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ABA SIL International Procurement Committee Year in Review 2007

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ABA SIL International Procurement Committee Year in Review 2007

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This year, the International Procurement Committee's YIR contribution is divided into two sections. Section I reports on the important work being carried out on, among other things, framework contracting and electronic procurement by Working Group I of the United Nations Commission on International Trade Law (UNCITRAL). Section II deals with the World Bank's continued campaign to eliminate corruption in procurement through reform of the Bank's sanctions process, which complements its Voluntary Disclosure Program.

I. UNCITRAL Reform to Address Framework Contracting and Corruption Issues Under Model Procurement Law

UNCITRAL Working Group I,¹ which is developing reforms to the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (UNCITRAL Model

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1. Reports from Working Group I are available on the UNCITRAL website, at http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html. The authors have written extensively on the

Procurement Law),² met in September 2007 in Vienna, Austria for its twelfth working session. The working group made significant progress in its review of provisions regarding electronic procurement, including electronic reverse auctions.³

A. ELECTRONIC PROCUREMENT

The working group has largely concluded its discussion of electronic procurement. One of the main points of discussion has been electronic reverse auctions, which, while common in the U.S. federal procurement system, are largely unregulated under the UNCITRAL Model Procurement Law.⁴ The discussion has centered on how and where electronic reverse auctions should be used—specifically, whether it is appropriate for a procuring agency to weigh non-price factors in an electronic reverse auction. Drawing on the example of the European Commission's procurement directives, the working group will likely recommend that, while the UNCITRAL Model Procurement Law may accommodate non-price factors in an electronic reverse auction, any such non-price factors must be accommodated with careful attention to the distortion they may cause in an auction that is, after all, normally based solely on price.

Much of the next working group meeting, held in New York from April 7-11, 2008,⁵ was devoted to (1) framework agreements and dynamic purchasing systems, and (2) the Model Law's provisions regarding conflicts of interest in public procurement. The U.S. delegation to the working group offered a paper on those topics, drawing on the U.S. experience. The next sections draw upon and discuss the recommendations of the U.S. paper.⁶

progress of this UNCITRAL working group. See, e.g., Don Wallace, Jr., *UNCITRAL: Reform of the Model Procurement Law*, 35 PUB. CONT. L.J. 485 (2006); Christopher R. Yukins, *Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law*, 36 PUB. CONT. L.J. 307 (2007); Christopher R. Yukins, *A Case Study in Comparative Procurement Law: Assessing UNCITRAL's Lessons for U.S. Procurement*, 35 PUB. CONT. L.J. 457 (2006); Jeffrey Marburg-Goodman, Jason Matechak, Don Wallace, Jr. & Christopher R. Yukins, *International Procurement*, 40 INT'L LAW. 337 (2006) (discussing 2005 UNCITRAL developments); Christopher R. Yukins & Laurence Folliot-Lalliot, *Révision de la Loi Type sur les Marchés Publics de la CNUDCI*, 51 CONT. PUB. 36 (2006); Don Wallace, Jr. & Christopher R. Yukins, *UNCITRAL Considers Electronic Reverse Auctions, as Comparative Public Procurement Comes of Age in the United States*, 4 Pub. Proc. L. Rev. 183 (2005); DON WALLACE, JR., JASON P. MATECHAK & CHRISTOPHER R. YUKINS, *UNCITRAL Model Procurement Law: Reforming Electronic Procurement, Reverse Auctions, and Framework Agreements*, 40 PROC. LAW. 3 (2005); Don Wallace, Jr. & Christopher R. Yukins, *UNCITRAL's Model Procurement Law: Changes on the Horizon*, 81 FED. CONT. REP. 323 (2004).

2. A copy of the 1994 UNCITRAL Model Procurement Law is available at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html. A working copy of the proposed revised text of the 1994 law, as of July 2007 (shortly before the September 2007 meeting of the working group) is available at http://www.uncitral.org/pdf/uncitral/english/workinggroups/wg_1/crp-xxxxx.pdf.

3. A report on the twelfth session, U.N. Doc. A/CN.9/640, is available on the UNCITRAL website, at http://www.uncitral.org/uncitral/en/commission/working_groups/1/Procurement.html.

4. See, e.g., Christopher R. Yukins, *A Case Study in Comparative Procurement Law: Assessing UNCITRAL's Lessons for U.S. Procurement*, *supra* note 1.

5. See UNCITRAL Web Site, <http://www.uncitral.org/uncitral/en/index.html>.

6. U.N. Comm'n on Int'l Trade Law, Working Group I on Procurement, *Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—Proposal by the United States*, U.N. Doc. A/CN.9/WG.I/WP.56 (June 15, 2007). The authors assisted in drafting the referenced paper from the United States as advisors to the U.S. delegation to the working group. All of the working papers cited in this discussion are

B. FRAMEWORK AGREEMENTS AND DYNAMIC PURCHASING SYSTEMS

At its meeting of May 21-25, 2007, at the U.N. headquarters in New York,⁷ the Working Group made an initial review of working papers that presented drafting materials for the use of framework agreements and dynamic purchasing systems in public procurement. The working papers focused first on “framework agreements,” which are defined by a European procurement directive as any “agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.”⁸

Framework agreements are very similar to Indefinite-Delivery/Indefinite-Quantity (ID/IQ) contracts used by the U.S. government,⁹ including the related Multiple Award Schedules contracts principally sponsored by the U.S. General Services Administration.¹⁰ These contracts are sometimes called catalogue contracts in the United States, since typically a vendor will simply offer some part of its standard catalogue of goods or services to the government at a discount. The catalogue of offered goods and services will then become a standing contract (a framework agreement, using the European term), against which agencies may make specific orders for goods or services (contracts in the European system). These types of contracts have been the subject of intense controversy and study in the United States;¹¹ one purpose of the U.S. discussion paper, therefore, was to share the fruits of that debate with the UNCITRAL working group.

1. *Allowing for Multiple Framework Agreements*

Based on experience in the United States, the U.S. paper first recommended that the UNCITRAL working group ensure flexibility in any model law language regarding the structure of framework agreements. An earlier UNCITRAL working paper contemplated

available at the online compendium of Working Group I's materials: http://www.uncitral.org/uncitral/en/commission/working_groups/1/Procurement.html.

7. See U.N. Comm'n on Int'l Trade Law, Working Group I on Procurement, *Annotated Provisional Agenda for the Eleventh Session of Working Group I (Procurement)*, U.N. Doc. No. A/CN.9/WG.I/WP.49 (Mar. 2, 2007).

8. Council Directive 2004/18/EC, art. 1(5), 2004 O.J. (L 134) 114-240, available at http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm.

9. See, e.g., Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 16.504-16.505. A copy of the FAR is available at www.acquisition.gov/far.

10. See *id.* § 8.4.

11. See, e.g., Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the U.S. Congress*, ch. 1—Commercial Practices, ch. 3—Interagency Contracting (Jan. 2007), available at <http://www.acquisition.gov/comp/aap/finalaapreport.html>. The Acquisition Advisory Panel was a blue ribbon panel, tasked by Congress with recommending important changes to the U.S. procurement system. One working group within the Acquisition Advisory Panel—the Interagency Contracting working group—compiled a long list of government reports on interagency contracting, including a large number of reports highly critical of framework contracting in the U.S. government. That list is available at <http://www.acquisition.gov/comp/aap/documents/Sources%20for%20Interagency%20Contracting%20Group.pdf>. Because much framework contracting in the U.S. federal procurement system is done through centralized purchasing agencies, debates in the United States surrounding framework contracting and centralized purchasing tend to overlap considerably.

the award of a single framework agreement to multiple suppliers.¹² This approach seemed to draw from the European procurement directive.¹³ The U.S. paper recommended that the UNCITRAL Model Procurement Law also allow procuring entities to enter into multiple parallel framework agreements with multiple suppliers, rather than requiring procuring entities to enter into only a single framework agreement with many suppliers. Under this proposed approach, procuring entities would have the flexibility to enter into multiple agreements with essentially parallel language.

The U.S. paper noted that this more flexible approach would likely enhance purchasing entities' ability to achieve best value in procurement. Framework agreements are designed to allow procuring entities to launch mini-competitions among the subscribing vendors, as requirements arise.¹⁴ Forcing all the vendors to subscribe to a single master agreement would mean less genuine competition in those mini-competitions, since vendors would be forced to conform to identical terms at the outset. This would heighten concerns, similar to those raised by the European Commission approximately a decade ago, that framework agreements may foster anti-competitive behavior in procurement.¹⁵

An alternative approach used in the United States favors multiple awards to multiple vendors, under a single solicitation.¹⁶ This approach yields multiple, nearly identical master agreements with the various vendors but allows the procuring entity and the vendors to negotiate slightly different terms—such as different licensing terms—in each vendor's master agreement. These differences can increase the level of competition in subsequent mini-competitions under the master agreements. The U.S. paper further noted that the separate agreements also allow the procuring agency more flexibility should it, for example, decide to terminate one agreement with one vendor because of concerns regarding corruption or malfeasance.

2. Closing the Divide Between Framework Agreements and Dynamic Purchasing Systems

The UNCITRAL working papers initially prepared for the working group¹⁷ followed the European procurement directives and created a conceptual divide between framework agreements and dynamic purchasing systems.¹⁸ Indeed, one UNCITRAL working paper

12. See U.N. Comm'n on Int'l Trade Law, Working Group I on Procurement, *Possible Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services-Drafting Materials for the Use of Framework Agreements and Dynamic Purchasing Systems in Public Procurement*, U.N. Doc. A/CN.9/WG.I/WP.52, ¶ 10 (Mar. 13, 2007).

13. See Council Directive 2004/18/EC, *supra* note 8, art. 32, ¶ 4.

14. See U.N. Doc. A/CN.9/WG.I/WP.52, *supra* note 12, ¶ 6.

15. See Press Release, European Commission, *Public Procurement: Infringement Proceedings Against the United Kingdom, Austria, Germany and Portugal*, IP/97/1178 (Dec. 19, 1997), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/97/1178&format=HTML&aged=1&language=EN&guiLanguage=en>.

16. See, e.g., FAR, *supra* note 9, § 16.504(c).

17. See U.N. Doc. A/CN.9/WG.I/WP.52, *supra* note 12; U.N. Comm'n on Int'l Trade Law, Working Group I on Procurement, *Possible Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services-Drafting Materials for the Use of Framework Agreements and Dynamic Purchasing Systems in Public Procurement-Addendum*, U.N. Doc. A/CN.9/WG.I/WP.52/Add.1, available at http://www.uncitral.org/uncitral/en/commission/working_groups/1/Procurement.html.

18. For example, the guidance on dynamic purchasing systems published by one prominent centralized purchasing agency, the U.K. Office of Government Commerce, plainly indicates that dynamic purchasing systems are not erected using framework agreements. See U.K. Office of Government Commerce, *Dynamic Purchasing Systems: OGC Guidance on Dynamic Purchasing Systems in the New Procurement Regulations* (Jan.

explicitly cited the European procurement directive's definition of dynamic purchasing systems as follows:

A "dynamic purchasing system" is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specifications.¹⁹

The experience of the U.S.'s federal procurement system, however, has been that framework agreements and dynamic purchasing systems (at least as contemplated by the Model Law) are not distinct, but rather that dynamic purchasing systems are merely a logical extension of framework agreements.

A practical example may help illustrate the U.S. experience. For many decades, the U.S. General Services Administration (GSA) (a centralized purchasing agency) has sponsored Multiple Award Schedules contracts.²⁰ These are essentially framework agreements, which may be entered into at any time by any qualified vendor interested in selling the subject goods or services to the U.S. government.²¹ There are many different classes of these standing agreements, such as classes of contracts for information technology or for management services. The GSA Multiple Award Schedules contracts give U.S. agencies ready access to thousands of vendors and literally millions of commercial goods and services.

To enter into a Multiple Award Schedules contract with the GSA, a vendor may at any time prepare and submit a proposal against a standing GSA solicitation. The GSA contracting officer then works to negotiate an agreement with the vendor for the proffered goods and services.²² The terms of that agreement are generally based on the vendor's commercial sales practices; typically, the GSA Multiple Award Schedules contract is ultimately based upon a discount against the vendor's commercial prices, and incorporates at least some of the vendor's standard commercial terms.

The vendor's Multiple Award Schedules agreement with the GSA may be one of hundreds, if not thousands, of other such GSA agreements in the same industry. There are, for example, thousands of information technology vendors that hold GSA Multiple Award Schedules contracts for hardware, software, and information technology services. This rich field of potential vendors allows buying agencies to launch robust mini-competitions

2006), available at http://www.ogc.gov.uk/documents/Guide_dynamic_purchasing.pdf. See also Sue Arrowsmith, *Implementation of the New EC Procurement Directives and the Alcatel Ruling in England and Wales and Northern Ireland: A Review of the New Legislation and Guidance*, 2006 PUB. PROC. L. REV. 86, 114 (comparing dynamic purchasing systems and framework agreements); Sue Arrowsmith, *Dynamic Purchasing Systems Under the New EC Procurement Directives—A Not So Dynamic Concept?*, 2006 PUB. PROC. L. REV. 16, 28 [hereinafter *Dynamic Purchasing Systems*] (comparing formation of dynamic purchasing systems and formation of framework agreements).

19. U.N. Doc. A/CN.9/WG.I/WP.52/Add.1, *supra* note 17, ¶ 7.

20. See, e.g., Marc F. Efron, Terry L. Albertson & Nabil W. Istafanous, *The GSA Multiple Award Schedule Program*, BRIEFING PAPERS, Oct. 1994, at 94-11.

21. Information on the GSA Multiple Award Schedules contracts is available at the GSA website, www.gsa.gov (follow the "GSA Schedules" hyperlink).

22. See FAR, *supra* note 9, § 8.4.

amongst many eligible vendors—the eligible Multiple Award Schedules contract holders—when requirements later arise. As with the dynamic purchasing systems contemplated by the European procurement directive, these mini-competitions may be held through an electronic marketplace. There is no requirement in the U.S. system, however, that the system be fully electronic.

As this example illustrates, the U.S. experience is that a dynamic purchasing system can perhaps best be understood as a unique form of framework agreement—a third model,²³ under which vendors may join an always open standing system of agreements. While this approach would require some tweaking of the European model, this conceptual approach offers a smooth continuum from frameworks to dynamic purchasing systems.

There are advantages and disadvantages to this approach. Among other things, this “always open” model allows vendors to join existing framework agreements as market conditions and technologies evolve. As a result, there is less chance that framework agreements would protect locked sets of incumbent vendors, and agencies would be more likely to have easy access to new vendors and new technologies. On the other hand, this “always open” approach means that vendors, when initially entering into such agreements, would probably not be competing directly against other vendors, and thus would feel less acute competitive pressures to offer the government favorable prices and terms. To protect against this, the law would have to ensure that the mini-competitions subsequently held among vendors are indeed robust.

As a drafting matter, many of these concerns were addressed by the UNCITRAL working papers reviewed at the session in New York in April 2008. Those working papers propose provisions to ensure that procuring entities use careful procedures for entering into, and implementing, dynamic purchasing systems.²⁴ The U.S. recommendation, therefore, went mainly to the conceptual structure of the proposed revisions. Instead of dealing with dynamic purchasing systems as a distinct concept, the U.S. delegation recommended that the UNCITRAL working group treat such systems as another model for framework agreements, perhaps renamed dynamic framework agreements.

The approach recommended by the U.S. delegation—melding framework agreements and dynamic purchasing systems under the UNCITRAL model law—would have two apparent benefits. First, this approach would seem to clarify the intent behind these unique agreements, and might well make dynamic purchasing systems more attractive to procuring agencies.²⁵ Second, by making it simpler to amass dynamic framework agreements that are fully electronic and fully accessible from geographically dispersed points, the suggested approach could make it simpler to centralize standardized purchasing—and thus allow widely dispersed purchasing agencies, potentially from several governments, to buy commodities from a single source. The practical experience in the United States has been that this highly centralized approach (called cooperative purchasing, when, for exam-

23. Model 1 framework agreements (with fixed terms for purchase orders) and Model 2 framework agreements (which allow for mini-competitions among vendors under the agreement) are described in U.N. Doc. A/CN.9/WG.I/WP.52, *supra* note 12, ¶ 6.

24. See U.N. Doc. A/CN.9/WG.I/WP.52/Add.1, *supra* note 17.

25. Dynamic purchasing systems have not, it seems, until now been met with great enthusiasm in the European procurement community. See, e.g., *Dynamic Purchasing Systems*, *supra* note 18, at 28.

ple, a state government makes a purchase under a federal contract) offers important new efficiencies for governments and their vendors.²⁶

C. ANTI-CORRUPTION MEASURES: CONFLICTS OF INTEREST IN PROCUREMENT

In previous sessions, the UNCITRAL working group agreed to add the issue of conflicts of interest to the list of topics to be considered in the ongoing revision of the Model Law.²⁷ In this regard, the United Nations Convention Against Corruption (Convention), which entered into force in December 2005,²⁸ specifically calls for anti-corruption measures in procurement to address conflicts of interest. The Convention calls, in relevant part, for “measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.”²⁹ In light of the Convention’s language, the U.S. delegation to the UNCITRAL working group recommended that the UNCITRAL Model Procurement Law include such conflict-of-interest provisions, so that nations implementing the Model Law have, included in their procurement systems, provisions in place in accord with the Convention.³⁰

26. See, e.g., Kathryn E. Swisher, *Expanded Use of GSA Schedules by State and Local Governments*, 42 *PROC. LAW* 20 (2007).

27. See, e.g., U.N. Doc. A/CN.9/WG.I/WP.49, *supra* note 7, ¶¶ 8, 64.

28. Information on the UN Convention Against Corruption is available at http://www.unodc.org/unodc/crime_convention_corruption.html. For a broader discussion of how the UN Convention Against Corruption might be accommodated by the UNCITRAL Model Procurement Law, see Christopher R. Yukins, *Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law*, 36 *PUB. CONT. L.J.* 307 (2007).

29. Article 9, paragraph 1, of the UN Convention Against Corruption reads, in total, as follows:
Article 9

Public procurement and management of public finances

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

- (a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;
- (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;
- (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;
- (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;
- (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

30. Nations adopting the UNCITRAL Model Procurement Law may have joined the UN Convention Against Corruption already. For a list of nations that have signed, and then ratified, accepted, approved of, acceded to, or succeeded to the Convention, see http://www.unodc.org/unodc/crime_signatures_corruption.html.

A great deal of work relating to conflicts of interest in procurement has been done internationally, including studies done by the Organisation for Economic Cooperation and Development (OECD),³¹ and the United Nations' own Standards of Conduct for the International Civil Service, which specifically highlight the dangers of conflicts of interest in procurement.³² The United States has developed an extensive body of law regarding conflicts of interest in procurement, and work continues in expanding and improving this area of law.³³ The U.S. experience should, therefore, prove useful, as the UNCITRAL working group moves forward to integrate the principles of the Convention as part of the broader effort to update and reform the UNCITRAL Model Procurement Law.

D. CONCLUSION

The initiative to reform the UNCITRAL Model Procurement Law is entering its fourth year. When the UNCITRAL working group convened in New York in April 2008, the working group addressed framework agreements, dynamic purchasing systems, and at least initially the U.N. Convention Against Corruption. Because the U.S. federal procurement system has such a rich history in many of these areas, it is hoped that the U.S. experience will prove useful to the working group in its ongoing deliberations.

II. Combating Corruption in World Bank Procurement: Voluntary Disclosure Program and Sanctions Reform

Following in the wake of last year's announcement of the initiation of a new Voluntary Disclosure Program (VDP), the World Bank Group continues to battle the cancer of corruption in World Bank programs and procurements through the unveiling of a new sanctions process. These sanctions reforms add a bigger stick to complement the carrot of the VDP. This section will summarize the VDP and provide an overview of the World Bank's new sanctions regime.

A. THE CARROT—VDP

The VDP is—as its name connotes—a voluntary program whereby World Bank contractors can come clean on past improprieties.³⁴ Specifically, the VDP—as implemented by World Bank's Department of Institutional Integrity (INT)³⁵—provides a framework whereby World Bank contractors can (1) cease corrupt practices and commit to not engage in misconduct in the future; (2) disclose to the Bank the results of an internal investigation into past fraudulent, corrupt, collusive, or coercive acts in Bank-financed or

31. Organisation for Economic Cooperation & Development (OECD), *OECD Guidelines for Managing Conflict of Interest in the Public Service: Report on Implementation* (July 11, 2007), available at http://www.oecd.org/department/0,3355,en_2649_34135_1_1_1_1_1,00.html.

32. United Nations Educational, Scientific and Cultural Organization, *Standards of Conduct for the International Civil Service*, ¶ 22, available at <http://unesdoc.unesco.org/images/0014/001497/149745e.pdf>.

33. See, e.g., Keith R. Szeliga, *Watch Your Step: A Contractor's Guide to Revolving-Door Restrictions*, 36 PUB. CONT. L.J. 519 (2007).

34. See generally The World Bank, Voluntary Disclosure Program, <http://www.worldbank.org/vdp>.

35. Additional information on the World Bank's Department of Institutional Integrity is available at <http://www.worldbank.org/integrity>.

supported projects or contracts; and (3) implement a robust “best practices” internal compliance program monitored by a Bank-approved third-party for three years.³⁶ Through the VDP, World Bank contractors can avoid debarment and publicity problems and may continue to compete for and participate in World Bank-supported projects.³⁷

In order to enter the VDP, interested contractors need only complete a standard background data sheet.³⁸ Within thirty days, INT confirms contractor eligibility by making sure that the contractor is not already under active investigation by the World Bank and invites the contractor to accept the VDP’s standard terms and conditions.³⁹ Upon acceptance of these terms and conditions, which generally cannot be negotiated or modified, the contractor is required to undertake an internal investigation and disclose any sanctionable activity in accordance with a World Bank-approved Internal Investigation and Report Protocol.⁴⁰ Upon completion of the internal investigation and submission of the investigative report, the World Bank will verify the report and institute a regime of compliance improvements and monitoring.⁴¹ Within three years, participating contractors are expected to complete the VDP.⁴²

While the VDP may be an appropriate course of action for some World Bank contractors, it is important to note that the VDP only applies to disclosed past problems and that other issues discovered during the course of the program can lead to debarment. Further, the VDP’s confidentiality provisions should not be considered an amnesty from local or international enforcement.⁴³ Specifically, while the World Bank may choose not to debar a VDP participant and keep the proceedings confidential, there is nothing in the VDP’s purview that would prevent a separate enforcement action brought by national authorities. Likewise, the VDP does not offer a witness protection program or have the capacity to protect VDP participants.

B. THE STICK—SANCTIONS REFORM

Along with the institution of the VDP, the World Bank has reformed its sanctions program. These reforms include structural reforms and the addition of a broader array of sanctions beyond simple debarment. Structurally, the sanctions program has been reconstituted into a two tier regime. At the first tier, INT and other World Bank staff investigate allegations of sanctionable misconduct.⁴⁴ Upon sufficient evidence, INT refers the case to the Sanctions Evaluation and Suspension Officer (Officer). If a preponderance of the evidence supports a finding of sanctionable activity, the Officer issues a Notice of

36. See The World Bank, Department of Institutional Integrity, Voluntary Disclosure Program, VDP Guidelines for Participants, § 3 (July 20, 2006), available at <http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDPPGuidelinesforParticipants.pdf>.

37. See *id.*

38. See *id.* § 5.2.3.

39. See *id.* § 5.3.

40. See *id.* § 5.5.

41. See *id.* § 5.6.

42. See *id.*

43. See *id.* § 6.

44. See The World Bank, Sanctions Management, Office of Evaluation and Suspension, *Overview—Tackling Corruption Through a Two-Tier Sanctions Management Process*, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITTS/EXTOFFEVASUS/0,,contentMDK:21419040-menuPK:3601079-pagePK:64168445-piPK:64168309-theSitePK:3601046,00.html>.

Sanctions Proceedings and offers a proposed sanction.⁴⁵ The Officer also has the authority to suspend the offending party from bidding on future World Bank financed contracts. Challenges to the Officer's determinations may be raised to the second tier Sanctions Board.⁴⁶ The Sanctions Board, which is a reconstituted version of the prior Sanctions Committee level bolstered by non-World Bank staff, has the final say in sanctions decision-making.

By way of sanctions options, in addition to straight debarment, the sanction reforms now include a number of other possibilities. First, public letters of reprimand are part of the sanctions program's "name and shame" capability.⁴⁷ Second, conditional non-debarment allows a contractor to continue to participate in World Bank funded projects so long as conditions similar to those of the VDP are met.⁴⁸ Third, debarment with conditional release results in a debarment that can be shortened subject to the achievement of certain benchmarks.⁴⁹ Finally, restitution is now available as a tool of sanctions enforcement.⁵⁰

The combination of the VDP and Sanctions reform has placed the World Bank in a much better position to police corruption in World Bank funded procurements.

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*