require submitting bid bonds. This exemption of bid bonds accelerates the process and is justified by the assumption that the company, thanks to its market position, will be willing and capable to execute the contract.

A loophole in the description is that no specification can be found in the 2008 Regulation that explains how to identify companies holding monopolies or exclusive rights.

Remark

More detailed provisions are needed to specify how the companies holding monopolies or exclusive rights are identified and are thus eligible to participate in single source method procurement. This specification is important in order to avoid subverting the use of the single source method from its original purpose. It is equally important to control the eventual use of discretionary power when choosing the use of this method.

2.6. Purchasing committees

According to the 2008 Regulation, the “purchasing committees” procedure applies to domestic or international contracts worth less than IQD 50 million or “any value determined in the current budget” (Article-4-Sixth). No further indications guide the procurement officials to decide in what circumstances the “purchasing
committees” can be used, as this is the only specific article that deals with these “purchasing committees”. More information on the composition, role, activity, resources and power of the purchasing committees is needed in the procurement provisions.

In the meantime, the 2007 Contracting Guide contains some details on the purchasing committee’s procedures, but these details are not included in the 2008 Regulation. The Contracting Guide explains, for example, that for these contracts, advertising is not required, nor is the establishment of bid opening or bid evaluation committees. It also stipulates various thresholds to be used. The responses to the survey questionnaire specify the purchase controls that are in use for projects with a value less than IQD 50 million, developed in Article 3 of the Federal Iraqi Budget regulation of 2008, namely:

- Up to IQD 100 000 (i.e. USD 86): direct purchase without any authorisation;
- From IQD 100 000 to IQD 3 000 000 (i.e. from USD 87 to USD 2 576): a purchase committee may make the purchasing decision (no offers are needed);
- From IQD 3 000 000 to IQD 50 million (i.e. from USD 2 577 to USD 42 800): the purchase committee chooses the best offer among a minimum of three proposals.

**Remark**

Despite of the above information being included in the Contracting Guide, it seems necessary to further specify details on the use of the purchasing committees procedure in the procurement regulations. Also reference to the Federal Iraqi Budget regulation of 2008 in the 2008 Regulation might be considered.

2.7. Specific or additional controls

No specific, or additional controls are stipulated in the 2008 Regulations for non-competitive procedures, such as direct invitation and single source procedures described under § 2.4. and § 2.5. Specific controls may be set out in other laws or regulations, to which it would be important to refer to in the procurement provisions.
One additional control element can be the High Contracts Committee. Although the responses to the survey questionnaire confirm the importance of the committee in the procurement process, neither its composition, nor its role or responsibilities are mentioned in the procurement provisions. Moreover, problems arise from the fact that the committee often changes the dates of its meetings and sometimes even changes the terms of previously negotiated contracts.

**Remark**

Clear reference to the composition, organisation, role and competencies of the High Contracts Committee would be required to be included in the procurement regulations.

The controls made by the purchasing committees are indicated in § 2.6. A reference to the modalities of these controls would be important to add to the 2008 Regulation.
II. ELEMENTS OF MANAGEMENT

3. Principle 3

Ensure that public funds are used in public procurement according to the purposes intended.

Provisions exist in all countries to ensure that public funds are assigned to public use and are spent according to the general public interest. In many cases these provisions are implemented by public bodies with auditing and inspection mandates. In most countries, it is the Court of Accounts and Inspectors’ Offices (of the Ministry of Finance) which are the institutions in charge of carrying out such controls and checks. In addition, expenditure plans are scrutinised by local or regional assemblies (municipal or regional councils) and by parliamentary committees that must approve major investment projects having major impact on the strategic development of the country.

3.1. Preparing procurement

The 2008 Regulation stipulates and describes in detail how a procurement transaction should be properly prepared; this is clearly one of the strongest parts of the Regulation, even in an international perspective. It provides that:

- Procurement shall be based on public funds that are at this time available.
- The total amount of the contract shall be deposited in a bank in the form of an irrevocable letter of credit for international procurement contracts.
- High-level civil servants and specialists shall be personally involved throughout the whole process, and especially when the contractors’ bids are opened and examined.

The preparation and planning of public contracts and the associated expenditure is one of the strong points of the 2008 Regulation. Important administrative steps are taken to ensure that the award of a contract meets a need which has been precisely assessed and for which the required funding is actually available (Article-3-First-c).
Another strong point is the opening, in an authorised governmental bank in Iraq, of an irrevocable letter of credit for a sum equal to the estimated total cost of the project (Article-9). Besides the fact that this letter guarantees, in theory, the availability of funding of the procurement contract, this measure also provides guarantees for the contractor regarding payment. It is worth noting the usefulness of these innovative provisions, which applies only for international procurement contracts, are often lacking in procurement regulations in other countries.

Even if the use of letters of credit is largely developed in Article-9, nothing is said concerning the rules to apply when the contracting entity concludes a contract with a national company without using a letter of credit, but uses certified cheques, bank guarantees or loan bonds mentioned in the Article-16-First-a.

3.2. Managing the bidding process

The involvement of officials at the highest level throughout the process is ensured by appointing senior civil servants to monitor the key phases of the contract award process, e.g. the provision of funding (irrevocable letter of credit), opening of sealed bids and evaluation of tenders.

The controls stipulated in the 2008 Regulation are administrative ones related to the financing of the public contract. However, the 2008 Regulation does not specify the use of control mechanisms on procurement, in particular the recourse to independent committees to verify the appropriateness and good management of the procurement process from the definition of needs until the execution of contract, through the bidding and bid evaluation phase. It is possible that the regulations on procurement do not say so – this being the case in the majority of domestic and international regulations on procurement. However, it would be useful to clarify the role of the Board of Supreme Audit, the Inspectors General – mentioned under Article-12 – or any other government bodies and their experience in reviewing and controlling procurement procedures.

As mentioned in the United Nations Convention against Corruption, it is necessary “to enhance transparency in the public administration, including with regard to its organisation, functioning and decision-making processes” (Article 10 of UNCAC). One way to implement this recommendation is to clearly specify the composition, role and responsibilities of the different committees or entities related to the public procurement process.
3.3. Administrative simplification and cutting red tape

Most of the representatives from ministries and from the Supreme Board of Audit who attended the procurement workshop organised by the Procurement Assistance Centre agreed that ministerial routines and red tape is a real obstacle to effective public procurement in Iraq and that they slow down the procurement process.\footnote{For details, please see Procurement Assistance Center (2007), “Procurement Workshop for Iraqi Ministries, 8-13 December 2007”, Ministry of Planning and Development Cooperation, Iraq.}

The 2008 US Government Accountability Office report mentions the inappropriateness of the process for high-value contracts, where, in certain cases, several ministerial or equivalent level signatures are required for tender contract approval. This significantly slows down the overall purchasing process.\footnote{US Government Accountability Office (2008), “Iraq Reconstruction: Better Data Needed to Assess Iraq’s Budget Execution”, Report to Congressional Committees, January.}

Although red tape undoubtedly hinders efficiency in public procurement in Iraq, some elements of administrative simplification can be noted in the 2008 Regulation, compared to the provisions of the 2007 Procurement Regulations. These administrative simplification efforts aim to accelerate the procurement process.

One important change is the diminishment of the direct role of the minister in procurement transactions, through delegation, as evidenced by the following points:

- In the 2007 Procurement Regulations, the decision of re-advertisement of a specific tender required the minister’s approval; in the 2008 Regulation this decision is made by the head of the contracting authority (Article-Sixth-a).
- Similarly, in the 2007 Procurement Regulations, the bid evaluation committee’s recommendation on the contractors’ ranking to the tender is subject to the approval of the minister, while in the 2008 Regulation it is subject to the approval of the head of the contracting entity (Article-7).
- The role of the minister in the resolution of contractors’ recourse and complaints has also been changed. According to the 2007 Procurement Regulations, the minister was the only person to whom the committee – formed to review complaints – had to submit its recommendation in order to have his/her final decision. In the 2008 Regulation, the committee’s recommendation can also be submitted to the head of the contracting entity (Article-10-First-b), while the final decision remains under the minister’s competency.
As a minister sometimes has to deal with overwhelming details of specific procurement transactions, the delegation of this power and responsibility might make procurement faster and decisions more public-oriented. However, clear rules for the delegation process as well as their appropriate control mechanisms are fundamental to put in place to ensure an effective process.

The difficulties stemming from the administrative burden incumbent on the bidders is clearly stated in the responses to the survey questionnaire. Private sector representatives mention that one problem for the companies is the obligation to present all the necessary references for each tender procedure. The result of this requirement is the multiplication of files and demands for validating certificates issued by different governmental entities.

**Remark**

Administrative simplification in this regard might be obtained by:

- Validating the reference for a period (of one year, for example) instead of for one single tender.

- Re-organising the administrative system to make it possible for companies to obtain all the necessary documents at a unique counter. This possibility is already available in several developing countries, such as Senegal, and more recently, Algeria. The rationale behind this would be to encourage local companies to participate in the public tendering process.

**Country example**

In Senegal and Algeria, as mentioned above, all the authorisations and administrative certificates required from a contractor to submit a procurement bid can be obtained in a timely manner from a single office at the Ministry of Finance. This “one-stop shop” helps contractors avoid consulting different administrations and offices to obtain the required documentation individually. The creation of this single office is accompanied by the publication – on the website of the Ministry of Finance – of the list of the documents necessary to obtain the required authorisations and administrative certificates.

### 3.4. Financial procedures linked to procurement

**Financial guarantees** (such as bid bonds) required from companies participating in the procurement selection procedure is a common practice in most countries. The rationale for requiring bid bonds – a bank deposit – when submitting a tender is to
assure the seriousness of the contractor’s tender to provide the goods or services. In most countries, the unsuccessful bidder receives back the deposed amount once the tender selection is finished and the contract is signed with the winner.

The requirement to submit bid bonds is clearly defined in the 2008 Regulation under the part entitled “Legal insurance” (Article-16). However, responses to the questionnaire show that the deadline given to the contractors to submit their offer is rarely long enough to secure these financial conditions from the banks. One reason is that the bid bond corresponds to the amount of 1% of the offer. The company has to calculate its price before, and then seek a bid bond from the bank for the percentage of the calculated price. Due to the often limited advertising period of tenders, there is generally only one or two days left to obtain the bid bond, which is not sufficient for the bank to verify the possibility of according the required guarantee. There could, as a result, be a considerable risk of corruption in the bank – such as to issue a bid bond without verifying the guarantees presented by the company.

**Remark**

The publication of the cost estimation of the project in the tender notice, and the calculation of the bid bond by using this indicative price as a reference, may give companies enough time to obtain guarantees from banks because these guarantees may be based on an official calculated price known in advance – even if the proposal of the company is cheaper.

For all bid bonds issued, there is a definite expiration date stated so that unsuccessful bidders resources are not unnecessarily held. However, the 2008 Regulation stipulates that the “bid bond of the three first bidders nominated for the award is not to be released” (Article-7-Seventeenth). The rationale for that, described under Article-17-First is that in case of non-performance of the first awarded bidder, the second nominee, or in case of abstention from the second nominee, the third nominee will execute the contract. This practice is not only a deterring factor for submitting a bid but it can also lead to liquidity problems – even to temporary insolvency in the case of small and medium-sized enterprises (SMEs) – for contractors that were awarded as second or third-best offers in parallel with several procurement projects. In addition, responses to the survey questionnaire show that significant delay may arise when unsuccessful contractors intend to release their bid bonds, as the 2008 Regulation does not specify deadlines and modalities for the reimbursement.

In several countries, the procurement law or code stipulates modalities of reimbursement of bid bonds, as illustrated in the following country example.
Country example

In European Union countries, the guarantee deposits are automatically reimbursed to non-successful bidders 15 days after the award of the contract to the company with the best tender offer. The payments of the deliveries are made not later than 45 days after the reception of the bill sent by the company awarded for the tender. These rules offer the companies real financial security and reduce the difficulties to present bid bonds to different tenders, because the reimbursement of one bid bond offers the possibility of presenting another without an additional bank loan.

In south-eastern European countries, such as in Macedonia, the law on public procurement adopted in December 2007 indicates that the tender guarantee shall be returned to the unsuccessful bidder within its validity period and the tender guarantee shall be returned to the selected bidder after the latter signs the public contract and submits the performance guarantee if required (Article 47 § 7 and § 8 of the Macedonian Procurement Law).

Provisions such as Article-17 and responses to the survey questionnaire show that this is a common situation in Iraq – that the first awarded bidder refuses, or fails, to execute the contract.

According to the US Government Accountability Office, the reason committed procurement contracts are not executed stems from the capacity and security challenges currently facing Iraq. However, the situation seems to be more complicated. Huge amounts of engaged public money lay in the form of outstanding letters of credit – meaning of unfulfilled public contracts – as liabilities in different ministries’ budgets. This is worsened by the fact that certain companies happen to be awarded again and again to public contracts even if they were unable to execute previously awarded projects. Sometimes, high-value contracts are awarded to small, unknown and non-performing companies; which highlights the risk of subjective selection and favouritism in the selection process.

Remark

In cases where procurement projects are not executed, it is important to modify the selection criteria and to impose heavy penalties – e.g. blacklisting for a pre-defined period – on companies that submit offers without real intention and/or possibility to execute the contract. The recommendation of the bid evaluation and analysis committee and the final decision of the head of the contracting authority require verification in cases of non-performing companies to confirm that the selection was not influenced by non-objective evaluation factors and the possibility of mismanagement, fraud or corruption had not arisen.

Several good practices can be adopted to overcome the difficulties related to bid bonds. One good solution for the financial deposit guarantees is illustrated by the following country example.

### Country example

In Algeria, local companies felt that they were automatically excluded from tenders because they had to present bid bonds for every tender, especially when the tenders were published at the national level for all contractors across the country. Only the big Algerian and foreign companies had sufficient financial resources to submit offers for these tenders. According to the decision of the Government of Algeria on 23 July 2008, financial deposit guarantees are hence required only for contracts above the threshold of 250 million Algerian dinars (DZD).

*Source: Liberté newspaper, 26 July 2008.*

### Remark

Another solution might be global guarantees (*i.e.* not specific to a given contract) applied for contractors, issued by the banks for a given period. Where foreign firms are concerned, moreover, it might be possible to use guarantees of banking institutions based in their countries of origin (that could then be registered by the Iraqi banks in a simple and rapid manner). Finally the calculation of the bid bond as a percentage of the published indicative price of the tender may facilitate the obtaining of these guarantees.

The Iraqi banking system plays an important role in these transactions, namely in returning guarantees to non-successful candidates. It would be important to require that the same Iraqi bank issues the bid and performance bonds on the one hand and the commercial letter of credit on the other. This universally used requirement would help ensure that one corresponds to another; as it is difficult to co-ordinate that performance bonds are in place without knowing the status of the payment mechanism.

According to the 2008 Regulation, the performance bond guarantee, required from the winner to ensure the smooth execution of the contract, is determined at a rate of 5%. This proportion seems to be in line with the practices in use in the public work sector. Nevertheless, it would be important to specify that the bid bonds will be reimbursed when the performance bond is presented. Also the bid bond could be considered as a part (20%) of the performance bond and must be modified if necessary. While the 2008 Regulation requires the performance bond guarantee for all contracts (Article-16-First-d), it is also important to recognise that different types
of contracts call for different types of financial guarantees. Accordingly, supply contracts may require less guarantees while, in the meantime, contracts for large and complicated projects would probably call for several types of financial guarantees (*i.e.* Advance Payment Bonds, hold-backs that are not released until satisfactory completion of the contract, performance bonds). Iraq’s procurement regulations should consider providing that flexibility.

A new element in the 2008 Regulation compared to the 2007 Procurement Regulations is the exemption of the public sector and of the government’s public companies from submitting the bid and performance bonds for a period of three years starting from the date the Regulation takes effect (Article-16-First-e). *Justification of this three-year limit is needed.*

As far as payment modalities concerned under the 2008 Regulation, they are much more explicit than in the previous regulations (Article-19). The system adopted is similar to those in use in other countries; however, payment control measures are less developed in Iraq (except for supplies coming from foreign countries).

4. Principle 4

**Ensure that procurement officials meet high professional standards of knowledge, skills and integrity.**

According to international standards, ensuring that the overall procurement process is managed by qualified public officials is a prerequisite for good and effective procurement. This professionalism can be guaranteed by providing and updating a common body of knowledge, skills and ethical standards among procurement personnel.

The 2008 Regulation *does not explicitly address the professionalisation of public officials* involved in the award, monitoring and execution of contracts – which is generally not the object of a law on government procurement. However it is very important to have competent and properly trained officials in place to reduce the risks associated with the award and execution of contracts.\(^{18}\) In order to control

---

\(^{18}\) In Cameroon, for example, on 21 and 22 July 2008, the high-level officials in charge of the execution of public investments declared that administrative and bureaucratic red tape was the reason for the insufficient financial execution rate of the investments (4%). The insufficient qualification of the employees in charge of the follow up of the contracts was included in the description of the administrative red tape. *Source: Le messager, 28 July 2008.*
these risks, the 2008 Regulation lists specific ethical principles that should be adopted by those in charge of a public contract; they have to abide by professional principles.

A statement in the tender’s documentation is required “clarifying that the government and public sector employees are not allowed to participate in tenders, either directly or indirectly” (Article-5-Second-q). This first trail of managing conflict of interests is very positive, yet, would need further elaboration. The 2008 Regulation also stipulates the non-disclosure of information to persons not implied in the contracting process (Article-13) – doing so may lead to criminal prosecution. The Contracting Guide specifies the content of the reports that have to be drafted during the process; civil servants are obliged to follow these instructions – it is a part of their ethical behaviour.

These provisions of the 2008 Regulation are considered particularly modern and innovative in light of other countries’ procurement rules.

However, according to the survey questionnaire responses, the general opinion of private sector representatives is that public procurement officials are not sufficiently qualified to deal with their assignments. The private sector commented on public officials lacking the expertise to correctly evaluate logistical and technical elements of the procurement contracts, and also stressed the lack of their basic English-language skills. Public officials in charge of procurement have also acknowledged that the procurement and managerial staff are unqualified and unsuitable for their positions.19

The Procurement Assistance Centre (PAC), mentioned previously, contributes to the proper implementation of the Iraqi procurement regulations through organising trainings for public officials in charge of public procurement. Their regular procurement workshops address crucial procurement provisions for public procurement officials in several governorates and Iraqi ministries. The effectiveness of the trainings can be hindered by inviting not properly targeted public officials to the sessions, and by the high turnover in Iraqi ministries and non-ministerial agencies in provinces and regions.

As previously mentioned, PAC developed the 2007 Contracting Guide to explain how to effectively implement the provisions of the 2007 Procurement Regulations and provide a fairly standardised approach. It is important to mention that PAC has

already used OECD documents – such as the one drafted for, and presented at, the 8-10 July 2008 meeting in Paris\textsuperscript{20} – as training material.

\textsuperscript{20} “Improving Transparency in Government Procurement Procedures in Iraq” (2008), discussion paper prepared for supporting discussions and exchange of views in Workshop 2, Session 1 on Enhancing Transparency in Public Procurement, 8-10 July, Paris, France.
III. PREVENTION OF MISCONDUCT

5. Principle 5

Put mechanisms in place to prevent risks to integrity in public procurement.

5.1. Corruption risk awareness

A number of important points related to corruption risk awareness are covered by the 2008 Regulation, including the ban on the disclosure of information to persons not involved in the procurement process (Article-13). Another important measure prohibits government and public sector employees from participating in procurement tenders directly or indirectly (Article-5-Second-q). This ban is very important, but further explanation is required to clarify the scope of the wording “indirectly”. This specification could compensate for the decision that the need to fill in a form declaring any private interest has been deleted from the 2008 Regulation, although it was stipulated in the 2007 Procurement Regulations.

Reference can be found in the 2008 Regulation to comply with provisions to prevent corruption, in particular requiring the need to seek authorisations throughout the process. Another point related to risk awareness concerns the evaluation of the bid: Article-5-Second-p mentions the existence of “evaluation ratios” which are included in the bid documentation. Even if it is not considered sufficient to publish evaluation ratios in the tender notice instead of evaluation criteria, this is a first step in the right direction to limiting risks of arbitrary criteria (which can lead to accusations of favouritism in the procurement award process).

Despite this undeniable progress and the fact that these provisions can reduce the risks of corruption, there is no reference in the 2008 Regulation to improving risk awareness (risk mapping, for example) in the design and implementation of the procurement process. Also, the 2008 Regulation does not contain any significant innovations with regard to the strengthening mechanisms to prevent risks of corruption in public procurement. It is nonetheless worth noting that it is not necessarily the purpose of a public procurement law to combat corruption. Indeed, in most countries, regulations on public procurement aim exclusively at helping the administration make the best purchases possible by organising competition while the fight against corruption is regulated in the criminal code. The respect of
transparent procedures opened to the maximum number of competitors is generally the best means to reduce fraud and corruption.

**Control and authorisation procedures exist and are in place at several levels** (technical feasibility of the project, verification of the specifications before publishing the tender notice, availability of land for the projects, availability of funding, references for tendering firms, guaranteed deposits, compliance of the offer with the specifications). Furthermore, responsibility for the signing of the contract depends upon the value of the contract; disputes will be judged, in the first instance, by the competent minister or governor (Article-10) and in appeal by the specialised administrative court. All these provisions make it possible to say that a **certain number of precautions have been taken to enhance organisational resistance to corruption**. However additional measures may limit and/or substantively reduce the risks of corruption.

**5.2. Rotation of public officials**

Likewise, **it is recommended that qualified officials be rotated**, particularly when they are members of the bid evaluation committees. In the 2007 Procurement Regulations, specific provisions stipulated that the bid evaluation committee should be renewed at least every six months. **This provision is no longer included** in the 2008 Regulation.

Rotation of qualified public officials can be a safeguard for their integrity in positions highly exposed to risks of corruption and bribery. Procedures which call for brief tenures and short rotation periods may lead, however, to loss of organisational experience and knowledge. In practice, the duration of a mandate in a committee may not exceed one or two years.

**5.3. Use of new technologies in procurement**

E-procurement may also provide a promising instrument for standardising processes, avoiding direct contact between officials and bidders and fostering transparency and accountability in the process. The use of new technologies, in a wider context, can contribute to reduced red tape as they require rationalisation of processes.

National Internet portals are used for publishing procurement tender opportunities in some cases – as found by the survey questionnaire. Although the 2007 Procurement Regulations did not allow **taking into consideration bids**
presented to the contracting parties by electronic means, this prohibition has been
deleted from the 2008 Regulation. As the 2008 Regulation has only recently been
approved, the e-readiness of the contractors who intend to do business with the
Iraqi government may yet to be confirmed. A wider question on securing
information and data in Iraq may also be raised.

E-procurement may also help assure that relevant information on public
procurement tenders and processes is safeguarded in a stable format. It could
contribute to the requirements related to filing and archiving procurement
documentation. Amongst its several advantages, e-procurement also provides the
possibility of avoiding direct contact between public officials and bidders as well as
between different bidders. Therefore, using new technologies can help diminish risks
of corruption and collusions between companies.

Nevertheless, it is important to note that Iraq still faces regular electricity
problems, which hinders providing any further concrete proposals about e-
government in general, and e-procurement in particular.

5.4. Anti-corruption agencies

In order to effectively combat corruption, it is necessary to act simultaneously
on three levels: preventing corruption, educating the population and sanctioning
corruption. In several countries, a special agency is established to manage these
tasks.

The oldest anti-corruption agency was created in Hong Kong, China. Others
have been created in a majority of countries. Some are in charge of investigations
and sanctions, while a few are only tasked with prevention (e.g. Albania, France and
Slovenia).

With regard to public procurement, the activities of anti-corruption agencies
are designed to prevent corruption by:

- helping the authorities identify risks in the procurement process and in
  public officials’ roles, responsibilities and behaviour – by using
  organisational, process and persons’ audit methods;
- mapping out vulnerable points of the procurement control system;
- providing tools for reducing the identified risks.
Another activity of anti-corruption agencies consists in using the knowledge of the corruption mechanisms to help the investigators, from police or justice, to more easily detect evidence of corruption offenses.

**Country example**

In Latvia, unsuccessful bidders of a public tender can file their complaints directly with the Procurement Monitoring Bureau, which is the Latvian public procurement agency. If the latter does not answer favorably, the case is passed to the Corruption Prevention and Combating Bureau (KNAB) which will investigate it. This collaboration makes it possible to respond very quickly to company complaints, start investigations and detect fraud and corruption before the signature of a tender contract.

In France, the Central Service of Prevention of Corruption (SCPC) has been ensuring specific training for police officers and “gendarmes” in charge of public procurement investigations. These trainings build investigators’ capacities and help them find evidence of fraud in the public procurement process.

In Iraq, the Commission on Integrity was created to reduce the risks of corruption and to increase the integrity of the Iraqi officials (civil servants and elected officials). Its mandate to fight corruption requires supervising, controlling and inspecting.

With regard to public procurement, the Commission on Integrity employs officials specifically in charge of inspecting irregularities with the help of submitted complaints in public procurement. Whenever fraud is discovered, the Commission transfers the case to the judiciary branch.

Integrity and honesty of officials involved in public procurement procedures is fundamental to ensuring the best use of public funds, delivery of goods and services, and reducing corruption.

**Remark**

To promote integrity in the public sector in general and in the public procurement system in particular, several acts can be carried out, such as:

- mapping out the risks throughout the whole public procurement process (from assessment of needs to final payments), including process risks, management risks and risks related to people;
- helping authorities to put in place effective control procedures;
• helping authorities to put in place efficient management procedures;

• developing transparent and efficient decision-making processes together with the concerned public entities;

• helping the investigators to more easily detect fraud and corruption cases;

• advising authorities on how to inform and educate the wider public (awareness-raising) so that they contribute to the non-tolerance of corruption.

6. Principle 6

Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.

Fostering an open dialogue with suppliers contributes to reducing the information asymmetry private sector representatives may experience vis-à-vis the public procurement process. Co-operation is crucial as international and/or local enterprises are governments’ direct business partners, needed to provide the required supplies, services, consultancy and public works.

Co-operation starts from the beginning of the process by defining the “rules of the game”. Drafting public procurement regulations involves wide-ranging collaboration between public sector officials and professionals from the private sector in many countries. The quality of this collaboration will determine the quality of the legislation as well as the ease with which it can be implemented and applied. Such collaboration has always taken place before the law has been adopted and is not usually mentioned in the final public procurement act. This may explain why collaboration with the private sector is not mentioned in the Iraqi regulations related to public procurement.

This dialogue may continue and take place throughout the procurement cycle, in particular with regard to practices, e.g. prompt responses from the purchasing administration to contractors’ questions for clarification before submitting bids. The 2008 Regulation requires that the tender notice contains an indication of the contracting entity’s website with the e-mail address for further inquiries (Article-5-First-h). This provision constitutes a real improvement over the 2007 Procurement Regulations. The 2008 Regulation also gives the opportunity to the contractors, as already mentioned in previous sections, to complete or correct their submitted
tender documentation (Article-7-Sixteenth), so as to avoid exclusion due to administrative inadvertence.

Furthermore, the 2008 Regulation stipulates that the tender documentation must contain the date for a conference to answer all contractor inquiries at least seven days before the tender’s closing date (Article-5-Second-g). The aims of this conference are to help disseminate information related to the procurement and answer remaining questions. In practice, fixing such a conference date might prove difficult, as the tender closing date is not a predefined date in the calendar, but links to the last advertisement of the tender notice (refer also to § 1.3.2).

Exchange of information should not stop with the awarding of a contract. One element that builds contractor trust in the overall procurement process is the availability of dispute-resolution mechanisms.

\[
\text{Country example}
\]

In the Maghreb countries, and in Morocco in particular, all bidders have the right to ask for clarification regarding a procurement project before submitting their tender. The purchasing ministry, governmental unit or entity, when receiving such a request, is required to disclose its reply to all the other bidders in order to ensure fair access to information.

This possibility also exists in countries of the European Union and bidders are recommended to make their request solely in writing so that the reply can be forwarded to all the firms that request details on the specific procurement project. In addition, it is also specified that requests for clarification addressed to the purchasing ministry, governmental unit or entity during the last week preceding the bid deadline will not be examined. The rationale of this latter restriction is to avoid the extension of the consultation period only because of unending requests for further information.

In contrast, Iraqi regulation does not say whether it is possible for firms to request further details on a project during the consultation period. Only the above-mentioned conference is organised to answer bidding company questions. Allowing firms to ask specific questions in writing would avoid subsequent problems and misunderstandings. The answers to the written inquiries should be sent to all contractors having purchased the tender documentation.

It is also often difficult for a company to introduce a dispute claim against the decision of the contracting entity. The companies are quite concerned that, in bringing a dispute, the contracting entity may blacklist the company.

\[
\text{Country example}
\]
In Morocco, there is a recourse and complaint system in place for procurement appeals. However, the companies which were not satisfied with the decision of the administration concerning the award of a public contract hesitated to make an appeal and challenge those decisions. They were discouraged to do so for fear of possible consequences, such as being eliminated from future public contracts. In order to keep the contesting company anonymous and to overcome its reluctance to contest the decisions of the administration, the General Federation of Moroccan Businesses (GFMB) presented a solution. The GFMB decided to assume the responsibility to represent the company in the contest procedure while keeping the company’s secrecy throughout the complaint process.

Dialogue with suppliers is facilitated if there are longstanding relations between an official (decision maker, for instance) and the representatives of the firms. These relationships can enhance the efficiency of business transactions, but may also facilitate bribery and corruption.

Responses to the survey questionnaire show that the private sector has several suggestions for improving procurement procedures. They expect better communication and information sharing from the contracting entity vis-à-vis the private sector contractors concerning the procurement process, including:

- Diffusion of clear and standard procedures for the public procurement process and the related financial arrangements and guarantees.
- Information sharing related to the evaluation criteria and the estimated costs of the project.
- Prompt responses to the private sector’s requests concerning the procurement contracts prior to submitting the bids. Responses to these requests should be forwarded to all of the other contractors to ensure equal treatment.
- A standardised way to inform the bidders about the result of the contract award; for the selected one and the non-successful contractors alike. The survey questionnaire responses show that replies to requests for an explanation from unsuccessful companies remain too formal.
- A functioning and effective post-bidding appeal and recourse mechanism system that could restore the confidence of those contractors involved in the whole procurement process.
7. Principle 7

Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly.

Monitoring the public procurement process and detecting irregularities and corruption should be accompanied by accessible procedures for reporting identified irregularities and effective, proportional and timely sanctions for possible breaches.

It is important to mention that the purpose of the 2008 Regulation on public procurement is generally not to list the measures devoted to detect and fight corruption and bribery. These integrity measures – such as codes of conduct, financial declarations, control mechanisms, etc. – need to be the subject of additional specific laws or regulations, as is the case in other countries. It would, however, be useful if there were an explicit reference to these regulatory provisions in the 2008 Regulations.

A positive and very important provision (to be further discussed under § 8.1.) is the strict requirement to archive the main components of the tender documents. Stringent provisions stipulate the list of information that must be recorded and filed before the tender evaluation (Article 6-Fifth). These documents can help to document past procurements and provide a basis to detect misconduct or mismanagement by procurement control mechanisms. The 2008 Regulation should also provide similar provisions concerning the filing of documents even after the procurement contract is implemented. It should also mention the sanctions and/or penalties to be applied in case these documents are not, or only partly, archived.

Other provisions regarding the fight against corruption and sanctions should be made in a separate law or in the criminal code, as is the case in other countries. The reference to these legal or regulatory measures would help clarify the responsibilities of the different institutions in charge of the fight against corruption in general, and in public procurement in particular.

Example

Among the legislative texts which contain specific references to integrity in public procurement, the most recent and widely known is the United Nations Convention against Corruption (UNCAC). With regard to public procurement, the UNCAC, in its Article 9, highlights the necessity to:
a) publicly distribute information,

b) establish the conditions of participation in the tenders in advance,

c) establish objective and predetermined criteria to use for the selection of the suppliers,

d) establish an effective system of recourse,

e) establish measures to regulate matters regarding personnel involvement in procurement, such as declaration of interests, selection of personnel, training requirements.
IV. ELEMENTS OF ACCOUNTABILITY AND CONTROL

8. Principle 8

Establish a clear chain of responsibility together with effective control mechanisms.

8.1. Archiving documentation

The requirement to file bids and documentation is extremely precise in the 2008 Regulation (Article-6-Fifth). If properly implemented, any malfunctioning in the tender process can be traced throughout the procedure. The Contracting Guide even stipulates what form the various reports included in the archives should take. This point is essential, not only for controlling the decision-making process, but also for ensuring transparency, if the documentation is accessible to the control institutions and representatives of civil society. There is little data on effective implementation of this specific provision and on how these files are kept in practice.

The Contracting Guide provides detailed guidance on archiving documents. However, as the 2007 Procurement Regulations have been replaced by the 2008 Regulation, the status of the 2007 Contracting Guide is pending.

8.2. Chain of responsibilities

In order to guarantee the legal security of the public procurement contract award process, it is essential to define a clear chain of responsibility as well as put in place effective control mechanisms. The 2008 Regulation defines a number of levels of responsibility, both for contract approval and for the amendment of certain contractual terms and conditions. Provisions clearly specify important accountability mechanisms, in particular by defining:

- the role of the bid opening committee,
- the role of the bid evaluation and analysis committee,
- the role of the minister and governors in the process,
• the content of the reports,
• the content of the archived files.

Before launching a public contract, according to the 2008 Regulation, the “specialised authorities” confirm the availability of allocated funds needed to finance the contract (Article-3-First-c) and indicate the classification of the project within the project plan. *It remains unclear, however, what “specialised authorities” refers to.*

In most countries, major structural investments are debated and approved by the Parliament which, in most cases, adds a special item to the general state budget to cover the funding of such investment. The funding for smaller investment projects is voted by regional or local assemblies. Based on the responses to the survey questionnaire, these practices do not seem to be common in Iraq.

The technical and economic feasibility reports of the project are subject to a pre-approval issued by the Ministry of Planning and Development Cooperation (Article-3-First-a). As this provision is new in the 2008 Regulation, it is not certain how this pre-approval procedure is being enforced.

For a public reconstruction contract, all legal and financial issues (Article-3-First-e,f and g) regarding the location of the work is to be prepared by the contracting entity before announcing the tender and should be pre-approved by the Ministry of Planning and Development Cooperation (Article 3-First-a). Again, enforcement of this provision is not clear.

The 2008 Regulation does not give guidance on who is responsible for choosing the tendering method to use for procurement projects. It simply states that one of the six existing tender methods shall be adopted by the contracting entities (Article-4).

According to the 2008 Regulation, the head of the contracting entity, or any person he authorises, decides and give his/her approval to re-launch a previously unsuccessful call for tender (Article-5-Sixth-a), while s/he informs the Minister of Planning and Development Cooperation about the re-announcement. The role of the Minister of Planning and Development Cooperation remains important in the procurement process, but is diminished compared to the 2007 Procurement Regulations.

The role of the bid opening committee and its composition has been specified in great detail in the 2008 Regulation (Article-6-First to Forth) as well as that of the bid evaluation and analysis committee (Article-7). *These specific details on the role*
of the committees, their establishment and the contents of their reports are strong points of the 2008 Regulation, particularly in view of the fact that they are rarely provided in the procurement legislation of other countries.

Although provisions discuss a number of stages of the procedure, these verifications and controls concern the initial phases of the project: from the definition of the needs to the attribution of the contract. No further indications in the 2008 Regulation explain the means by which it is verified and certified that the deliveries are in conformity with the specifications of the contract. As one main possible source of corruption, this point is essential and must be specified in the regulations. Detailed information is also necessary to provide, especially concerning the obligation of external auditors to audit activities relating to the contract award process.

8.3. Procurement oversight institutions

According to international practices, public procurement control – independent from the government contracting entity – is ensured by the Inspector General(s) offices and the Court of Audit institutions and covers the pre-tendering, tendering and post-tendering phases. These external audits are vital to ensure that implementation practices are in line with the processes required by legal and regulatory frameworks. Financial audits help detect and investigate fraud and corruption in public procurement. In general, external control institutions provide yearly reports and recommendations for systemic or procedural improvement. External controls should compliment each other and be carefully co-ordinated to avoid gaps or loopholes and maximise the information produced.

In Iraq, a legal framework exists that defines the mandate and responsibilities of the Inspector Generals, as well as of the Iraqi Board of Supreme Audit (BSA). This legal framework dates back to the CPA era. Accordingly, in each ministry, the Inspector General’s (IG) office is in charge of the financial and performance audit of the ministry, including the process of complaints of fraud, waste, abuse of authority and mismanagement in the ministry. The IGs are in charge of publishing reports with their main findings.

The BSA, created as independent external oversight institution, is responsible for the control and audit of public accounts subject to financial control and it verifies the soundness of application of financial laws, regulations and instructions. Also, as a public supreme audit institution, it serves as a “public guardian” by identifying fraud, waste and abuse and by promoting anti-corruption and integrity in the Government of Iraq.
The 2004 Coalition Provisional Authority Order Number 77, pertinent to the Board of Supreme Audit, requires that the BSA shall work in conjunction with the Commission on Integrity and Inspectors General of individual ministries “to ensure that the Iraqi government remains honest, transparent and accountable to the people of Iraq."

According to bilateral discussions with Iraqi public officials and with reference to responses to the survey questionnaire, some aspects of the public control system, and in particular the public procurement control, requires improvement.

First, very little information is available on the actual powers and resources of the Iraqi control institutions, in particular on the Inspectors General, the Board of Supreme Audit and the Commission on Integrity, related to procurement control. Furthermore, little information is available concerning the actual publishing of the annual reports of these institutions as well as the purpose, use and impact of these reports (which aim to improve the system).

Secondly, while the division of tasks and responsibilities is clarified in legal sources, practical application seems problematic. Responses to the survey questionnaire confirm that instead of providing relevant information by co-ordinating the work of the above-mentioned institutions on the one hand, loopholes remain in the control system and responsibilities may overlap, on the other hand.

Remark

It might be important to establish a new basis for co-operation between the Inspectors General, the Board of Supreme Audit and the Commission on Integrity to ensure that their co-ordinated work results in enhancing the efficiency of controls in general, and procurement control in particular, with the ultimate aim of reinforcing the credibility of the Government of Iraq.

Thirdly, as mentioned under § 8.1., there is a concern about the existence and accessibility of written documents, which serve as the basis for monitoring public auditors and inspectors in Iraq. Bilateral discussions with Iraqi public officials confirmed that even if these documents are available, it is difficult to find them – as they are stored in separate offices and buildings and the databases that catalogue them are incomplete. Also, as no legal framework exists on empowering the public at large to freely access this information, these documents can not reach the public at large. Therefore, the application of the principle of transparency seems restricted.
9. Principle 9

Handle complaints from potential suppliers in a fair and timely manner.

The fair settlement of claims within a reasonable period of time is a requirement specified in the instructions of all international organisations. The European Union has adopted one specific directive that deals with “Remedies procedures” in order to provide suppliers with guarantees and requires governments to introduce effective complaint and recourse systems.

Article-10 and Article-11 of the 2008 Regulation specify the complaint and recourse procedures available to unselected contractors, prior to contracting and following contract signature. The dispute resolution mechanism after signing the contract (Article-11) contains new mechanisms not mentioned in the 2007 Procurement Regulations, such as conciliation, arbitration and recourse to specialised courts.

The most important aspect of these procedures, as described in the 2008 Regulation, is that they are extremely rapid, compared to similar systems in place in other countries. The specialised administrative court, established at the Ministry of Planning and Development Cooperation, issues its decisions to solve conflicts within 120 days starting from the date of paying the legal court dues (Article-10-Forth). The central committee formed in every contracting entity should review written complaints and objections and submit its recommendation to the head of the contracting entity or to the minister within a period of 15 days, while the latter is allowed to decide on the complaint in only 7 days.

Contractors have seven days to make an appeal challenging the award of a contract starting from the date of awarding. Although the 2007 Procurement Regulations – even if this is not necessarily their purpose – do not specify whether such an appeal will defer the award of a contract and its execution, the 2008 Regulation stipulates that the contracting parties “have to wait before signing the contracts until the issue is solved by the competent minister” (Article-10-First-c).

According to the provisions of the 2008 Regulation, the central committee formed in the contracting entity is the first instance jurisdiction to which a “hierarchical” recourse may be presented. The administrative court can be used when the decision of the ministry is not accepted by the unselected contractor. However, it is not stipulated in the provisions whether an appeal should be lodged
with one before the other, or whether it is possible and/or mandatory to make an appeal with both institutions simultaneously.

The role of the head of the contracting authority in the protest and complaint system is ambiguous, being simultaneously “judge of” and “party to” disputes between the purchasing administration and unselected contractors. S/he has the final word on the attribution of the contract (Article-7), while the recommendations of the central committee responsible for reviewing complaints and disputes are also submitted to him/her for consideration. The final decision on accepting or rejecting a submitted complaint remains under the minister’s competency. The administrative court option cannot be seized before the final decision of the minister.

**Remark**

In order to ensure neutrality of the decisions concerning contractors’ complaints, the administrative court option may be seized with complaints as soon as possible and at the same time as the central committee in the contracting authority.

However, risks of abuse of authority may still exist – e.g. informal sanctions vis-à-vis the company when the contracting authority decisions have been challenged and annulled by the administrative court.

### 10. Principle 10

**Empower civil society organisations, media and the wider public to scrutinise public procurement.**

According to international standards, governments enable stakeholders and the wider public to scrutinise public procurement through the disclosure of information. Oversight bodies also play an important role in enhancing scrutiny.

**Country example**

In Armenia, civil society is involved in the work of the working group in charge of developing the national anti-corruption strategy and action plan for the next five years, which also includes specific measures on integrity in public procurement. Although final approval of the proposed measures remains in the hands of the Armenian government, civil society was given the option to express their opinion on this issue.
The 2008 Regulation does not specify what means of monitoring the award of contracts should be made available to the general public and the parties involved. No details explain what information should be made public to inform all interested stakeholders about the procurement system, process and specific procurement transactions. According to the responses to the survey questionnaire, even the contractors who are personally involved in the procurement have to deal with this lack of information. As mentioned previously, no specifications are found in the 2008 Regulation as to how the potential contractor may seek further information on a specific tender unless s/he participates in a “special conference to answer the inquiries” (Article-5-Second-g). Also, unsuccessful bidders learn they have not been selected for the procurement in an indirect way: by not receiving a confirmation that they have been selected.

In most countries and territorial authorities, there is a system of expenditure programming which results in the adoption by the municipality, provincial or regional council, the ministry or even Parliament (the latter is only in the case of big investment projects with strategic importance for the country) of a report justifying the intended expenditure. When this report is submitted for approval, the opposition and ordinary citizen have the opportunity to check that real needs exist and, if need be, mount a challenge through clearly identified procedures.

In Iraq, further legislation, for example a specific law on the fight against corruption, bribery and fraud, would be needed to specify the form such monitoring might take. For the time being, however, the only information available is from publishing procurement notices and making public the award of public contracts. However, this obligation for publishing information does not concern all public contracts. It would be of interest if, as in European countries, details of all contracts awarded were published, irrespective of the procedure used to award the contract.

However, it is worth noting under this point, that the “offices of public procurement in all ministries” and Inspector Generals are responsible for monitoring the application of public procurement procedures (Article-12).
PART II

ANALYSIS OF THE REGULATION N°1 OF 2008 OF GOVERNMENTAL CONTRACTS IMPLEMENTATION, ARTICLE BY ARTICLE
In order to facilitate the work of the Iraqi authorities, the Regulation N° 1 of 2008 of Governmental Contracts Implementation (“2008 Regulation”) has been examined article by article. This also helps identify the changes or improvements which might be made to the provisions of the 2008 Regulation in order to bring it into line with the recommendations of international organisations. Some of the comments will refer to the differences with the former 2007 Procurement Regulations.

**Article-1**

The text of the procurement regulations does not include a preamble or introduction, but begins immediately with Article-1. Given the remarks made in Part I of this report about the overlapping of procurement regulations with other regulations and laws – concerning, for example, the public procurement control rules, the fight against corruption legislation or the general organisation of State services – it would be important to list in a preamble all the legislation which, though not directly concerning public procurement, applies to certain stages or persons referred to in the present document. For instance, the European Directives could serve as a good example for preparing such a preamble.

Article-1 could be considered, in a certain sense, as a kind of “preamble”. Although it contains the objectives of the 2008 Regulation – *i.e.* clarifying the general principles, regulating the implementation methodologies, designating authorised parties for opening and analysing bids and initiating an appeal to the Administrative Tribunal – further introductory elements, definitions and references should be added. References to the system of “contractor’s classification” should also be indicated in the preamble.

**Suggestion**

List in a preamble all the laws and regulations that apply to certain stages of the procurement procedure as well as laws the 2008 Regulation refers to. Also add definitions of procurement actors, institutions, techniques and processes, which are necessary to properly interpret the Regulation.
Article-2 describes the scope of application of the 2008 Regulation by indicating that it applies to contracts concluded between all Iraqi Government or public sector entities and contracting partners from Iraq or elsewhere.

The 2008 Regulation does not seem to apply to non-governmental entities that local or regional authorities can sometimes be. If this is true, it is a fundamental difference with nearly all the legislations regulating public procurement in most countries. It would mean that in parallel with this 2008 Regulation stipulating the procurement processes for purchasing government entities and public bodies, each local authority defines its own rules. That would certainly complicate the work of contractors since they will have to check, each time they prepare to submit a bid, what are the rules to apply with the specific contracting entity.

**Suggestion**

Extend the scope of application of the 2008 Regulation to all territorial authorities – regardless of whether they are governmental or not.

In the second point of Article-2, it is specified that the provisions of the 2008 Regulation do not apply to contracts and projects financed by international or regional organisations. Rules agreed on a case-by-case basis (agreements or special protocols) will be applied to such projects.

This provision means that these are “tied” contracts which the United Nations and the World Trade Organization have been trying to eliminate for several years due to the risks of bribery, favouritism and kickbacks that have resulted in the past.

**Suggestion**

Ensure that all public contracts in Iraq are subject to the same rules irrespective of the bodies that finance them – Iraqi Government, foreign governments or organisations.

---

21. When a donor country provides its foreign aid for goods, services or public works under the condition that the projects financed by this aid should be implemented by enterprises from the donor country, this is called “tied-aid”. Under this type of contract, it often happens that the beneficiary enterprise gives back a certain amount to the donor (notably for the funding of political parties) in the form of a “kickback”. This is why “tied-aid” is not promoted by international organisations; they clearly prefer aid funds to be “untied”, i.e. available for the recipient country to use without any conditions attached.
Article-3

Article-3 explains the procedures to be followed before launching invitations for tender. It contains important and detailed information on all administrative steps to be taken before publishing a procurement notice, including the requirements prior to the preparation of the tender documents, the pricing of the bidding documents and the preparation of the tender advertisement.

According to the first part of Article-3, prior to the preparation of the tender documents, contracting entities have to meet the following requirements:

- preparation of a technical and economic feasibility report of the procurement project, that has to be pre-approved by the Ministry of Planning and Development Cooperation;
- preparation of a study of the project in order to estimate its cost (“Cost Estimates Study”);
- verification, by the specialised authorities, that the funds are available in the national federal budget;
- preparation, in detail, of the project terms and specifications in order to ensure that the project will not change during its execution (to be published in the tender);
- approval of the exact location of the project;
- dealing with all the legal and financial concerns about the localisation of the project;
- preparation of the work site in compliance with the planned schedule, etc.

Such a comprehensive list of obligations required prior to the launch of a procurement project represents a positive approach, that has, when properly implemented, a considerable influence on the contract procedure. Such an approach is rarely observed in such a detailed manner in other countries’ procurement legislations.

However, the preparation of the tender does not require written justification that the procurement responds to a justified need of the contracting authority.
Suggestion

Verify, even in a separated report in case of high-value contracts, that the public procurement responds to a well-defined and justified purchasing need of the contracting authority.

Article-3 does not contain reference to the possibility of price adjustments. The rationale behind price-adjustment provisions is to ensure that the increase – or decrease – of the price of certain public contract elements (such as steel or gas) are considered during the contract execution period, taken into account in the cost calculation. Therefore, when the length of a contract exceeds one year, it is necessary to update the final costs of the project by a predefined system indicated in the tender documentation.

Suggestion

Include in the Regulation the use of specific measures to take into account price adjustments during the contract execution. These measures may be called “price actualisation” (for long-term contracts) and “price revision” (for important variations in the rough material cost). The description of the formula and the references of the indicators to use are to be included in the tender documentation and thus be accessible to all contractors.

The second part of Article-3 specifies that every tender documentation has a non-refundable purchasing price that is based on the contract’s importance and its costs of preparation. The fixing of a documentation purchasing price aims at promoting serious participation on the part of the bidder.

The third part of Article-3 relates to public advertising of procurement notices. Accordingly, priority is given to publishing procurement notices in the written press; however, ministry websites, Iraqi embassies outside Iraq or the United Nations Development Programme (UNDP) website may also be used.

This provision stipulates that the cost of publishing and advertising is to be paid by the selected contractors. This provision is not in line with international good practice and seems to be difficult to implement. The advertising cost, that reduces the benefits of the successful contractors once awarded, will be in advance calculated by the contractor in the submitted bid; even higher than the real cost. As mentioned, this may lead to a general price increase in the submitted bids, and makes the procurement less efficient. Thus, this is in the government contracting
entities’ interest to bear the tender-publication costs. This solution is adopted everywhere, namely in the new procurement law of Morocco, in countries of the European Union and in most other countries. Moreover, the application of this provision, *i.e.* awardees paying advertising costs, could become very difficult in cases of cancellation of the procurement procedure.

**Suggestion**

The cost of the publication of the procurement notice should be borne by the government contracting authority.

One missing element is the obligation to publish all procurement notices and contract award notices over a certain threshold (*e.g.* IQD 50 million); this would be important for transparency reasons. The contract award notice may be published even if the contractor was selected “directly”, meaning by non-competitive tender methods without public advertising, in conformity with the tender procedures stipulated in the Regulation.

**Suggestion**

Publish all procurement notices and contract award notices for tenders over a fixed threshold. The contract award notice could be published independently of the award procedure (*for example, even in case of single source or direct invitation*).

**Article-4**

Article-4 describes the different types of tender methods that can be used in public tendering. The description of the different procedures is more explicit in the 2008 Regulation than in the 2007 Procurement Regulations – in particular as far as the description of the “direct invitation” and “single source method” are concerned. Although the necessary conditions for using these procedures are well explained, some points would require further elaboration and specification, *e.g.* “special characteristics” for the direct invitation.

The denomination of the tender methods is different from those that are in use in the United Nations Convention against Corruption and in other international instruments regulating public procurement. For instance, Article-4 uses “public tender” instead of “open tender”, and “limited tender” instead of “restricted
tender”. This might simply be a question of the translation terms used when the 2008 Regulation was translated from Arabic to English.

International organisation recommendations on government procurement build on the background philosophy of using open tender as a general rule and keeping non-competitive tenders for exceptional cases. In the Iraqi procurement regulations, open tenders are stipulated to be used only for contracts worth more than IQD 50 million. Thus, the 2008 Regulation does not call for the use of open tender as a general rule.

As far as limited tenders (restricted procedure) are concerned, in view of the local situation, the requirement to consult at least six enterprises (Second-b) will probably considerably limit recourse to this procedure. For example, consulting six companies for the construction of a refinery would seem quite impossible.

<table>
<thead>
<tr>
<th>Suggestion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ensure that the competitive tender methods (open or restricted procedures) become the general and common rules to apply to all contracts. Other procedures must be used only in exceptional circumstances or in contracts involving very low amounts (threshold to be determined, fewer than IQD 50 million).</td>
</tr>
</tbody>
</table>

The two-phase tender is new tender method introduced by the 2008 Regulation. The main difference between it and the restricted procedure is that it is “applicable for contracts with intricate technical specifications or for goods, works and services whereby the details of the technical specifications for the products of the works are not available at the beginning of the project.”

This method, which applies to contracts of more or less than IQD 50 million, is similar to the procedure in use in countries of the European Union concerning the design and construction of public equipment. The use of this procedure should remain exceptional.

Article-5

Article-5 describes the information to be included in the procurement notice and in the instructions to bidders. It also provides information on the extension of the advertising period and on re-announcement of tenders.
The advertisement periods for the bids given in the paragraph (First-c) seem vague and may be subject to different interpretations. Even if the length is determined according to the importance of the contract, the minimum days’ length required are too short for contracts exceeding IQD 50 million.

A minimum delay for advertising should depend on the tender method applied for the procurement and, eventually, on the nature of the contract (works, supply, services or consultancy). It could be specified with the possibility of extending the period according to the amount of the contract or possible difficulties with the preparation of the offer. Advertising periods may differ for each consultation procedure. They also could be reduced in case of re-advertisement.

**Suggestion**

Indicate the minimum advertisement period (depending on the applied tender method) in the procurement regulations for each procedure and, if appropriate (e.g. in the case of restricted procedure) for each phase of the procedure.

The instructions concerning the tender advertising and tender documentation are clearly explained in the 2008 Regulation. An important change compared to the 2007 Procurement Regulations is that in 2008, information on the time and place for the public opening of the tenders is published in the tender documentation and not in the procurement notice anymore.

The paragraph (Second-p) makes a reference to “the evaluation ratios” when analysing the submitted bids of the contractors. Neither the criteria, nor these ratios are known in advance by the possible contractors that may suspect corruption or favouritism in the awarding. On this particular point, the Regulation needs to be updated to be in line with the existing provisions of other procurement legislations and, for example, with European Directives or World Bank regulations.

**Suggestion**

Publish the evaluation ratios and the evaluation criteria used for the evaluation of the submitted bids in the procurement notice. This publication will increase the transparency of the evaluation process.
It is also indicated in the article that “the tender’s advertisement duration [may be extended] in case of extreme necessity” (Third). Generally, in other countries, the use of the terms “extreme necessity” is proposed to reduce the tender’s advertisement length and not to increase it. Therefore, the wording “extreme necessity” should be clarified.

Paragraph Fourth highlights another difference from the previous regulations as it makes it possible for the contracting entity to accept submitted bids with prices under the administration indicative price. The upper limit (15% over the indicative price) may even be exceeded in case of re-announcement (§ Fifth-c). In this case, the limit for analysing the bids is 30% over this price.

**Article-6**

Article-6 describes the establishment of the bid opening committees and their tasks. The description is clear and easily understandable.

One point (Fifth-b) needs clarifications about the committee, namely the nature of the criteria for designating the head of the bid opening committee as well as the criteria used by the head to designate the committee members.

**Suggestion**

Clearly indicate the rules and criteria used for the nomination of the head and the members of the bid opening committee in the procurement Regulation.

**Article-7**

Though the bid evaluation and analysis committees and their tasks are very clearly indicated in Article-7, they require two proposals (as follows).

**Suggestion**

As previously mentioned, publish in the procurement notice the “unified basis” on which all bids must be evaluated according to the Regulation (Seventh).

Clarify and make public the criteria to be used for the evaluation, and do not apply any other criteria throughout the evaluation and bid analysis stages of the procurement process.
### Suggestion

Define objective criteria for the rejection of “inefficient contractors” and indicate it in advance in order to limit suspicions of favouritism.

Take specific measures for contractors that have no experience with the Iraqi Government in order to not exclude them systematically from public procurements.

In paragraph Twentieth-a, the 2008 Regulation refers to the threshold, above which the head of contracting entity has to address the Central Contracting Committee (CCC) for approval of the public contract. Instead of referring to the existence of thresholds, it would be more exact to indicate the concrete amounts of these thresholds, in Iraqi Dinars, in the Regulation.

### Suggestion

Indicate the threshold in Iraqi Dinars, above which the head of contracting entity has to address the CCC for approval of the public contract. Specify the thresholds that pertain to different contracting entities (such as key ministries, other ministries and provinces).

### Article-8

Article-8, not mentioned in the 2007 Procurement Regulations, explains the preparation of the procurement contract.

The reference on government debts requires clearer explanation.

### Article-9

Article-9 refers to necessary procedures for opening letters of credit to cover international procurement contracts. The use of letters of credit is explained in conformity with the uses in such contracts in other countries.

However, no similar provisions explain how to deal with national procurement contracts when using of letters of credit is not required, and bidders can use other options to present guarantees.
Suggestion

Provide all necessary information for national procurements not using the practice of letters of credit, in a separate Article.

Article-10

The dispute-resolution mechanism to be used prior to contracting is clearly developed under Article-10.

It is important to note that, according to the Regulation, an unselected contractor is not allowed to go directly to the administrative court. The administrative court may only be appealed once the decisions issued by the central committees are formed in every contracting entity tasked with reviewing complaints.

The first, “hierarchical” recourse stops the awarding of the contract at the level of the Minister and gives important role to the Minister or Governor. This role will probably limit the complaints presented by the companies that may be afraid of possible negative consequences of the submitted complaint.

Suggestion

In order to ensure the maximum guaranties to the bidder against unjustified decisions of the contracting authority, give the possibility of reviewing unselected contractors’ complaints by an independent jurisdiction, in parallel with the existing “hierarchical recourses”.

In order to limit non-justified recourses, it might be considered to require from the complainers to pay the value of damages occurring through delays in the signature of the contract, because of the non-justified complaints. It may be possible to adopt this provision if a high number of unjustified complaints take place. However, as the recourse and complaint system is only in its infancy, this practice can only be considered in two or three years’ time.

Article-11

Once procurement contracts are signed, disputes shall be solved through conciliation, arbitration, transfer to specialised court and international arbitration, as Article-11 explains. These practices are generally used only for solving disputes with
foreign companies. Using them in internal disputes can also be efficient and more transparent compared to presenting the recourse to a penal court.

**Suggestion**

Explicitly offer the use of conciliation, arbitration and transfer to specialised courts to national companies.

**Article-12**

Article-12 sheds light on the relations and the co-operation necessary between the contracting authorities, Inspector General offices and Government Public Contracts Directorate at the Ministry of Planning and Development Cooperation. This co-operation should be reinforced in order to ensure that all relevant information related to the public procurement process and its control are properly shared amongst these entities.

**Article-13**

Article-13 prohibits those public officials participating in the procurement process from disclosing any related information to a third party.

The 2007 Procurement Regulation used to forbid public officials from acquiring any interest when performing their duties. Generally, this type of prohibition is not included in procurement regulations but in codes of ethics or deontology. Therefore, it can be considered as a unique provision.

Also, the 2007 Regulations required the contracting officers to disclose information regarding their financial interests by filing a specific form. This provision, however, is no longer in the 2008 Regulation.

**Suggestion**

In order to reinforce the anti-corruption provisions, re-introduce the obligation for public officials to disclose all interest when performing their duties. One solution could be to require them to regularly complete an “assets declaration” in order to detect and limit illicit enrichment during their public activity.

**Article-14**
This article indicates the procedure to follow when extending the duration of the contract and lists the cases where such extensions are possible. The article also specifies that the contractor should submit a written request addressed to the contracting entity, explaining the reason for the contract extension.

**Article-15**

Article-15 indicates the conditions for introducing alterations in the contracted project or adding works and/or new quantities. No alteration or additional work could start before obtaining a written order issued by the contracting entity. Cost evaluation for alterations and additional works is also carried out by the contracting entity and should be communicated at an early stage of the contract implementation. While the provisions explain the budgetary constraints for additional works, they do not deal with the specific situations where alterations result in money savings in the project.

<table>
<thead>
<tr>
<th>Suggestion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stipulate a specific control of the quality and specify it in detail in the Regulation in order to limit the risks of reducing the quality of the project during the contract execution phase for reasons including savings.</td>
</tr>
</tbody>
</table>

**Article-16**

Article-16 indicates legal insurance, penalty delay fees and administrative expenses that must be provided by the companies in the procurement process. The article explains the amount and use of bid bonds and performance bonds and explains the method to calculate penalty fees.

The text does not specify the processes of reimbursement of the guarantees of non-selected contractors.

<table>
<thead>
<tr>
<th>Suggestion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annul and immediately reimburse the bid bonds presented by the contractors that do not obtain the contract at the end of the contract award process, as soon as the selected bidder signs the contract.</td>
</tr>
</tbody>
</table>

**Article-17**
Article-17 describes the legal consequences stemming from contractors’ violation of their contractual obligations. Two main categories of consequences are explained; those resulting from violations prior to the signing of the contract – such as confiscation of bid bonds – and those appearing in the post-contract signature, in particular the confiscation of the performance bond. It can also be stipulated that the defaulting contractor pays the difference between his concluded price and the price which the other contractor(s) successfully implement(s) the original project.

The implementation of these provisions remains a real challenge, especially as they require the defaulting contractor to pay when the reason of its non-performance was bankruptcy, for instance.

**Article-18**

Article-18 refers to the procedures, described in other regulations, for blacklisting Iraqi and non-Iraqi contractors. As the practice of blacklisting is new in the 2008 Regulation, more details would be important to include in this regard.

**Article-19**

Article-19 describes the initial and progress payments for the procurement works by referring to the Federal Budget Law. The article specifies that the progress payment should be paid to the contractor in line with the progress of work.

**Article-20**

Article-20 contains observations related to public construction contracts.

**Article-21**

Article-21 emphasises the importance of co-ordinating the contracting plans of contracting entities with the Office of Government Public Contract Policy (OGPCP) at the Ministry of Planning and Development Cooperation (MoPDC).

**Article-22 to 26**

These provisions contain undertakings of the OGPCP, the entity that had issued the 2008 Regulation. It explains that the 2008 Regulation is based on the CPA Order N° (87) of 2004, it abolishes the 2007 Procurement Regulations and that it became effective from the date of publishing in the official gazette.
PART III

PROPOSALS FOR ACTION
AND PRACTICAL TOOLS TO SUPPORT IMPLEMENTATION
PROPOSALS FOR ACTION

This Benchmark Report was drafted in close co-operation with Iraqi stakeholders who, in particular, replied to the OECD “Survey on Current Public Procurement Legislation in Iraq”. The aim of the report is to provide the Government of Iraq with the information they need to improve their public procurement system.

The analysis of the Benchmark Report, as well as the Proposals for Action are based on the analytical framework of relevant international instruments, in particular the OECD Principles for Enhancing Integrity in Public Procurement, the UNCAC, the GPA and the UNCITRAL Model Law.

The objective of the following Proposals for Action is to provide policy options for decision makers to consider when modernising the Iraqi procurement regulations and to support their proper implementation in daily practice.

Throughout the Benchmark Report, several remarks and illustrations of country examples showed possible solutions to take into account when updating current Iraqi procurement regulations.

Complementing the remarks, country examples and suggestions of Parts I and II of the Benchmark Report, the following proposals focus, in particular, on enhancing transparency, integrity and accountability of the public procurement system in Iraq and on limiting the risks of fraud, mismanagement and corruption in the procurement process. The proposals are not presented by priority, but follow the structure of the analytical framework. They are accompanied by selected practical tools to support implementation.

The proposals have been drawn up on the basis of various resources, including:

- the responses to the OECD survey questionnaires: the OECD Secretariat received more than 40 responses from procurement departments of Iraqi ministries, members of the Joint Anti-Corruption Council, members of the Iraqi Parliament, representatives of the private sector in Iraq and multinational corporations doing business in Iraq;
• interviews conducted in the field with various actors from the public and private sectors;

• consultations with high-level delegates from the Government of Iraq.

It is important to emphasise that these Proposals for Action do not impose an external system of rules and procedures. Although they may have had a positive impact in one country, they could contradict the local practices and context of another country.

Proposal No. 1: Make procurement procedures more open and efficient in order to increase competition

1.1. Choosing the right tender methods

Middle East and North Africa (MENA) region and OECD country experience shows that the use of non-competitive tender methods and restraining contractor participation in competition can lead to a major risk of fraud, favouritism and corruption, and may reduce efficiency. Therefore, it is important to limit the use of procedures such as “direct invitations” or “single source”, not only to reduce these risks but also to facilitate the controls in order to fight more efficiently against corruption.

Currently, Iraqi procurement regulations do not set open competition as the general rule for procurement.

Although the use of open tendering seems to be widespread – with the exception of specific types of products and services – the Government of Iraq may refer explicitly to public tender as the general rule in procurement, stipulating the use of open competition to the extent possible.

Furthermore, Iraqi contracting entities would need detailed guidance on the criteria necessary to choose the best tender method - taking into account the nature of the supply, service, consultancy or public work to be purchased and its local and international market actors’ capacities.
1.2. Appropriately balancing the lengths of procedures

It is important to reconcile efficiency and timely decision making with the principle of transparency as the latter may increase the length of the procurement process.

In Iraq, the length of the processes can result in the abandonment of contracts as well as in extended delays in contract execution. In the meantime, sufficient time should be allocated to ensure proper completion of the procurement processes. Therefore, the right balance of procedure lengths needs to be found.

On the one hand, timeframes should provide sufficient time for preparing, awarding, signing and notifying the tender. On the other hand, they should contribute to making procurement more efficient and accelerate the rebuilding of the country’s economy.

One solution might be to carry out an objective audit that would help better understand the constraints that the implementation of the 2008 Regulation imposes on the administration and the contractors. This audit could verify the necessity of existing constraints, and also contribute to identifying possibilities for streamlining the process in line with the efficiency, transparency and corruption-prevention efforts of the Government of Iraq. The audit could help, in particular, to:

- Identify areas for administrative simplification and cutting red tape.
- Define possibilities for delegation of power and of less direct involvement of public officials at the highest levels in all decisions. The delegation of power would require clear definition of responsibilities in the procurement process, and also strict control mechanisms for verifying compliance.

Proposal No. 2: Set clear rules for the evaluation of bids

2.1. Making evaluation criteria public

In most countries, the non-publication of the evaluation criteria used for evaluating submitted procurement bids is considered an important risk of bias, favouritism and even corruption.

In Iraq, the 2008 Regulation does not require tender evaluation criteria to be published.
The Government of Iraq may consider publishing the evaluation criteria in the tender announcement to help contractors prepare their bids. Once the evaluation criteria are made public to contractors, it is important to evaluate and analyse all submitted bids according to this pre-defined criteria.

Publishing and applying the evaluation criteria should reduce the risk of partiality and favouritism in the tender selection process, and raise trust among contractors and the wider public in the objectiveness of the selection in Iraq.

2.2. Handling abnormally low offers

Specific provisions exist in several countries to handle very, or “abnormally”, low offers. Internationally speaking, very low bids are not excluded automatically in the selection process, but bidders who submit low prices are required to justify their low prices. Non-exclusion is important as very low prices may stem from, for instance, innovative technological solutions.

In Iraq, there is no mention of how to handle abnormally low offers in the 2008 Regulation.

In order to prevent arbitrary decisions, the Government of Iraq may consider establishing provisions with regard to abnormally low bids, including the requirement to ask for explanations from the contractors to clarify the reasons for their low bids before eliminating them automatically from the competition.

Clear procedures to follow in the case of very low bids should contribute to making procurement more efficient (e.g. by generating savings in the budget) in Iraq and avoiding recourse resulting from the exclusion of potentially well-performing contractors due to their low offers.

Proposal No. 3: Make contract execution more transparent

3.1. Managing subcontracting

In OECD countries, improved transparency is also required in the contract execution stage, in particular as it relates to information on subcontractors. Ensuring co-ordinated delivery of subcontractors’ obligations is a prerequisite for timely execution of the originally awarded contract.

In Iraq, subcontracting is a common practice and the 2008 Regulation allows using it. However, subcontracting companies are not always declared and therefore information relevant to the execution of the contract – such as past performance,
capacity of the contractor, etc. – is not known by the contracting authorities. This can lead to poor contract execution or unacceptable performance.

In order to achieve better performance in contract execution and thus make overall procurement more efficient and transparent, the Government of Iraq may consider adding further specifications to the subcontracting provisions.

For instance, a ceiling may be determined and added to the 2008 Regulation concerning the percentage of the original contract that can be subcontracted. According to international practice, this ceiling could be fixed up to 30% of the originally awarded contract.

Furthermore, if the contracting authorities knew in advance the subcontractors, the risks of non-performance in procurement could be decreased. One possibility in this regard could be that the contracting entity requires the tender winner to provide information regarding its subcontractors to the authority.

When the subcontractor is known in advance and approved by the contracting authority, the possibility of direct payment to the subcontractor from the contracting authority could be considered. This practice can be used in case of non-payment from the main contractor, while the latter remains responsible for the execution of the contract.

3.2. Improving the access of local small- and medium-sized enterprises (SMEs) to procurement contracts

Generally speaking, SMEs are important actors in national economies. They usually have an increased knowledge of the local context and employ the local labour force. For these reasons, national governments usually promote measures to improve the access of SMEs to procurement contracts.

If the aim of the Government of Iraq is to answer SME demand to participate in public procurement and in the rebuilding of the economy, several solutions could be considered to facilitate their access to Iraqi procurement contracts.

For instance, specific measures could be adapted to help them obtain the required bank guarantees.

Another solution could be to give SMEs the option to submit procurement bids jointly, i.e. by forming partnerships to execute public contracts.

Moreover, their submitted prices could be given preferential treatment.
Higher contribution from local SMEs in public procurement contracts should result in a strengthened national economy in Iraq.

Proposal No. 4: Ensure effective financial guarantees and their timely reimbursement

4.1. Issuing bid bonds

In most countries, financial guarantees are required from contractors when submitting public procurement bids.

In Iraq, contractors often face difficulties in presenting the necessary guarantees in time to participate in tender competition.

Therefore, the Government of Iraq may consider modifying the obligation to present a specific guarantee (bid bond) for each tender. For instance, “global guarantees” could be applied to contractors, issued by the banks for a given period, valid for any tender under a fixed amount. Also, submitting bid bonds could be mandatory above pre-defined thresholds.

4.2. Reimbursing bid bonds

In OECD countries, financial guarantee deposits are automatically reimbursed to non-successful bidders once the contract has already been attributed to the selected company.

In Iraq, problems related to financial guarantees occur with regards to the reimbursement of the bid bonds. No indication can be found in the 2008 Regulation about deadlines and modalities for this reimbursement.

The Government of Iraq may consider adding exact indications on the modalities of releasing and automatically reimbursing unselected contractors’ submitted guarantees in the 2008 Regulation.

Proposal No. 5: Enhance civil servants’ capacities

In general, efficient procurement, resulting in best value for public money, requires a professional capacity of procurement officials. This includes procurement officials’ awareness and good knowledge of rules and regulations as well as their
specific skills (e.g. managerial and technical) to properly implement these rules and regulations.

Responses to the OECD survey questionnaire signalled public officials’ lacking awareness on the latest procurement provisions in Iraq.

In order to update their knowledge of procurement laws and regulations, the Government of Iraq may consider further promoting systematic trainings for public officials in charge of procurement. The aim of these trainings would be to develop officials’ capacities to apply procurement provisions on a daily basis.

Due to the size of the public administration personnel, one possible solution might be developing trainings for trainers (who could be in charge of further trainings once trained) under the responsibility of institutions that currently train public procurement officials.

Furthermore, centralised trainings could also improve understanding of the risks of fraud and corruption in public procurement. In order to set explicit rules, specific provisions with regard to ethics and integrity in public procurement could be added to the 2008 Regulation.

Another equally important factor that the Government of Iraq may wish to pay attention to is to embed the procurement process in a more general context of the Iraqi public service and promote transparent and merit-based human resources management practices in the selection and career promotion of procurement officials.

Proposal No. 6: Ensure co-ordinated control mechanisms

6.1. Covering the entire procurement cycle with adequate control mechanisms

International experience shows that control mechanisms are critical in preventing waste of public money and any irregularities during the preparation of a tender and the attribution phase. Most countries also recognise that particular attention is required to verify the conformity of the contract execution with the original tender specifications, as this phase of the procurement process is highly vulnerable to corruption.

Formally, numerous a posteriori controls exist in Iraq with a legal framework in place to define the mandates of the Inspector Generals, the Board of Supreme Audit
and the Commission on Integrity. However, in practice, it is not clear how these controls complement each other. The *a priori* procurement control, independent of the contracting entity, is currently lacking from the Iraqi procurement provisions. Furthermore, the control of the contract execution phase of the procurement cycle is not yet covered by current Iraqi procurement regulations.

In order to ensure properly co-ordinated *a priori* and *a posteriori* public procurement controls, the Government of Iraq may consider clarifying different control institutions’ responsibilities and tasks. It may find it important to establish specific monitoring institutions for the *a priori* control to be in charge of, in particular, reviewing the bidding documentation and approving the applied tendering method. As far as controls in the execution phase are concerned, even if they depend on the competent ministries, the Government of Iraq may wish to refer to these controls in the 2008 Regulation.

The independence of control institutions from political power and their provision with adequate budgetary and human resources are critical. Enabling control institutions to efficiently apply the laws – including the procurement law and the anti-corruption law – to all parties in an equitable manner should result in a better performing control system in Iraq. Accompanied by proportional and applied sanctions, the efficiency of Iraqi public procurement will improve.

### 6.2. Reinforcing public officials’ accountability

At the operational level, clear rules and responsibilities should be set up to efficiently manage the procurement process and define an accountability chain.

In Iraq, responses to the survey questionnaire shed light on the general reluctance of public officials to assume the responsibility of making decisions without written instructions from their hierarchy. This reluctance may stem from unclear or non-defined responsibilities of public officials in general, and public procurement officials in particular, in the procurement process.

Therefore, the Government of Iraq may consider clearly defining in the 2008 Regulation who is responsible for key decisions in the procurement process, in particular for:

- choosing the tendering method;
- approving that the procurement responds to a real need of the administration;
• selecting the president and other members of the bid opening committee as well as of the bid evaluation and analysis committees;

• verifying the conformity of the delivered goods and services with what has been contracted.

Adding this information to the procurement provisions should result in accelerating the process, improving accountability and could reduce the general reluctance of Iraqi public officials to sign official documentation related to procurement.

Proposal No. 7: Ensure timely functioning of the dispute resolution system

The existence of an efficient dispute resolution system is a guarantee for the contracting companies and also for the public-at-large in most countries. Dispute resolution mechanisms provide contractors with important guarantees concerning the integrity and equality of the contract-awarding process.

In Iraq, the government has set up a legal framework for the dispute resolution system. Accordingly, dispute resolution mechanisms exist prior to signing, as well as after signing, the contract. The efficiency of the existing dispute resolution mechanisms prior to signing the contract is largely due to their rapidity with which they deal, officially, with submitted complaints and objections. The dispute resolution mechanisms after signing the contract describe dispute resolutions that rather seem, in general, to be used for foreign companies’ dispute resolution.

In order to ensure that procurement complaints are resolved respecting the strict deadlines the 2008 Regulation stipulates, the Government of Iraq may consider first nominating the entity that is in charge of resolving procurement disputes and clearly defining its composition. Also, the Government of Iraq may consider clarifying to what extent the dispute resolution mechanisms after signing the contract may be applied to national companies.

After the definition of the entity that decides on the complaints and objections as well as on its functioning, the next step will be to ensure proper resources of the system to enable it to function effectively and in a timely manner. It is equally important to raise awareness of the system among contractors, as the OECD survey questionnaire signalled limited knowledge of the dispute resolution system.
Proposal No. 8: Develop specific tools to fight corruption in procurement

The main challenge of procurement regulations is their proper implementation by all ministries, non-ministerial agencies, provinces and regions in a consistent manner. The efforts made by the Procurement Assistance Centre and the Office of Government Public Contract Policy (OGPCP) in this regard need to be further developed and multiplied. The experience of other countries shows that using complementary practical instruments and performance tools is useful in promoting implementation.

Fighting corruption in public procurement is part of a wider landscape of governments' efforts to fight corruption, not only in Iraq, but in all countries across the globe. It comes from the recognition that public procurement is a strategic governmental activity with a considerable amount of public funds at stake, that is particularly exposed to the risks of corruption.

As a first step, governments should consider developing and efficiently enforcing laws for fighting corruption (taken in a broad sense); and also putting in place specific judicial and administrative entities accompanied by special economic investigation forces in order to detect and sanction irregularities in the implementation of the regulations.

Accordingly, in addition to the establishment of clear laws and regulations, the Government of Iraq may concentrate on investing efforts in fighting corruption in three main areas:

1) Preventing corruption and risks of integrity violations

Preventing corruption is as important as severe sanctioning of penal offenses. Preventing corruption consists in taking measures to reduce the likelihood of fraud and corruption opportunities and incentives for the future; to limit these risks by controlling discretionary power of decision makers, and to eliminate the risks linked to the absence of control mechanisms to inefficient processes or inappropriate management of procedures and resources.

2) Effectively sanctioning corruption cases

Applying sanctions in case of breaches requires a country context where the rule of law is generally accepted. Also, an independent judiciary and efficient investigators are necessary. Institutions need to be steady and properly empowered to apply laws and regulations to parties in an equitable manner without consideration of their hierarchical and/or political power.
3) Raising awareness and educating the population

Educating the population about the impact of corruption in order to render it unacceptable requires a cultural-mental change and thus promotes a long-term objective. Support from the population to fight corruption presumes their access to relevant information – through the public education system and non-biased information diffused by the government and by independent media. Citizens should be aware of the costs of corruption when projects are not realised and economic improvement is hindered due to corruption in the public procurement process. Highest level political will to tackle corruption is also a necessary factor to ensure that campaigns and measures do not remain un-implemented.

A wide range of tools and instruments could be applied in order to achieve the above goals. The next section highlights selected tools and instruments that help strengthen transparency, accountability and integrity, and foster organisational resistance to corruption in the procurement process.
PRACTICAL TOOLS TO SUPPORT IMPLEMENTATION

In order to promote the above-mentioned areas in the Iraqi public procurement processes and system, the following instruments and measures might be considered:

Risk mapping

Risk mapping refers to the use of audit tools to identify risks in the existing laws and regulations; in the processes in place in the different organisations; *i.e.* risks deriving from the lack of certain controls and the risks due to the particular situation of civil servants or elected officials in certain posts involved in procurement procedures.

Benchmarks

Benchmarks help the contracting entities and more generally the administration to identify and understand good practices that function effectively in other countries. These examples can be adapted in the country, but it is important to ensure that the practice does not contradict local practices.

Control of assets

The control of assets means constant surveillance of the fortune, revenues and properties of public officials and their families in order to discover illicit enrichment during and/or after their official mandate.

Responsibility

The “responsibilisation” of officials in charge of procurement is essential to enforce the principle of accountability in the public service in general and in the public procurement process in particular. Responsibilities should be clearly defined and disseminated through targeted trainings, for instance. It is also important to apply severe sanctions in response to breaches, regardless of the hierarchical level of the accused.
Ethics

Ethics consist in defining and disseminating key values in the public service and also in the public-at-large. It covers public officials trainings as well as awareness-raising of the general public by providing information that enables them to understand the role and responsibility of civil servants and political leaders in eliminating corrupt practices. As already mentioned, independent media is a prerequisite for achieving this objective.

Training for investigators

Regular trainings for investigators are essential to shed light and explain corrupt techniques and acts that can be used in public procurement. These trainings contribute to improving the efficiency and professionalism of investigators in charge of detecting and sanctioning irregularities and mismanagement.

Strategy and action plans

A comprehensive anti-corruption strategy – including measures to promote transparency and integrity in public procurement – has to be developed to fix medium- and long-term objectives. In order to translate strategy into targeted actions and clear timeframes, action plans might also be defined. They should be adopted by consensus of high-level officials to ensure that they remain in place independent of political changes in the country.
ANNEX A

OECD RECOMMENDATION ON ENHANCING INTEGRITY IN PUBLIC PROCUREMENT

The Principles for Enhancing Integrity in Public Procurement were approved in October 2008 by Council in the form of OECD Recommendation. The Recommendation demonstrates the political commitment of OECD countries to tackle risks of waste, fraud and corruption in the whole procurement cycle, from needs assessment to contract management and payment. The Recommendation is a key instrument for policy dialogue between OECD countries, and with non-member countries. In 2011 OECD countries will report on progress made in implementing the Recommendation.

The Principles provide policy guidance for governments to enhance integrity throughout the entire public procurement cycle, from needs assessment to contract management. The Principles and Checklist are based on applying a good governance approach, that is, transparency, good management, prevention of misconduct, accountability and control to enhance integrity in public procurement. The overall aim is to enhance integrity efforts so that they are fully part of an efficient and effective management of public resources.

A. TRANSPARENCY

Principle 1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.

Principle 2. Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

B. GOOD MANAGEMENT
Principle 3. Ensure that public funds are used in public procurement according to the purposes intended.

Principle 4. Ensure that procurement officials meet high professional standards of knowledge, skills and integrity.

C. PREVENTION OF MISCONDUCT, COMPLIANCE AND MONITORING

Principle 5. Put mechanisms in place to prevent risks to integrity in public procurement.

Principle 6. Encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management.

Principle 7. Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly.

D. ACCOUNTABILITY AND CONTROL

Principle 8. Establish a clear chain of responsibility together with effective control mechanisms.

Principle 9. Handle complaints from potential suppliers in a fair and timely manner.

Principle 10. Empower civil society organisations, media and the wider public to scrutinise public procurement.

Furthermore, a Checklist was developed to provide practical guidance for procurement officials on how to implement this framework at each stage of the procurement cycle. Public procurement is divided into three main phases:

- The phase upstream of the call for tender, which includes the assessment of needs, planning and budgeting, drafting of specifications and choice of procedure.

- Tendering and contract award.

- The downstream phase, notably contract performance, purchases order and payment.
It is designed to be used in conjunction with good practices identified in governments across the world (see Integrity in Public Procurement: Good practice from A to Z, OECD, 2007, at www.oecd.org/gov/ethics/procurement).

An extensive consultation was carried out in 2008 on the Checklist and Principles. The consultation with representatives from OECD bodies working on related issues helped reflect the multi-disciplinary approach of the OECD. Furthermore, the consultation of representatives from government from non-Member economies, private sector, civil society, bilateral donor agencies and international organisations - such as the United Nations, the World Trade Organisation or the European Union – confirmed that the Principles are in line with international legal instruments on public procurement and anti-corruption. The Principles provide policy guidance for governments and can be placed in the appropriate international legislative context.
ANNEX B

IRAQI REGULATION N°1 OF 2008 OF GOVERNMENTAL CONTRACTS IMPLEMENTATION

Accordance to paragraph (1) of section (14) of Coalition Provisional Authority (Dissolved) Order number (87) of 2004:-

We hereby promulgate the following:

Regulation No. 1 of 2008
Of
Governmental Contracts Implementation

Article -1- This regulation is issued to 1) clarify the general principles in implementing the governmental contracts (by state agencies and public sector) in the fields of procurement of public works, goods and other services, and consultancy contracts with Iraqi and non-Iraqi entities; 2) to regulate implementation methodologies; 3) designate authorized parties for opening and analyzing bids and awarding contracts; and 4) initiate an appeal to the Administrative Tribunal. The aforementioned objectives take into consideration that all procedures should be conducted in manner of transparency, competition, and integrity.

Article -2- First – The provisions of this regulation apply to the contracts that are concluded by the government contractual entities (the State agencies and the public sector) represented by the ministries, entities not related to a Ministry, provinces not related to a region, and the Regions. These concluded contracts mentioned above are with Iraqi and Non-Iraqi entities to execute state public works or consultancy contracts or providing good or services related to the said projects.

Second – The provisions of this regulation shall not apply to the projects and the public works of the government Contracts financed by International or Regional
Organizations, executed according to agreements or special protocols with Iraqi parties. On the other hand, it is possible to take into consideration the given regulation if it is not included in the text of these agreements or protocols, and is consistent with the rules and regulations adopted by these organizations.

**Article -3-First** – All government contracting entities in ministries, non-ministerial agencies, provinces, and Regions should meet the following **requirements prior to the preparation of the tender documents**:

a- the Technical and Economic feasibility reports pre-approved by the Ministry of Planning and Development Cooperation (MoPDC) according to Regulation No. (1) of 1984 issued by the dissolved Council of Planning. When negotiating an additional project to be inserted in the investment project plan, the feasibility reports mentioned above must have the attached Project Petition Form (follow-up form for Investment projects implementation) and should take the specialty of the rehabilitation projects into consideration.

b- the Cost Estimates Study for the project or the contract should be a part of the feasibility study as a measure to analyze the bids and award the contracts, taking into consideration the confidentiality of the task.

c- Availability of national federal budget allocation to implement the contract, or confirmed by the specialized authorities for the requests of the contractual parties' needs. Any special project classification within the projects plan should be indicated in the bid documentations.

d- Verify that all terms, specifications, bills of quantities, drawings and others necessary for the implementation are to be accurate and completed to avoid any changes or additions in the contract during the implementation, taking the following into consideration:

1. Financial authorities authorized to make decisions on this subject in accordance with the federal budget law and its regulations;
2. Clauses concerning the implementation of the projects on the basis of a complete project (turn-key), mentioned in the investment projects regulation according to the federal budget law;
3. The prohibition of any increase in the quantities and the costs of the procurement contracts and consultancy services, for any given cost, during the contract’s implementation period, observing the given authorities in the federal budget law and regulations; and
4. The special controls and procedures issued by the Ministry of Planning and Development Cooperation to consider the contractors’ requests for compensation due to the increase in prices

e- To have approvals from the competent entities regarding the location and use of the land, and allocation required for the project or the work when executing public works contracts.

f- To eliminate any existing legal and physical issues, including any land acquisition procedures, at the work site during the implementation of the public works contracts.

g- To have the work site completely prepared for the commencement of the work or at least in part in accordance to the approved time schedule.

h- To fulfil any other procedures required due to the nature of the work or the contract.

Second- The value for a set of the bidding documents for the general and the limited tenders, including the two-phase tenders, is based on a relative pricing according to its importance and cost of preparation, to promote serious participation therein. A bidder who has already participated in a restated tender is required to include the receipt of its first participation in his renewed bid. In case the purchasing prices of the restated tender documents are revised, the bidder therefore bears the difference between the two prices, and must submit both first and second receipts in his bid.

Third –

a- The advertisement is to be published in at least three daily national newspapers that are widely distributed, considering one of which to be the newspaper for advertisement that is issued by the Ministry of Finance; in case the last said newspaper is out of print for any given reason, the advertisement will therefore be published in another widely spread newspaper. The awardee is responsible to bear the costs of publishing and advertising to the last advertisement of the tender with the exception of the requests for the import of medicine and food products, observing the provisions in Article – 5 - First – c - (1) of the this regulation.

b – The advertisement for national public tenders is to be published in the respective website and the announcement board of the contracting entity; international public tenders advertisement shall also be published at the
commercial attachés office at the Iraqi embassies outside Iraq and the United Nations’ business Development website (DGMARKET).

**Article – 4** – The contracting entities shall adopt one of the following methods when implementing the different types of budget projects or public contracts:

**First – The public tender:** The head of the contracting entity shall designate the public tender as either national or international, taking into consideration the nature and cost of the contract. The implementation of this category is conducted through a public invitation to all who meet the requirements of the participation and are willing to take part in the implementation of the different contracts having a value no less than fifty million Dinars (ID 50,000,000), or any other value that is limited by the concerned parties taking into consideration that the procedures should be based on open public access and competition, fairness, and transparency.

**Second – The limited tender:** is carried out through a general invitation from the contracting entity addressed to all who meet the requirements of the participation and are willing to participate in the implementation of the different contracts having values that are no less than (50 000 000), fifty million Dinars or any other value that is limited by the concerned entity. The said tender is to be made by two phases as follows:

a- Phase one: consists of submitting the special technical and financial qualification documents of the bidders in accordance with the applicable laws, for evaluation by a specialized committee at the contracting entities and select the qualified bidders to participate in phase two.

b- Phase two: is carried out through conducting a direct invitation according to the legal conditions for participation, which will be at no additional cost, and is to be addressed to the pre-qualified bidders to participate in the tender and submit their technical and financial documents. The said invitation must be sent to no less than six (6) bidders.

**Third – The two-phase tender:**

a- The head of the contracting entity or any person he authorizes is entitled to apply the method of submitting the bid in two phases in the contract to obtain the best way to achieve his contracting needs. The said method is applicable for contracts with intricate technical specifications; or for goods, works, and services contracts whereby the details of the technical specifications for the products or the works are not available at the beginning of the project.
b- Submitting of the bids in two phases may be preceded by procedures for pre-qualifications that are referred to in item (Second) of this article. The following must be considered for the purpose of implementing this method:

1. Phase one: To invite the bidders to submit their technical bids based on the preliminary design and the description of the activities. The head of the contracting entity has the right, if necessary, to revise the cost estimate;

2. Phase two: To invite the pre-qualified bidders whose technical bids were approved on basis of the standards of qualifications in phase one, to submit their financial bids based on the tenders’ revised documents as per the applicable conditions by the contracting entity.

Fourth – Direct invitation:

a- To have a direct invitation issued by the contracting entities and addressed to no less than five (5) contractors and / or companies and / or consistent institutions with technical and financial capabilities for the implementation of various public contracts, and in case of any of the following justified reasons:

1. If the contract is of a special characteristic / or requiring secrecy in all the contracting and implementing procedures in the interest of national security reasons;

2. If the objective is to achieve speed and efficiency in implementation especially in cases of emergency, natural disasters, supplying of medicaments, and life-saving necessities.

3. The lack of interest from the bidders to participate in the re-issued stated public tenders for a second time.

b- To provide the bid documentation free of charge to the suppliers, contractors, and consultants.

c- To exempt the bidders who obtain direct invitation from the bid bond requirement.

d- To take into consideration the financial authorities for the purposes of awarding and contracting when applying this method.

Fifth – The single source method (a sole source): This method is to be conducted through the issuance of an invitation free of charge from the contracting entities and
addressed to one bidder, concerning contracts with monopolized characteristics for goods, implementation of works, consultancy services, or manufacturing, which are deemed necessary and justified, taking into consideration the following procedures:

a- The special contracting entities at the ministries and governmental non-ministerial agencies, provinces, and regions shall inform the Central Contracting Committee at the General Secretariat of the Council of Ministers (CCC) when implementing the contract in the said method, demonstrating justifications for this choice.

b- To consider the financial Authorities of the contracting entities for the implementation of the public contracts. The approval from the CCC should be obtained on the recommendations of the committees responsible for analyzing the bids for contracts that are beyond the head of contracting authority's approval authority.

c- the CCC shall have implicitly approved the request if it has not taken a decision on the contracting entities’ request within a given time of fourteen(14) working days starting from the date of registering the request at the said committee. After this time, contracting entities are to proceed with the award process and its implementation.

d- Invited parties are to be exempted from submitting the bid bond, using this method.

Sixth – The purchasing committees: - This method is applied to provide the governmental offices with goods and services of a value that is less than fifty million Dinars (ID 50 000 000) or any other value determined in the current budget taking into consideration the controls that are issued by the directorate of the public contracts at the Ministry of Planning and Development Cooperation in coordination with the competent entities related to the subject.

Article – 5 – First – The following should be considered for the advertising of the public contract tenders:-

a- The tender’s name (title), number, address and the classification listed in the budget.

b- A brief and clear description of the project or the contract to be implemented, demonstrating the required products and services.
c- The time duration for the tender or the direct invitation’s advertising to be decided as follows:

1. Time duration of (15 – 60) days for procurement and consultancy services contracts, to be determined according to the importance of the contract, starting with the date of the last advertisement; contracts for supplying wheat, rice and medicine are exempted as per the assessment of the concerned minister;
2. Time duration of (21 – 60) days for public works contracts to be determined as per the importance of the contract starting with the date of the last advertisement.

d- Indication of the date and the place for the submission of the bids and the tender’s required time validity in addition to the date and the place for selling the tender’s documents.

e- Indication of the required bid bond amount to be obtained from the bidders.

f- Indication of the tender’s closing date.

g- Indication of the tender’s non-refundable purchase price.

h- Indication of the contracting entity’s website with the email address of the administrative section responsible of its respective tenders.

Second – The contracting entities shall include the following in the instruction to bidders within the tender’s documentations for (public works, goods and consultancy services):

a- The main terms of the contract to be concluded and the payment methods for fees or amounts that will be agreed upon later such as the percentage or the deducted amount or the compensated expenditures and other acknowledged methods, in accordance with the respective provisions listed in the federal budget law.

b- A statement revealing that the ownership of the designs, drawings and specifications prepared by the party who obtained direct invitation upon the conclusion of the contract, revert to the employer as per the consent of the contracting entity's head and except for some particular cases. The said entities have to avoid publishing any information related to the nature of the contract before obtaining the respective authorization from the competent entity.
c- A request addressed to the bidders to include, if available, similar projects in their bids, which should be approved by the related contracting parties.

d- An indication of the time and the place for the opening of the tenders in public.

e- A request addressed to the concerned entities to clarify its technical qualifications and the full-time and part-time specialists who will be working in the entity during the implementation of the various contracting or the consultation contracts.

f- A request addressed to the concerned parties to submit the required work plan.

g- A notice determining the date for a special conference to answer the inquiries of the participants in the tender, scheduled to take place at least seven (7) days before the tender’s closing date, with the exception of tenders for supplying foodstuffs.

h- A statement indicating the required contractor’s classification and level for the Iraqis; in addition, general works contracts require the bidder’s certificate of establishment and the work practice license from the bidder’s legally authorized bureaus.

i- A request to determine the cost for supply contracts with respect to the place of delivery (CIP, CFR, CIF, and FOB) and others (INCOTERMS).

j- A statement determining the method for calculating the demurrages as per the conditions of the contract (freight demurrage, delivery demurrage).

k- A statement clarifying that the contracting entity is not obliged to accept the lowest bid.

l- A statement clarifying that the government contracting entity may cancel the tender paying no compensation to the bidders with the exception of the tender’s documentation purchasing price only.

m- Any other instruction, document, or data that the bidders may need to provide.

n- A statement requesting to write down the bid's prices in ink or in print, in digital numbers and in writing.
o- A statement clarifying that the bidders have no right to write off any of the terms given in the tender’s documentation, or introduce changes of any kind therein.

p- A statement clarifying that the bid documentation is to be inclusive of the applied method for measuring the evaluation ratios for the awarding purposes when analyzing the bids.

q- A statement clarifying that the government and public sector employees are not allowed to participate in tenders either directly or indirectly.

r- A request addressed to the bidders to indicate in their bids their website and the email address, in addition to the name and address of the person responsible to follow the inquiries concerning the bid.

Third – The contracting entity may extend the tender’s advertisement duration in cases of extreme necessity and only once, taking the following into consideration:

a- It must obtain the consent of the head of the contracting entity or any person he authorizes with due consideration as to the financial Authorities for contracting purposes.

b- It must issue and publish in the same advertisement newspapers a respective appendix, and send copies to all tender participants time before the closing date due for the bid’s submission.

Fourth - The head of the contracting entity or any person he authorizes may accept bids not to exceed fifteen (15%) percent of the estimated cost for contracting purposes, provided that there is availability of the required financial allocations in the general federal budget and it is within the total cost of the project; the Ministry of Planning and Development Cooperation must also be informed of the said action.

Fifth – The re-announcement of the tenders are concluded in one of the following cases:

a- If no bids are submitted within the tender advertisement time, or in case there is the submission of one bid which was financially and technically acceptable during this time, then it will therefore be approved and proceedings are to follow for analyzing and awarding the bids.

b- If the amount of the best offer submitted by the bidders exceeds the determined percentage in item (Fourth) of this article when analyzing the estimated cost for
contracting purposes to implement the projects or the works listed in the budget.

c- The head of the contracting entity or any person he authorizes may accept and analyze the bid if it exceeds the estimated cost for implementing purposes by no more than (30%) thirty percent, provided that there is availability of the necessary financial allocations within the total project’s cost; and once it addresses the CCC by presenting respective justifications for the purpose of obtaining the approval to award. The said committee has to take a proper decision whereas the award is considered, within a period of time equivalent to fourteen (14) days starting from the date of registering the request in the contracting entity. The award is considered approved in case the authorities stated in paragraph (Fourth) of this article do not respond after the time period mentioned above.

Sixth- The following procedures must be followed for re-announcement:

a- The head of the contracting entity or any person he authorizes must approve, and inform the Ministry of Planning and Development Cooperation of the said action, determining the time duration of the announcement in accordance with Article (5) - First, item c, of the this regulation.

b- The bidders who participated in the previous tender must be informed of the said action.

c- Adopt the previous serial number for the re-announced tender, giving respective indication in the new advertisement if occurring at the same year.

d- Inform the concerned entities about the re-announcement.

e- Investigate the reasons for not participating when the tender was first advertised and take the necessary procedures to correct them in this respect.

f- adopt the sole source method in case of re-announcement, taking the following into consideration:

1. must have the bid cost amount within the estimated cost, considering paragraph (Fourth) and item (c) of clause (Fifth) of the this article for contracting purposes, concerning the project’s required financial allocations.
2. must have the bid made in accordance to the technical specifications and the required conditions in the tender advertisement.

3. must notify the Ministry of Planning and Development Cooperation whenever the amount of the best bid obtained at the second advertisement is higher than the cost estimates stipulated in paragraph (Fourth) and item (c) of paragraph (Fifth) of Article – 5 –and must observe one of the following to implement the project or the required work:

   a. postpone the project’s implementation until the coming year;

   b. make use of the allocated amount for the implementation of other projects if postponement takes place; or

   c. increase the estimated cost for contracting purposes within the project’s financial allocations in the plan.

4. Must consider a third (last) re-announcement or take the necessary procedures to change the contract implementation method with respect to the adopted methodologies. The head of the contracting entity may conclude the afore-mentioned in case no acceptable bid is submitted in the second advertisement.

**Seventh-** The aforementioned clauses stipulated in paragraphs (First), (Second), (Third), (Fourth), (Fifth) and (Sixth) of the this article are applicable to civil engineering (construction), mechanical and electrical works, in addition to goods and consultancy services contracts.

**Article – 6 – Establishing the bid opening committees and their tasks:**

**First-** One or more central bid-opening committees are to be established in every ministry or non-ministerial government entity. The said committee is to be made of experts and specialists headed by an employee in a position no lower than Director or Chief Engineer, along with members representing the Financing and Law Directorates, a specialized technical employee, and a secretary having a job title that is no less than Observer.

**Second-** Establishing an opening-bid committee at the ministerial and non-ministerial entities is allowable, provided that the said committee is formed in accordance with the statement in paragraph (First) of this article.
Third- A central committee is to be established at every contracting entity in the region and at the provinces, and shall be headed by the head of the contracting entity or any person he authorizes, along with members specialized in law, financing and technology, representatives of the beneficiary party and the provincial council, with a secretary having a title that is no less than Observer who is responsible to open the bids that are announced in the region or the province that is non related to a region.

Fourth- Opening-bid Committees may be established at the regional or provincial entities. Each of the said committees is to be established according to the specified committee in paragraph (Third) of this article.

Fifth- The following procedures are to be observed by the secretary of the bid opening committee while performing his tasks:

a- Insert the bids in a special box that is kept with the concerned entity and issue a receipt in two copies, one of which is to hand over to the bidder or any authorized person while keeping the other with the concerned entity, and to writing down the following information in a special dossier:

1. The tender name and number as shown in its documentation.

2. The bidders’ names or their official agents’ names, with fully documented address inside or outside Iraq,

3. The name of the officially authorized bid holder with his signature and address.

4. The bid’s submission time and date.

5. The attached bid documentation (if available).

6. It is allowable to send the bids by express or registered mail; they must arrive to the competent entity prior to the bid closing date and must be recorded by the Secretary as soon as delivered.

7. It is prohibited to reveal any information, such as names and addresses of the bidders or their agents, to unauthorized entities during the announcement period in order to maintain the secrecy of the procedures.
b- The head of the bid opening committee has to observe the presence of the committee members. If some of them did not attend the meeting, the head of the contracting entity should assign other employees having similar specializations to replace them.

c- For the purpose of proceeding with the public opening of the bids and in presence of the bidders or their agents willing to attend, the bid opening committee directly holds a meeting once the tender closing time is over, or at the beginning of the following working day after taking the approval of the head of the contracting entity or any person he authorizes and as deemed necessary. The meeting is to be held in a previously assigned place whereby the tender’s special dossier will be closed and the following will be annotated in the committee’s minutes of meeting:

1. Verification of the stamps and seals on the bid's envelopes.

2. The bids with no bid bonds, as required in the tender documents.

3. The bids based on a deducted amount or a percentage of reduction, among the remaining bids that are submitted for the same tender.

4. The alternative (revised) bids substituting previous financial and technical bidder information, and rejecting their previous bids that are relevant to the same tender if submitted during the tender’s advertisement valid period, and returning them to the submitters.

5. The number of pages comprised in each bid.

6. Encircling marks on every scratching, erasing, addition or corrections that are shown in the priced bills of quantities, with signatures of the committee’s head and members.

7. Adding a horizontal line next to any non priced item in the priced bills of quantities, with signatures of the committee’s head and members.

8. Verifying the bidder’s signature on the tender submission form and on every page of the priced bills of quantities and any attached annexes.

d- The committee must clearly record in the meeting notes any comments or reservations stated in the bid and appended documents to give clear indication of samples, mock-ups and drawings that are submitted with the bid, writing down their general description and any relevant distinctive characteristics.
e- The committee must stamp all pages of the bid with the committee’s stamp and to have members’ signatures on all pages of the bid priced bills of quantities.

f- The committee must clearly indicate any missing information or data needed in the bid according to the bidding instructions within the tender documentation, including the tender document purchasing receipt.

g- According to the said instructions, the committee’s head has to undertake the following actions after opening the bids:

1. He must declare the bidders’ prices, technical specifications and implementation periods, writing these on the advertisement board and as fixed in the said bids, emphasizing that these are subject to auditing and evaluation.

2. He must prepare and sign the meeting minutes jointly with the committee members, the bidders or their attending agents, annotating any relevant notes corresponding to the committee’s work.

h- Bids and their attachments shall be forwarded to the Verification and Analysis Committee with a special memorandum informing the contracting entity with the said action.

**Article – 7 – Establishing bid evaluation and analysis committees and their tasks:**

One or more evaluation and analysis committees are to be established at every contracting entity to review the bid’s legal, technical, and financial terms. The committee is to be headed by a specialized and expert employee having a rank not less than Director or Chief Engineer, along with a number of specialized technicians, including one legal and financial official, and the committee’s secretary. The said committee is to fulfil its tasks according to the schedule determined in the establishing decree and **may seek assistance from specialized entities with expertise of to the nature of the tender.** The recommendations of the committee are subject to the approval of the head of the contracting entity or any person he authorizes as per the applied contractual financing rights. The committee has to consider the following procedures:

**First-** It must reject the bids with no bid bonds, as required in the tender's documentation.
Second- It must reject the bids based on a deducted amount or a percentage of reduction from any other bids submitted to the tender, and to refuse any reservation or reduced in pricing post tender’s closing date.

Third- It must analyze the bids in confidentiality and issue a final report addressed to the authorized entity for the award. These procedures are to take place within the period determined by the head of the contracting entity within the period of the bids' validity.

Fourth- It is prohibited to send the bids outside Iraq for analysis, the consultants outside Iraq have therefore to send their representatives to Iraq for the purpose of proceeding with the required analysis unless the nature of the work necessitates require otherwise; In that case, it is required the approval of the concerned minister or head of the non-ministerial contracting entities is required, or the CCC and as per the applied rights in this respect, provided keeping the original copy in the contracting entity.

Fifth- It must accept the reductions in percentages or in deducted amounts if given in the original bid, when proceeding with the analysis and the evaluation.

Sixth- It must eliminate the reserved amounts given in the priced bills of quantities submitted with the bid that are not required in the tender documents, for comparison and analysis objectives.

Seventh- It must consider all bids' prices on unified basis, as per given statement in the instructions to bidders within the tender’s documents.

Eighth- It must consider the written price in words if inconsistent with the price written in numbers. As such, to consider the unit price if inconsistent with the total price of a given item.

Ninth- It must consider the total price of the bid inclusive of the price of any item or items that is not priced in the bid, as per the given quantities for the said items.

Tenth- It must apply the following procedures and controls for the purpose of naming the best bid:

a. Reject the non-compliant bid with the required technical specifications even if was the lowest in price.
b. Reject the inefficient contractor based on the Government’s previous experience with the contractor in executing previous contracts. These principles also apply to vendors and consultants.

c. Consider the financial capability through submitting the previous year’s financial statement audited by a legal accountant, if required in the tender documents.

d. Consider the amount of contractor, vendor or consultant’s, annual financial obligations.

e. Consider the capacity to conform to the given dates for both delivery and execution.

f. Consider a satisfactory record of previous projects achievements.

g. Consider the availability of the technical capacities and skills for the implementation of the contract (engineering and technical cadre with specialized equipments).

h. Consider obtaining confirmation regarding the execution of similar projects, issued from the government contracting entity.

**Eleventh**- It must determine and assess the weighing percentages for the financial and technical proposal in accordance with given texts in the bidding instructions to compare the technical and financial specification, in order to select the highest scoring bids in the financial and technical evaluations, which should be considered for awarding objectives.

**Twelfth**- It must annotate in the final report, the details of any disagreement in opinion occurring among the members of the bid evaluation committee subject to be resolved by the head of the contracting entity.

**Thirteen**- It must prepare a table with a list of all bids obtained, giving full relevant details and list the missing documents ( if any ), proceeding with the comparison and evaluation of the legal, technical and financial terms, after the completion of the analyzing procedure.

**Fourteen**- It must include, in the final meeting minutes a special field showing the recommendation of the bid evaluation and analysis committee, stating the name of the selected bidder for award and his identification, as per a respective appended table, showing the bid price, currency, period of implementation or supplying in
days, the basis applied by the said committee, and stating that the bid's price lies within the acceptable limits of the estimated cost. The said meeting minutes are to be stamped and dated after being signed by both the head of the committee and its members.

**Fifteenth**- It is prohibited to negotiate the prices with the bidders except the single source method.

**Sixteenth**- It is authorized to complete the required technical data submitted by the bidders and correct the mistakes, if any, but it is prohibited to add or complete any data affecting the presented prices.

**Seventeenth**- It is authorized for the contracting entity to release the bid bond as per request of the bidder who, prior to the end of bidding, is not expected to be awarded the contract, and after raising the committee’s recommendations, and post-approval of the head of the contracting entity. However, in all cases, the bid bond of the three first bidders nominated for the award is not to be released.

**Eighteenth**- The concerned entity should check the validity of the basic data within the documents, given in the tender prior to the award, including the Bank Guarantee letter for the bid bond.

**Nineteenth**- The bid evaluation committee should submit its recommendations concerning the nomination and the award to the head of the contracting entity to decide the awarding, in accordance with his contracting rights.

**Twentieth**-

a- It must observe the financial authorities on contract awarding; when the contracting decision exceeds the threshold of the head of the contracting entity, he therefore has to address the CCC to obtain the approvals for award. If the CCC does not reply within a period of fourteen (14) days starting with the date of referring the issue to it, then the request is implicitly considered to be approved.

b. The award decision is considered valid starting from the date of notifying the awardee to sign the contract, which must be signed within fourteen (14) days from the said date, it must also be approved by the head of the contracting entity, and all other bidders must be notified.
c. If the winning awardee refrains from signing the contract within the given time in item (b) in this article, then a warning letter must be addressed to him to sign the contract within fifteen (15) days. In case of refusing to sign, the contracting entity has therefore to apply the legal procedures stated in paragraph (First) of Article – 16- of this regulation.

Article- 8- Preparing a Contract:-

First- The draft contracts are prepared by the contracting entities at the ministries, non-ministerial entities, regions, and, in coordination with the financial, technical directorates and the beneficiary entity. The contracts are to include the given items in the tender’s conditions or the invitation with any additional conditions that both parties agree upon assuring the quality of the execution according to contract samples issued by the OGPCP/MoPDC.

Second- The draft public contract should include a text for collecting the government debts according to law no. 65/1977 (Collecting government debts).

Third- The draft contract should include the names and addresses of both parties who authorized to sign the contract and the document of authorization as per the applied procedures, providing that it should be valid at the time of contracting and issued prior to the date of signing the contract by a period of time not to exceed three (3) months.

Fourth- The contractor may award parts of the contract to subcontractors after taking the approval of the contracting entity. The main contractor remains responsible on the execution of the contract. It is prohibited to transfer the whole contract to another contractor or subcontractor.

Fifth- Ministerial, non-ministerial, regional, and provincial contracting entities should inform MoPDC, Ministry of Work and Public Affairs, the Central Bank of Iraq, Central Agency for Statistics Companies’ registration office and the General Authority for taxes with the contractor’s name, address and nationality, in addition to the contract price and period as soon as the contract is signed.

Sixth- If the contract stipulates paying an advanced payment to the contractor after signing the contract, then the contracting entity has to request the contractors to submit a Bank Guarantee issued from an authorized bank in Iraq taking into consideration the effective procedures as per the law of the general federal budget.

Seventh- 

a - The contract is to be written in Arabic, Kurdish and English languages, if possible.
b - The tender documents should list the prevailing language in case of interpretation disputes.

Article – 9 – Letters of credit:
The following procedures are to be considered when opening letters of credit to cover the international procurement contracts (importing goods, execution projects and purchasing of services) when contracting with Arab and foreign companies:

First- The competent ministry (or non-ministerial entity, region, or province) has to undertake the necessary procedures for opening a (irrevocable and unconfirmed) letter of credit after issuing the award, official signing of the contract, and obtaining the performance bond.

Second- The opening of the letter of credit should be in accordance with the international standards and practices and issued by an authorized governmental bank in Iraq as per the bank special forms (a request form and a contract form for the opening of a letter of credit). These forms are to be inclusive of the financial conditions for the import process in addition to other conditions conforming to the contractual terms between both contracting parties (the seller and buyer).

Third- The procedures for opening of letters of credit consist of the following:
 a- Specify the name of the beneficiary for opening the letter of credit (the seller) with his full address.

b- Specify the required goods, stating the purchasing contract’s number and date.
c- Specify the required credit amount in numbers and in writing.

 d- Refer to the type of commercial sale as per the international commercial terms (INCOTERMS) such as (FOB/CIF/CFR/CIP) or others as per the conditions of the contract.

 e- Indicate the means of shipping (land, sea, air or others) and the final destination.

 f- Specify if partial shipment is accepted resulting as such to accept the delivery of the goods in a number of shipments, or in one shipment only, taking into consideration that the payments are in balance with the acquired shipments.

 g- Specify if more than one means of transportation (Transshipment) is acceptable or not.
h- Indicate the period and the validity of the letter of credit, as per the contract conditions.

i- Specify the delivery time according to the contract.

j- In case there is an existing need to extend the period of the letter of credit, the equal extension of the bank guaranties validity time or the warranties must also be considered accordingly.

k- Modifications and variations on the irrevocable letter of credit are prohibited without the consent of both contracting parties.

l- It is prohibited to terminate the irrevocable and unconfirmed letter of credit unless getting a written approval of the opener (buyer) and the consent of the beneficiary (seller) or a request from the corresponding bank according to the seller’s request and the written consent of the buyer.

m- In case of an advanced payment (certain ratio of the letter of credit amount), it is required to obtain a bank guarantee in the same currency as the L/C on condition to be made through an authorized bank in Iraq.

n- If the seller insists on opening an irrevocable and confirmed letter of credit, then he is responsible for paying the confirmation charges.

o- 1. The buyer (opener of the L/C)) pay the charges due for the procedures of opening the letter of credit inside Iraq.

2. The seller (beneficiary) pays the charges and profits due to the charges of opening of the letter of credit outside Iraq.

p- It is preferable that all bank charges (inside and outside Iraq) are on beneficiary’s (seller) account.

q- The insurance should cover all the risks, and is to be stated in the credit statement whether the insurance was actually covered by the seller or the purchaser provided that it covers the value of the goods based on (CIP or CIF).

r- The payment conditions and the method applied to release them must be indicated in accordance with the conditions stipulated in the contract between both parties (the buyer and the seller). The payment method should be clear as
well the type of the necessary documents to be submitted by the seller to get the said payments.

**Fourth-** The required documents for the letters of credit, their certification as well as to determine their circulation must be done in accordance with the applied international practices and conventions (600 Ucp).

**Fifth-** An import license must be submitted for the goods or the equipment required a license of importation, according to the law.

**Sixth-** The competent ministry, non-ministerial entity, region or province shall monitor the shipping and the delivery of goods and get the seller’s receipts on the details of the shipments, taking the following into consideration:

a- It must finalize the procedures for the customs clearance of the delivered goods and equipment and facilitate the delivery to the warehouses.

b- It must finalize the procedures for loading and clearance, as soon as possible and within the determined allowances; to avoid paying extra charges caused by late receiving of the goods delivered to the airport or to customs.

c- It must finalize the procedures of ship unloading, as soon as possible and within the determined allowances, to avoid paying demurrages due to the delay of unloading the cargo.

**Seventh-** The governmental contracting entity must prepare the necessary tools and equipments at the warehouses to finalize, with no delay, the procedures of unloading and delivery of the arrived goods, taking into consideration to record the condition of the received goods for the purpose of assuring the insurance rights.

**Eighth-** It must follow up the finalization of the procedures by performing a technical test of the delivered goods and issuing a test and acceptance certificate, dated on the same date of delivery, according to the determined period in the contract,

**Ninth-** Defects, losses and damages:

a- In case of receiving a delivery showing defects or non conformity to the required technical specifications, the test and approval committee established by the contracting entity, has to issue a certificate of specification mismatch and respectively inform the seller, without delay, for the purpose of replacing the said items.
b- In case of missing items or items with total or partial damage, the test and approval committee has to issue a mismatch report for the said items and to inform the seller with the details of the missing or damaged items for the purpose of compensation when the sale is based on (CIF or CIP) since the insurance is covered by the seller.

c- In case the insurance is covered by the buyer and there is damage or missing items in the arrived delivery, a mismatch report is therefore to be issued and it must inform the National Insurance Company for the purpose of assuring the compensation.

Tenth- All regulations issued by the Council of Ministers for the opening of the letters of credit and the methodology of its implementation must be adopted.

Eleventh- Other instructions:

a- The conditions determined by the buyer, addressed to the opener bank, should be clear, precise and transparent.

b- It is prohibited to open a transferable L/C, except the transfer to the manufacturing entities specified in the contract.

c- It is prohibited to give the seller any advance payment unless receiving an On Demand Bank Guarantee equal to this payment and in the same currency. On Demand means that the amount could be withdrawn without notice or judicial order.

d- It is not preferable to accept, Loaded on Deck, method of sale.

e- The opener Bank should follow up the receipt of special bank notifications for the purpose of being acquainted with the movement of the credits, the expenditures and the respective financial settlements.

f- The contracting entity should monitor its account, in foreign currency, so that the fund should be sufficient to cover the amount of the L/C for the implementation of a certain purchasing contract. It is prohibited to have any contractual obligation with the seller before checking the availability of sufficient funding in foreign currency to cover the contract.

g- L/Cs should be opened to cover the foreign purchasing contracts such as equipment, tools, goods or services. The conditions of the L/C should be according to: The Uniform Customs and Practice of Documentary Credit.
h- A certain percentage of the L/C amount should be kept to cover the installation, the operation or the maintenance for equipment, tools or goods. It must be included in the conditions for payment of the L/C.

i- In case both contracting parties decide to proceed with modifications on the said contract, the bank holding the open letter of credit will be notified to make any necessary adjustments.

Article - 10 The Dispute resolution mechanism prior to contracting:

First – pre-contracting disputes will be solved as follows:

a- A central committee is to be established at every ministry, non-ministerial entity, region, and province to review the contractual complaints and objections; the committee will be connected to the competent minister or the governor or who will be authorized by them; the said committee should consist of experts, specialists, and the committee’s secretary with title no less than observer.

b- The committee is responsible for reviewing the written complaints and objections submitted by the bidders or their official agents who had as such made no request to withdraw the bid bonds as referred to in paragraph (Seventeenth) of Article (7) of the given instructions; and should be addressed to the competent contracting entity within seven (7) work days starting from the date of issuing the letter of notification and awarding. A respective recommendation is to be submitted to the competent minister or the head of the non-ministerial entity, region, or province, within a period of fifteen (15) days from the date of registering the complaint at the contracting; the said minister or governor has to decide on the recommendation within seven (7) days; not giving a decision is considered to be a refusal to the objection after termination of the given time.

c- Contracting parties in ministries and non-ministerial entities, regions, and provinces have to wait before singing the contracts, until the issue is solved by the competent minister or the governor taking within the determined time limitations; the legal periods for reviewing complaint as per the law given in paragraph ( B) , item (First) from the said article must be observed in addition to a condition that the complainer should submit an official commitment to pay the value of the resulting damages caused by the delay in signing the contract due to deliberate or non-justified reasons for the benefit of contracting entity.
Second-

a- A specialized administrative court for reviewing the objections submitted by the bidders is to be established at the Ministry of Planning and Development Cooperation. The court is to be chaired by a judge nominated by the Supreme Judicial Council, with the membership of a representative from the Ministry of Planning and Development Cooperation with a title of no less than Director General and one representative with expertise and specialization from Iraqi Contractors Union and the Union of Chambers of Commerce.

b- The court is to have a secretary with a title no less than Observer.

Third- bidders may object at the administrative court stated above to the referral decisions issued by the ministries, non-ministerial entities, regions, and provinces during a period of seven (7) work days starting from the date of the decision undertaken by the competent entity, which the bidder is complaining about.

Fourth- The court should issue its decision concerning the complaint within a period not exceeding one hundred and twenty (120) days starting from the date of paying the legal court dues.

Fifth- The court’s decision are considered decisive if no appeal is filed at the competent Court of Appeal within thirty (30) days starting the following day after the date of the notification of the decision.

Sixth- The court performs its due tasks as per to order number (87) for the year 2004 which issued by the Coalition Provisional Authority (dissolved), the court will be guided by Civil procedural Code number (83) for the year 1969 for all matters not included in the regulations or the controls issued by the directorate of public contracts at Ministry of Planning and Development Cooperation.

Seventh- The directorate of public contracts at the Ministry of Planning and Development Cooperation is bound by the decisions issued by the court in coordination with the competent entities.
Article – 11- Dispute resolution mechanism after signing the contract:

First- All disputes occurring after signing the contract will be solved through one of the following methods:

a- Conciliation: - to be concluded through the establishment of a joint committee between both disputing parties represented by the contracting entity (the party with whom the contract was concluded, i.e. contractors, suppliers, or consultants) to study the matter and come to an agreement to treat the said disputes accordingly as per to the valid laws and regulations concerning the matter of the dispute.

b- Arbitration:- to be concluded by both disputing parties choosing expert and specialized arbitrators in the matter of the dispute to represent them and a third arbitrator chosen by the earlier two to lead the arbitration committee. In case the choice making for a third arbitrator is unachievable, an authorized court is therefore responsible to nominate the third arbitrator. Thereafter, the arbitration committee studies the matter of the dispute in all its details and issues a final decision to resolve the dispute. The losing party bears the expenses of the arbitration and is bound by the committee’s decision after the respective approval by the authorized court according to the law.

c- Transfer the dispute to specialized courts for the purpose of obtaining their verdict in accordance with applicable laws to solve the said disputes.

d- The contracting entity may chose international arbitration to solve the disputes only if it is included in the contract terms and when one of the contracting parties is foreign, considering the mechanism of the approved procedures in the contract, and selecting one accredited international organizations for arbitration to solve the said dispute.

Second- Both contracting parties are committed to choose the best method to solve the disputes arising from implementation of the contract through one of the aforementioned methods in item (First) of this article and as per the approved conditions of the contract.

Article - 12 – Function of public contracts formation:
The Function of public contracts formation founded at every ministry, non-ministerial entity, region, and province is determined as per section (2/2/a) of the Coalition Provisional Authority’s order number (87) for the year 2004; this Order is followed up by the implementing procedures from the public contracting offices in
coordination with the office of the inspector general and the concerned provincial councils; and in accordance with applied mechanisms at the of the Government Public Contracts Directorate at Ministry of Planning and Development Cooperation.

**Article – 13 – Adherence to laws and regulations:**
Contracting parties, government directorates, public sector employees and other authorized persons participating in the contracting process are not allowed to disclose any information that is not permitted in the bids to any party having no relation with the contract.

**Article – 14 – Contract duration and extension:**
Contracting parties are to abide by the following when extending the duration of contracts:

**First-** The contractor has to implement the clauses of the contract during the contract period to be calculated starting from the date of commencement or the date of the signing of the contract or any other date stipulated within the conditions of the contract, taking the following into consideration when extending the contract time duration:

a- In case of increasing or changing the work related to various contract terms; or changing the required quantities or the quality to be supplied, thus affecting the execution of the approved curriculum, which would disable the fulfilment of the curriculum within the agreed time as per the original contract.

b- If the delay in implementing the contract is due to reasons or procedures related with the contracting or legally authorized entity, or any reason concerned with other contractors employed by the contracting entity (the employer).

c- If after concluding the contract, exceptional circumstances arose that were unexpected and unavoidable and beyond the responsibility of the contractors, thus causing delay in the completion of the required works or the supply of the required goods as per the contract terms.

**Second-** The contractor must submit a written request addressed to the contracting entity or any authorized person, within fifteen (15) days of the supply contracts and thirty (30) days for the construction and consultancy contracts, starting from the date of the origin of the cause requiring a request for extension; the contractor must give full and precise details concerning any request for time extension. The contracting entity has to review the request and decide within thirty (30) days for all types of contracts starting from the date of receiving the request. No requests are
accepted after issuance of the initial delivery certificate stated in the contract conditions.

**Article – 15 – Work alterations and additional works:**

**First** – Introducing alterations in the contracted works, or adding works, or new quantities are not allowed, except in cases of prime necessity taking into consideration to restrict the alterations as much as possible, if one of the following cases occurs:

a- If avoiding the alterations or additions results in delaying the work or causes damages to the technical or economical aspects.

b- If avoiding the alterations or the additions results in eliminating the usefulness of the contracted work or supplies.

c- If the alterations or the additions result in savings in the project cost or the work.

d- If the alterations or the changes do not cause a basic change in the service or the determined productive capacity for the project or the work.

e- If the alterations cause a reduction in the contract time provided not to cause deterioration with respect to the technical specifications of the work or the project.

**Second**- All correspondence related to alterations and additional work invoices are considered to be urgent correspondence with prime importance when compared to others; the contracting entity has to decide accordingly within the given times stated in item (Second)-Article 14 - of this regulation.

**Third** – Any alteration or additional work should not start until after obtaining a written order (a change order) issued by the authorized entity at the contracting entities and as specified in accordance with the contracting conditions. The said order is to include a brief description of the work, its specifications, quantities, values and the additional time (if existent) necessary to add to the contract time. In case it is not necessary to add a time extension, then it is to be clearly stated in the order.

**Fourth**- The contracting entities must specify the required alterations or additions to implement on the contract at an early stage, so that it does not to affect the progress of the work as per the approved curriculum.
Fifth- Cost evaluation for alterations and additional works is carried out as per the contracting conditions. In case of adding new items with no similar or corresponding reference in the contract, the prevailing market prices are therefore considered as a base for the cost evaluation of the said items with additional profits and administrative costs.

Sixth- The amount of the alterations and additional works should not exceed the competent minister or the governor's given authorities, in accordance with the regulations for the implementation of the federal general budget.

Article – 16 – insurance, penalty delay fees, and administrative expenses:

First- Legal insurance:

a- Bid bonds are not acceptable unless in the form of letters of credit, certified checks, bank guarantees, or loan bonds issued by the Iraqi Government.

b- Bidders are to submit the bid bonds to guarantee serious participation in the tenders for all types of construction and supply contracts, with one percent (1%) of the bid amount. The bid bonds are to be issued by an accredited bank in Iraq as per a bulletin published by the Iraqi Central Bank concerning Banks' financial efficiency.

c- Bid bonds are confiscated from the awardee if he abstains to sign the contract after being duly informed about the award. All other legal procedures stated in this regulation are to be taken against him.

d- The performance bond guarantee for all contracts is determined at a rate of (5%) five percent of the contract amount, and is to be issued by an accredited bank in Iraq. The bid bond is not to be released only until due issuance of the final acceptance certificate and discharge of the final accounts. Releasing partial amounts of the total performance bond amount is allowable after final receipt of the said parts and the respective issuance of the final acceptance certificate, thus confirming that the said parts are qualified to be used.

e- The public sector and the government’s public companies are exempted from submitting the performance bond and bid bonds stated in this article, for a period of three (3) years starting from the date which this regulation takes effect. The Ministry of Planning and Development Cooperation is authorized to review the said exemption after due termination of the given period of time and in coordination with the Council of Ministers / Economic Affairs Committee.
Second – penalty delay fees:
The maximum limit for the penalty delay fees determined by the contracting entity is specified not to exceed the rate of ten (10%) percent of the contract’s amount. The implementing entity has to confirm the aforementioned ratio in the conditions of contract, the tender documents and the instructions addressed to the bidders. The contracting entity has, before reaching this limit and after accretion of the delay period to twenty-five (25%) percent of (the contract period of time plus any additional granted time allowances), to take the necessary procedures to guarantee the expediting of the contract implementation, inclusive of establishing an accelerating committee formed by experts with a representative of the contracting party to pay out for the remaining works or to withdraw the work in accordance with the contract conditions taking into consideration to apply the following equation to calculate the demurrage:

\[
\text{Contract value} \times (10\%) = \text{the charges for one day}
\]

Third- The penalty delay fees should be reduced in accordance with the determined percentage of execution for the contracting obligations, as per the contract’s execution plan, provided that the executed work or the supplied services or goods are ready to be used in accordance with the contract conditions.

Fourth- The contracting entity should, due to justified reason, impose or stop the demurrage upon withdrawal of the work from the contractor.

Fifth- Administrative charges:
The administrative charges are determined when the contracting entity executes, on its own, through any other person, rather than the contractor, any of the contractor’s obligations. It should not exceed twenty (20 %) percent of the actual contract value for the execution of the said obligation. The contracting entity should specify the aforementioned charges within the tender’s documents and the contract conditions.

Article – 17 – Legal consequences from contractors’ violation of their contractual obligations:

First- Legal consequences resulting from violations prior to the signing of the contract:
In case the awarded contractor refrains from signing the contract, after official warning to sign the contract within fifteen (15) days from the date of notice, the following procedures are undertaken:

a- Confiscate the bid bond of the abstained bidder.
b- Award the bid to the second nominee whereas the abstained bidder shall pay the difference between the two bid prices for the execution of the contract.

c- In case both first and second nominees abstain from signing the contract and / or submit the performance bond, the contracting entity should award the bid to the third nominee whereas the first and second abstained bidders pay the difference in values, as joint liability, and according to the ratio of their proposals, seizing as well the bid bonds for both.

d- The procedures stated in items (a), (b) and (c) of this article are applied on abstained bidders in case the abstinence takes place during the validity period of their bids.

Second- Legal consequences resulting from violations post contract signature:

a- Confiscate the performance bond.

b- Execute the contract on behalf of the contractor through an accelerating committee with representative of the default contractor. In case of contractor refusal, a court order shall be issued from an authorized court to execute the work on the contractor’s behalf, after confiscating all the contractor’s equipments and materials, for the purpose of settling the accounts, plus adding the demurrage and the administrative charges amount of twenty percent (20%). After a settlement of the final accounts, if the contractor is a debtor, he gets nothing, and if he is creditor, he must get compensation.

c- It is allowable for the contracting entity to award the remaining work to other contractors if the main contractor has defaulted; the defaulting contractor should pay the difference between his price and the new contractor price, plus the contracting entity shall confiscate the performance bond and follow other required procedures.
Article – 18 – Prohibition of contracting:

Contracting entities at ministries, non-ministerial entities, regions, and provinces should black-list the contractors violating their contractual obligations, taking the following into consideration:

First – Must undertake the procedures for black-listing Iraqi contractors as per the methodology stated in the regulation for the classification and registration of Iraqi contractors issued by the Ministry of Planning and Development Cooperation number (1) for the year 2005.

Second- Must undertake the procedures of listing non Iraqi contractors, Iraqi and non Iraqi vendors and Iraqi and non Iraqi consultants, as per the methodology stated in the respective issued controls.

Article – 19 – Operational or initial payment and progress payments for the work:

First: - Initial payment should be granted to construction, supply and consultancy contractors according to Federal Budget Law, taking into consideration the submission of the respective special bonds prior to their approval.

Second: - Progress payment should be paid to the contractor in a period not less than thirty (30) days as per progress of the work, according to the regulations of the general conditions of contracts and the contracting conditions stated in the tender documentations.

Article – 20 – Ministries, non-ministerial entities, regions and provinces are to observe the following:

First: - The public construction contracts should include provisions to apply the conditions of civil engineering works and the conditions for mechanical, electrical and chemical engineering works issued by the Ministry of Planning and Development Cooperation, and must consider the aforementioned regulations as an integral part of the contract. It should be applied for all matters not stated in the contract.

Second: - All effective relevant public contracts laws, the Instructions of OGPCP/MoPDC and the Instructions of the higher authorities should also be applied.
**Article – 21 – First:** Ministries and non-ministerial entities should oblige the contracting entity therein to coordinate their contracting plans with OGPCP/MoPDC, and send the required data for the purposes of the follow up and technical supervision of its work when commencing to execute its contractual activities.

**Second:** Ministries and non-ministerial entities should comply with the investment budget regulation issued by the Ministry of Planning and Development Cooperation and any regulations issued by the Ministry of Finance relevant to financial authorities related to the procurement of state agencies as well as the authorities granted to the concerned entities when implementing the projects listed in the budget.

**Article – 22 – OGPCP/MoPDC undertakes the following:**

**First:** To practice the authorities granted as per the law of public contracts, CPA order no. 87/2004.

**Second:** To issue controls to organize the contractual relations between the state agencies and the contractors and on the consequences related to violations of contractors’ contractual obligations.

**Third:** To issue and revise the general conditions for contracts and the conditions for the supply of goods and services.

**Fourth:** To evaluate the tasks and the procedures of the committees for opening and analyzing bids at the state agencies and to revise the aforementioned as necessary.

**Fifth:** To provide answers to the state agencies and other entities who conclude contracts on issues that are related with their tasks.

**Sixth:** To train and improve the capacities of the employees working at the contracting entities in Ministries, non-ministerial entities, regions and the provinces.

**Seventh:** To technically supervise the work of the newly introduced procurement agencies at Ministries, non-ministerial entities, regions and the provinces.

**Article – 23 –** It is allowable to award contracts to state companies within the Ministry of Industry and Minerals for manufacturing equipments and goods for the operation and production of other ministries in case of availability of capacities at the said companies.
Article – 24 – The general contracts are subject to the Iraqi laws and the jurisdiction of Iraq courts as per the adopted methodologies.

Article – 25 – The governmental contracts Regulation no.1/2007 is abolished.

Article – 26 – This regulation should be effective starting from the date of the publishing in the official Gazette.

Ali Ghaleb Baban
Minister of Planning and Development Cooperation
Dear Expert,

The OECD (Organisation for Economic Co-operation and Development) is contacting you in your capacity as an expert and would be pleased if you could assist in sharing your views and expertise in the area of public procurement regulations in Iraq.

The request is motivated by the fact that the OECD wishes to support the Government of Iraq in its undertaking to enhance economic and social development. The OECD is a unique forum where the governments of 30 countries come together to address the economic, social and governance challenges of globalisation. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies. (For further information on the OECD please consult our webpage at http://www.oecd.org/)

In order to improve transparency in public procurement provisions, the OECD proposes to analyse the Iraqi public procurement regulation in place in light of international good practice. As part of the OECD work-method, it is important to have a better understanding of the current situation and perspectives. To be able to have an informed opinion, we would be pleased if you could participate in this questionnaire and answer the questions below. Additional pages are provided for your answers.

Please address your replies and return the entire completed questionnaire via email to:

George E. Adair
Baghdad: +964 (0) 7904 397 488
Email: geadair@sxa-iraq.com and please copy
Email: aniko.hrubi@oecd.org

Thank you in advance for your very much appreciated contributions.
PART A. GENERAL QUESTIONS

General context

1) Please describe the responsibility that your department plays in the overall procurement process for your ministry?

2) Please describe your role in the overall procurement process for your ministry?

Legal sources of public procurement

3) What are the current and past legislations / instructions / guides that your department follows in procurement processes for your ministry?

4) What other regulations / instructions / guides used by your ministry are you aware of in the procurement process? Do those regulations address all the needs of your ministry for guidance in the overall procurement process?

5) Are you aware of procurement law N° (1) 2007, entitled “Implementing Regulations for Governmental Contracts (Procurement Law)”?

If YES If NO

(Please go directly to Part B)

6) Are all these “Implementing Regulations” used by your department/ministry for all procurement transactions?

If YES If NO

7a) What are your expectations and recent experiences in implementing these “Implementing Regulations”?

7b) What are the reasons of not using these “Implementing Regulations”?
PART B. QUESTIONS RELATED TO THE PROCUREMENT LEGISLATIONS / INSTRUCTIONS / GUIDES APPLIED IN YOUR ORGANISATION

Scope of the application

8) Are the procurement legislations / instructions / guides that you use applied:
   □ to state-owned enterprises? If not, why?
   □ to international-funded contracts? If not, why?

Tender methods

9) What type of tender contracts does your department/ministry use? E.g. single source, direct invitation, open tender, etc.

10) What is the proportion of direct invitation and single source tenders that your department uses compared to all tender contracts offered by your ministry?

11) Under what conditions and circumstances are exceptions from open and competitive tendering allowed?

Advertising periods and methods

12) What are the lengths of the advertising periods in use? Are they different depending on the value and/or the nature (supplies/services/public works) of the contract?

13) What methods for advertisement does your department/ministry use in the procurement process? News papers (which ones), radio, television, websites, etc.
Evaluation criteria

14) Do you solely use the lowest price criteria for the selection of the best tender candidate? If not, what other evaluation criteria help guide the decisions of the officials awarding procurement contracts? How, by whom and when are these tender evaluation criteria defined? Are they indicated in the tender notice?

Indicative price

15) Does your department/ministry develop a cost estimate for each tender before it is published? If yes, how is the cost estimate calculated? Which department in your ministry prepares the cost estimate? How much flexibility does your department/ministry have to deviate from the cost estimate?

Capacity of companies

16) When examining the offers submitted, do you start with the evaluation of the “capacity” of the company or with its submitted price? Does it happen that certain candidates are eliminated from the procurement process because of lack of “capacity” or previous poor experiences? How do you obtain this specific information?

17) For the purpose of assessing the technical capability of domestic tender candidates, does your department/ministry always rely on the company-classification system designed by the chambers of commerce and/or by the Ministry of Planning? Does your department/ministry think the chambers of commerce/Ministry of Planning’s company classification systems are fair and accurate representations of domestic tender candidates? Are you aware of other company-classification systems used by the government? If so, please specify which institutions/ministry elaborated it, and how it is used.
Results of the tenders

18) Do you publish the results of the tenders? What is the information published (name of the winner, price, the reason other candidates were disqualified or failed, etc.)? Where these information are published (e.g. in newspapers (which ones), radio, television, websites, etc.)?

Complaint system

19) What are the mechanisms in place for challenging decisions related to the procurement procedure? How does the system operate? Do you have any statistics about complaint cases submitted/settled?

Capacity and professionalism

20) How does your department ensure that the overall procurement process is managed by qualified individuals especially for the definition of the needs and for the opening and evaluation committees?

Challenges of implementation

21) What do you consider as main challenges of the implementation of the applied procurement legislations / instructions / guides put forth in the Implementing Regulations for Governmental Contracts (Procurement Law) No (1) of 2007?

Integrity measures

22) What rules and measures are in place to promote integrity and prevent corruption in public procurement? In particular, do you have, in particular:

□ code of conducts?
□ rules for managing conflict-of-interest?
□ assets / income declaration for procurement officials?
□ procedures to report misconduct in the workplace?
□ other measures? If yes, please specify.