



# APEC Procurement Transparency Standards in Vietnam

The Need to Move from Law to Practice



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The views expressed in this report do not necessarily reflect the researcher's own views.

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



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



Towards Transparency (TT) is a registered Vietnamese non-profit and non-state consultancy organization that was established in 2008 to contribute to national efforts in promoting transparency and accountability for corruption prevention and fighting. In March 2009, TT became the National Contact of Transparency International (TI) in Vietnam. In this capacity, TT supports and coordinates emerging activities of TI in Vietnam, within the framework of the TI Vietnam Program "Strengthening Anti-corruption Demand from Government, Private Sector and Society, 2009-2012." [www.towardstransparency.vn](http://www.towardstransparency.vn).

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## Abbreviations and acronyms

**2005 Procurement Law** Law No. 61/2005/QH11

**AmCham-Vietnam** American Chamber of Commerce in Vietnam

**APEC** Asia-Pacific Economic Cooperation

**APEC Standards** APEC Transparency Standards on Government Procurement

**CIPE** Center for International Private Enterprise

**DPP** Department of Public Procurement under Ministry of Planning and Investment

**EPC Contracts** Engineering, Purchasing and Construction Contracts

**GDP** Gross Domestic Product

**Law on Procurement** 2005 Procurement Law, as amended by Law No. 38/2009/QH12

**MPI** Ministry of Planning and Investment

**NBPs** Non-Binding Principles on Government Procurement

**ODA** Official Development Assistance

**SOEs** State-owned enterprises

**TI-USA** Transparency International-USA

**TT** Towards Transparency

**VCCI** Vietnam Chamber of Commerce and Industry

**VDR** Vietnam Development Report

**Vinashin** Vietnam Shipbuilding Industry Group

**WTO** World Trade Organization

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## Executive summary

Corruption damages economic development, hinders the growth of fair market structures, and impedes the ability of developing countries to attract scarce foreign investment. Nowhere is the cost of corruption more evident than in public procurement. Vietnam spent about 22.15 percent of its GDP on procurement in 2009. Its poor rankings on all major corruption indices make transparency and integrity in public procurement especially important.

Vietnam has endorsed the United Nations Convention against Corruption as part of its strategy for combating or preventing corruption, as well as for strengthening integrity in numerous government activities. In addition, as a member of the Asia Pacific Economic Cooperation (“APEC”), Vietnam agreed to implement the Transparency Standards on Government Procurement adopted by APEC in 2004 (“APEC Standards”).

Transparency International-USA (“TI-USA”), the Center for International Private Enterprise (“CIPE”), and Towards Transparency (“TT”), Transparency International’s national contact in Vietnam, cooperated on a project to assess Vietnam’s legal and practical implementation of the APEC Standards on Government Procurement. The project analyzed the Vietnamese legal framework for public procurement and consulted with private sector actors on whether those laws and regulations are implemented in practice and the degree to which the implementation has had an impact on corruption.

Vietnam has made significant progress in adopting legislation on public procurement. Since 2005, Vietnam has passed a number of laws regarding public procurement and adopted implementing regulations set forth in decrees issued by the Prime Minister. In addition, the government has issued guidance on the implementation of the legal framework through circulars and decisions, providing templates and detailed instructions for carrying out procurement processes. The sheer number of relevant documents makes implementing a standardized procurement process problematic and adversely affects the transparency of the system.

In most respects, Vietnam’s legal framework incorporates the APEC Standards in a satisfactory manner, though it falls short with respect to independent review of procurement decisions. Consultations with the private sector, however, make it clear that both the government and the private sector need to do more to promote transparency and integrity in the public procurement system. Significant problems arise with respect to providing an opportunity to comment on draft laws and regulations before they are adopted; applying procurement rules inconsistently at the provincial and local levels; the absence of a common code of conduct for procurement officials; and the lack of specialized procurement units within procuring entities.

Within the business sector, there is a reluctance to exercise the rights provided by the procurement rules, such as the right to ask questions about procurement opportunities and to challenge procurement decisions. Procurement clarification questions often remain unanswered or are met with unhelpful responses, and challenging a procurement decision frequently results in a complaining company not being invited to bid again by a particular procuring entity.



Problems exist on the private sector side as well. Few companies have codes of conduct or programs to encourage integrity in the procurement process. Compounding transparency problems is also the absence of civil society organizations with the mandate and expertise to monitor procurements.

As a result, the report makes the following recommendations:

- The government should increase its capacity to conduct transparent procurement by enforcing the requirement to seek public comment on new procurement rules; creating a Procurement Manual to standardize procedures at all levels of government; requiring bidders to have anti-corruption programs in place; and introducing a common Code of Conduct for procurement officials.
- The government should improve corporate governance and transparency of state-owned enterprises (“SOEs”), ensuring that each SOE has a code of conduct, training programs, and internal controls to combat corruption. In addition, the government should address the inherent conflicts of interest that result from the role of SOEs as both bidders and procuring entities and from the ability of SOEs to bid on procurement projects issued by the government entity which owns or controls the SOE.
- The government should encourage further development of civil society organizations that specialize in procurement and permit civil society to monitor procurement.
- The private sector should enhance its integrity by
  - adopting codes of conduct, training programs, and internal controls to combat corruption
  - working through local business organizations and with civil society to encourage the adoption of anti-corruption programs
  - and participating in initiatives like the Integrity and Transparency in Business Initiative implemented by the Vietnam Chamber of Commerce and Industry.
- The donor community should intensify efforts to improve procurement transparency and integrity by
  - piloting the use of Transparency International’s Integrity Pacts in some major procurements
  - including training on anti-corruption, financial management, and procurement procedures in new projects
  - creating and promoting a nationwide “hotline” or dedicated website for confidential reporting of public procurement abuses and instances of corruption.

# Introduction

Government procurement typically accounts for the largest share of public expenditures aside from government salaries and social benefits. Government procurement is generally between 14 to 20 percent of a country's GDP, which on a global basis would be between \$8.16 trillion and \$11.65 trillion annually.<sup>1</sup> This massive spending goes, in large part, to essential public services such as clean water, education, healthcare and infrastructure. With estimates that corruption can add 10-25 percent to the cost of public procurement, and in some cases even 40 to 50 percent, the potential financial and social costs are staggering.<sup>2</sup>

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

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

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

This report is one in a series initiated by TI-USA to assess and promote implementation by APEC economies of the APEC Standards. It includes an analysis of the implementation of the APEC Standards in Vietnam in law and practice. It is based on a review of the legal framework carried out by a Vietnamese

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1. The World Bank estimates global GDP as US\$58.26 trillion in 2009. See <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>. The figure of 14-20 percent comes from the other country reports in this series.
  2. The World Bank estimates that corruption can add 20 percent or more to the cost of public procurement. See <http://go.worldbank.org/VAT2EY5A00>. TI estimates that damage from corruption represents on average 10 to 25 per cent of a contract's value. See TI's Handbook for Curbing Corruption in Public Procurement (2006) at 13, available at [http://www.transparency.org/publications/publications/other/procurement\\_handbook](http://www.transparency.org/publications/publications/other/procurement_handbook).
  3. TI has developed the Integrity Pact, a tool aimed at preventing corruption in public procurement. See [http://www.transparency.org/global\\_priorities/public\\_contracting/integrity\\_pacts](http://www.transparency.org/global_priorities/public_contracting/integrity_pacts). It has also produced "Business Principles for Countering Bribery," in cooperation with Social Accountability International and the support of a Steering Committee drawn from international business, academia, trade unions, and other non-governmental bodies including CIPE. These principles provide a framework for ethical business practices. Available at [http://www.transparency.org/global\\_priorities/private\\_sector/business\\_principles](http://www.transparency.org/global_priorities/private_sector/business_principles).

expert on government procurement, Dang Chien Thang, MBIS, MSc, and the results of consultations with the private sector in Hanoi and Ho Chi Minh City on the degree of compliance with the legal framework by both Vietnamese authorities and domestic and foreign companies.

Section 1 outlines the background of the APEC Standards. Section 2 provides an overview of Vietnam's economy, business environment, and the scope of public procurement. Section 3 describes the legal framework for public procurement in Vietnam. Section 4 summarizes the findings of the review of Vietnam's legal framework and its compliance with the APEC Standards. Section 5 presents the findings of the business consultations and Section 6 contains the report's conclusions and recommendations.

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

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

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

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

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

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

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

The APEC Standards cover key aspects of public procurement:

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

The APEC Standards represent a political commitment by APEC members to transparency and integrity in government procurement. Implementation is crucial for spurring economic growth, facilitating financial stability, and promoting confidence in government actions. The availability of, and easy access to, public procurement information are key to conducting successful tenders and developing and strengthening sound economies that maximize the use of public resources.

At the APEC Ministerial Meeting in Sydney, Australia, held in 2007, member economies submitted reports on the assessment of implementation of the APEC Transparency Standards in various areas, including government procurement, and pledged to close the remaining implementation gaps. These reports showed general progress in implementation of the APEC Standards. However, they did not provide a full picture since they were written by the respective APEC economies without involving non-governmental stakeholders. Moreover, the reports focused on the harmonization of national laws and regulations with the APEC Standards rather than the examination of how those laws and regulations are implemented in practice and their impact on improving integrity in procurement.

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

## 2. Vietnam's Economic and Governance Context

### Country Profile

Vietnam's "Doi Moi" (renovation or renewal) policy launched in 1986 marked the beginning of transition from central planning to market economy, returning agricultural land to households for farming and opening Vietnam to foreign trade and investment. Increasing its integration into the global economy, Vietnam joined the Association of Southeast Asian Nations ("ASEAN") in 1995 and the World Trade Organization ("WTO") in 2007. Vietnam has attracted significant foreign investment over the past few years, taking the country out of the world's least-developed list.

**Table 1: Economic Indicators of Vietnam 2007 - 2010**

Indicators	2007	2008	2009	2010 (est.)
Gross Domestic Product (US\$ billion)	71.1	89.8	92.4	96.8
GDP per capita (US\$)	835	960	1,040	1,100
GDP growth rate	8.5%	6.2%	5.3%	6.2%
Consumer Price Index	8.3%	23.0%	6.0%	11.75%

Source: World Bank, International Monetary Fund, Asian Development Bank, General Statistics Office of Vietnam

In terms of governance, Vietnam ranks generally in the 25th to 50th percentile among the 213 countries and territories surveyed for the Worldwide Governance Indicators report, except for the component "Voice and Accountability", where Vietnam ranks in the 0 to 10th percentile, and "Political Stability", where Vietnam ranks in the 50th to 75th percentile.<sup>7</sup> Within the "Control of Corruption" component, Vietnam has improved over the past decade, though it still ranks in the 25th to 50th percentile of those surveyed.

The extent of corruption, particularly compared with other countries, remains very high. According to Transparency International's Corruption Perceptions Index, Vietnam ranked 116th out of the 178 countries surveyed in 2010.<sup>8</sup> Although this represents an improvement in Vietnam's ranking from 2009, its actual score of 2.7 did not improve.<sup>9</sup> Other indicators also demonstrate a high degree of corruption in Vietnam. According to the 2011 Index of Economic Freedom, Vietnam obtained a score of 27 out of 100 for Freedom from Corruption, with the report noting that "A confused overlapping of regulatory jurisdictions and bureaucratic procedures creates opportunities for corruption."<sup>10</sup> The World Bank's Doing Business Report 2011 ranked Vietnam 78 out of 183 countries. Although Vietnam was

7. Kaufman, D., A. Karsy, and M. Mastruzzi, *The Worldwide Governance Indicators (2010)*, available at [http://info.worldbank.org/governance/wgi/sc\\_chart.asp#](http://info.worldbank.org/governance/wgi/sc_chart.asp#).

8. Transparency International, "Corruption Perception Index, 2010," available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results).

9. Transparency International, "Corruption Perception Index, 2009," available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table). The scale runs from 0 to 10, with the highest ranking given to Denmark, New Zealand, and Singapore at 9.3.

10. Heritage Foundation, "2010 Index of Economic Freedom," available at <http://www.heritage.org/index/Country/Vietnam>

among the top 10 most improved countries in the survey,<sup>11</sup> it still ranked below average in starting a business, an area prone to corruption.

The extent of corruption in Vietnam is also demonstrated by the Vietnam Development Report (“VDR”) 2010, which was prepared by a consortium of international donor institutions.<sup>12</sup> According to the VDR 2010, the local perception that corruption poses a problem for people is pervasive. 65 percent of respondents said that corruption is a major problem for them and their families and 44 percent of respondents considered the overall level of corruption as serious or very serious.<sup>13</sup> The levels of corruption, as perceived by the private sector, remain worrisome. The report shows that more than half of the firms in one survey indicated that firms in their industry pay commissions when contracting with the government, and one in four of the firms in another study said they paid bribes.<sup>14</sup>

The first Vietnam-specific Global Corruption Barometer survey was done by TT and Transparency International in 2010. It showed that 62 percent of urban Vietnamese perceived that corruption increased in Vietnam over the period 2007-2010. Moreover, 49 percent of the respondents perceived the business sector to be corrupt.<sup>15</sup> There are, however, encouraging signs of awareness at the government level that corruption is harming Vietnam’s economic prospects. At the last National Party Congress in January 2011, a government official emphasized, once again, to delegates that corruption is holding back economic development in the country.<sup>16</sup>

When it comes to corruption in public procurement, the situation is complicated by the fact that mass media rarely focuses on procurement, in part as a result of the technical nature of the subject and lack of technical knowledge by journalists. It is also difficult to collect information on procurement problems and publish articles on sensitive topics, such as corruption, that involve large amounts of money, vested interests, and state-owned companies.

There are different types of civil society organizations in Vietnam that could play a role in monitoring public procurement. Decree No. 47/2007/ND-CP on Implementing the Anti-Corruption Law identifies three groups (in addition to journalists and citizens) with an obligation to combat corruption: Vietnam Fatherland Front Committees (an umbrella group based around mass participation), professional associations, and the People’s Inspection Boards (local bodies that receive and settle public complaints). At this time, however, none of these organizations has the mandate to focus on procurement or the expertise to systematically monitor it. There are no independent civil society organizations specializing in monitoring public procurement.

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11. International Finance Corporation and World Bank, *Doing Business Report 2011, “Overview,”* available at <http://www.doingbusiness.org/reports/doing-business/doing-business-2011>.

12. “Vietnam Development Report, 2010: Modern Institutions” (“VDR 2010”), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/03/19/000333037\\_20100319004055/Rendered/PDF/535730WP0P11221ng0reduced0file0size.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/03/19/000333037_20100319004055/Rendered/PDF/535730WP0P11221ng0reduced0file0size.pdf).

13. VDR 2010 at 101.

14. *Id.* at 110, citing surveys conducted by the Embassy of Finland and Center for Community Support Development Studies in 2008 and Central Institute for Economic Management and University of Copenhagen in 2008.

15. TT and Transparency International, “Vietnam country analysis of the Global Corruption Barometer 2010,” to be published in 2011.

16. Margie Mason, “Vietnam acknowledges corruption holds back country,” *Washington Post* (Jan. 12, 2011), available at <http://ph.news.yahoo.com/vietnam-acknowledges-corruption-holds-back-country-20110112-042343-019.html>.

## Economic Importance of Public Procurement

Procurement is carried out in Vietnam by the national government, 58 provinces, five municipalities, and numerous local governmental entities. In addition, there are 3,200 state-owned enterprises (“SOEs”) in Vietnam that participate in government procurement or carry out their own procurements, which constitute about 36 percent of GDP.<sup>17</sup> Significant funding for public procurement also comes from international donors through overseas development assistance (“ODA”). In 2005, Vietnam agreed with the multilateral financial institutions and the major donor agencies on the Hanoi Core Statement on Aid Effectiveness, which called for devolution of development decisions and powers to the national government and from the national government to provincial authorities.<sup>18</sup> Pursuant to the Hanoi Core Statement, ODA is channeled through Vietnam’s systems and procedures and follows Vietnam’s procurement rules to the extent possible. As a result, billions of Vietnamese dong of ODA now pass through Vietnam’s procurement system, raising serious concerns.<sup>19</sup>

In 2009, the total annual amount of public procurement was approximately VND 388,985 billion (US\$ 20.47 million), which is 22.15 percent of the GDP. In 2009, there were 80,202 public procurements, carried out by procurement agencies in all ministries, sectors, and provinces.<sup>20</sup>

The share of competitive methods in the total value of awarded government procurement contracts declined significantly between 2008 and 2009. In 2008, over 72 percent of contracts were awarded through competitive bidding, while in 2009 awards through competitive bidding accounted for only 53 percent of total procurement.

**Table 1: Economic Indicators of Vietnam 2007 - 2010**

Statistic	2006	2007	2008	2009
<b>TOTAL NUMBER OF BIDS</b>	<b>38,876</b>	<b>33,891</b>	<b>69,051</b>	<b>80,202</b>
Total contract awarded value (US\$ million)	6,752.6	57,605.7	16,588.4	20,472.9
Total value awarded via open bid competitive methods (US\$ million)	4,104.3	25,953.7	12,053.0	10,825.9
Ratio of Total value awarded via competitive methods to Total contract awarded value	60.78%	45.05%	72.66%	52.88%

Source: Department of Public Procurement (MPI)

17. See *EU-Vietnam MUTRAP III*, “Comprehensive Strategy For Service Sector Development to the Year 2020 (CSSSD) with a Vision to 2025,” Final Report (December 2009), available at <http://www.mutrap.org.vn/en/library/MUTRAPIII/Technical%20reports/COMPREHENSIVE%20STRATEGY%20FOR%20SERVICE%20SECTOR%20DEVELOPMENT%20TO%20THE%20YEAR%202020%20WITH%20A%20VISION%20UP%20TO%202025.pdf>; Department of State, “Background Note: Vietnam,” available at <http://www.state.gov/r/pa/ei/bgn/4130.htm>.

18. Hanoi Core Statement on Aid Effectiveness (June 2003) (“Hanoi Statement”), available at <http://www.oecd.org/dataoecd/25/16/39151259.pdf>. The Hanoi Statement implements the suggestions from the High Level Forum on Aid Effectiveness, held in Paris in March 2005.

19. In 2006, the head of a Project Management Unit in the Transport Ministry (PMU 18) was accused of using millions of Vietnamese dong of public funds including funds from donors such as JICA for gambling on soccer matches and luxury spending. The scandal raised serious concerns about ODA effectiveness in Vietnam and led to the resignation of the Minister of Transport. See <http://news.bbc.co.uk/2/hi/asia-pacific/4917466.stm>.

20. These figures were provided by the Department of Public Procurement Management to the author. US\$ figures in this report are converted at US\$1 = VN Dong 19,386.70, the rate applicable on January 1, 2011 and are all approximate.

## 3. Legal Framework for Public Procurement

### Relevant Laws and Decrees

Vietnam's legal framework governing public procurement has made significant advancements in the past few years. In 2002, the World Bank identified six major shortcomings in Vietnam's public procurement system:<sup>21</sup>

- Lack of clear primary public procurement legislation and standard procurement documents
- Inadequate notification and advertising of bidding opportunities
- Lack of public access to procurement rules
- Lack of a clear mechanism for handling of procurement disputes
- Lack of guidelines that clearly stipulate details in the implementation of procurement legislation, such as unique and common evaluation methods and domestic preferences
- Lack of procurement personnel capacity and organizations specialized in procurement

Vietnam has since adopted a number of laws and decrees governing public procurement that address some of the shortcomings noted by the World Bank, most recently in 2005 and 2009. The Law on Procurement (Law No. 61/2005/QH11), adopted in 2005 and amended by Law No. 38/2009/QH12 in 2009 (together, the "Law on Procurement").<sup>22</sup> Subsequently, the government issued implementing regulations for the Law on Procurement in Decree 85/2009.<sup>23</sup> Public procurement rules are also addressed in the 2003 Law on Construction.<sup>24</sup> There are many decrees and circulars implementing these laws (see Attachment 2).

The sheer number and size of those documents creates implementation problems for procurement officials and difficulties for the private sector in understanding the procurement system put in place. In addition, many of the decrees and decisions have not been translated into English or are translated by different procuring entities, leading to differing and possibly conflicting versions.

The Law on Procurement applies to all governmental entities.<sup>25</sup> However, there are overlapping laws, making procurement highly complicated and difficult to understand. For example, procurement by SOEs in the energy sector is governed by the Petroleum Law.<sup>26</sup>

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21. World Bank, "Vietnam: National Public Procurement Assessment Report" (December 2002), available at <http://www.unpcdc.org/media/4308/vietnam%20assessment.pdf>.

22. Law on Tendering, available at <http://www.havip.com.vn/images/download/Law%20on%20Tendering.pdf> and Law Amending and Supplementing a Number of Articles of the Laws concerning Capital Construction and Investment, available at <http://www.thuvienphapluat.vn/archive/Luat/Law-No-38-2009-QH12-of-June-19-2009-amending-and-supplementing-a-number-of-articles-of-the-Laws-concerning-capital-construction-investment-vb9607-4t10.aspx>.

23. Decree 85/2009/ND-CP dated 15 Oct. 2009 on the instructions for implementation of the Law on Procurement and the selection of contractors in accordance with Construction Law, available at [http://www.moc.gov.vn/site/moc/cms?cmd=4&portionId=88&articleId=37956&portalSiteId=6&language=en\\_US](http://www.moc.gov.vn/site/moc/cms?cmd=4&portionId=88&articleId=37956&portalSiteId=6&language=en_US).

24. Law No. 16/2003/QH11 (2003), available at <http://www.havip.com.vn/images/download/Law%20on%20Construction.pdf>.

25. Phillips Fox, "New Tendering Law," (April 2006), at 2, available at <http://www.usvtc.org/updates/legal/PhillipsFox/TenderingLawUpdateApr2006.pdf>.

26. Petroleum Law of 1993, as supplemented in 2002.



In addition to the procurement-specific laws and regulations, the legal framework relevant to public procurement also includes laws of more general application:

- Law on the Promulgation of Legal Documents of the National Assembly (“Law on Laws”), which requires notice and comment periods on draft laws and regulations
- Anti-Corruption Law (Nov. 29, 2005)
- Decree No. 47/2007/ND-CP (March 27, 2007), implementing the Anti-Corruption Law, which specifies the roles and responsibilities of civil society actors in the fight against corruption
- Decree No. 37/2007/ND-CP (March 9, 2007) on Transparency of Properties and Incomes, which requires certain government officials to file forms declaring their property and income (asset declarations) on a confidential basis

## Eligibility to Participate in Public Procurement

Procurement opportunities in Vietnam are divided into national and international tenders. Under the Law on Procurement, an international tender may only be organized in the following cases:<sup>27</sup>

- where there is no local bidder meeting the project requirements or for projects in which domestic tendering has been held without selection of a winner;
- where the project is financed by an international financial institution or donor agency and the funding agreement stipulates that the project is open to international bidding; or,
- where the tender is for procurement of goods not manufactured domestically.

International bidders can participate in domestic tenders only as subcontractors to Vietnamese bidders. In international tenders, preference is given:

- in all procurements, to bidders established in Vietnam under the Law on Enterprises and the Law on Investment;
- in procurement of consulting services, construction and installation contracts, and contracts involving Engineering, Purchasing, and Construction (“EPC Contracts”), to partnerships in which a Vietnamese company will undertake work constituting at least 50 percent of the tender package; and,
- in the procurement of goods, a bidder whose bid comprises at least 30 percent domestically manufactured goods.

A bidder must demonstrate that it possesses, in the case of a domestic bidder, proof of being locally established (such as certificate of business registration) or, in the case of a foreign bidder, a certificate of business registration issued by its home country. The bidder must show that it is an independent entity with a healthy financial status and is not bankrupt, insolvent, or in the process of dissolution. SOEs can also act as bidders on procurements conducted by other SOEs or government agencies.

There are procedures for disqualifying bidders and publishing information about Procurement Law violations. Information on the treatment of violations must be published in procurement newspapers and on the procurement website. The list includes both procuring entities and bidders found in violation of the law. It also includes the actions taken by government officials to address each case.<sup>28</sup>

27. This description of eligibility to tender is taken from Phillips Fox, “New Tendering Law,” (April 2006), available at <http://www.usvtc.org/updates/legal/PhillipsFox/TenderingLawUpdateApr2006.pdf>.

28. See <http://muasamcong.mpi.gov.vn>.

## Roles and Responsibilities of Government Officials

The Law on Procurement decentralizes management of the procurement process and provides a clear definition of roles and responsibilities for each level of government.

The Prime Minister:

- Oversees the inspection and handling of procurement complaints
- Designates the appraisal body – an organization meant to assist the person or office that is authorized to make decisions on a particular procurement, known as the “Competent Person.”

Ministry of Planning and Investment, Department of Public Procurement:

- Is responsible for appraising the overall government procurement plan and selecting contract awardees for special procurement packages
- Maintains the procurement newspaper, the procurement information website and the procurement portal
- Acts as the focal point for international cooperation
- Directs capacity building for procurement personnel
- Monitors implementation of government procurement
- Settles procurement complaints within its jurisdiction
- Conducts inspections nationwide to monitor the implementation of the procurement system

Ministries, ministerial-level agencies, and People’s Committees (the executive arm of provincial governments) at provincial and local levels:

- Implement and administer procurement opportunities
- Organize capacity building activities
- Summarize, assess, and report on procurement implementation
- Settle procurement complaints within their jurisdiction
- Carry out inspection of procurement by personnel under their jurisdiction

Where a ministry, agency, SOE, or People’s Committee is designated as the “Competent Person” (the entity which has the authority to enter into contracts), it:

- Approves annual procurement plans
- Approves, or delegates the authority to approve, bidding documents and evaluates bidders
- Handles special cases
- Settles procurement complaints within its jurisdiction

Where a ministry, agency, People’s Committee, SOE, or other governmental entity is the “Investment Owner” (the entity that provides the funding), it:

- Decides on bidders’ pre-qualification, list of qualified bidders, and ranking
- Approves bidding documents and evaluates bidders (Investment Owner can contract with an independent organization or another procuring entity to draft bid documents and evaluate bids)
- Creates a Procurement Specialist Team (can be within the Procuring Entity or outsourced to a professional organization) to evaluate the procurement
  - The person in charge of the Team must have a Certificate in Public Procurement Management,

knowledge of procurement legislation and project management, appropriate expertise matching the requirements of the bid package, and sufficient foreign language skill level

- Approves the technical requirements
- Makes contract award decisions
- Is responsible for drafting and signing procurement contracts and ensuring the contractual obligations are fulfilled
- Provides information to the procurement newspaper and the procurement website
- Settles procurement complaints within its jurisdiction

Procuring Entity (which could be the Investment Owner or a professional organization hired by the Investment Owner to conduct a given procurement):

- Conducts the procurement by organizing and evaluating the bid
- Seeks clarification from bidders during evaluation
- Reports to the Investment Owner for approval on bidder's qualification and bidder selection process
- Drafts and finalizes contracts with the approved bidder
- Provides information to the procurement newspaper and the procurement website
- Settles procurement complaints

Each procuring entity has internal auditors to monitor financial spending and determine whether procurement procedures have been followed. In addition, the State Audit Office of Vietnam has the power to audit the finances of national, provincial and local government agencies, as well as compliance by these agencies with relevant laws. In theory, this gives the State Audit Office the right to audit compliance with procurement procedures. In practice, the ability of the State Audit Office is limited and it does not constitute an effective independent review body.<sup>29</sup>

The decentralization of procurement responsibilities has revealed problems with capacity of public officials to conduct tenders according to the law. There are Public Procurement Management Training courses offered by several training institutions. However, the amount of training is limited by the lack of experienced trainers. Training in most cases is limited to three days.

A larger problem is the lack of expertise at the provincial and local levels. Provincial and local authorities have the right to issue internal rules governing procurement. However, the provincial Departments of Planning and Investment generally have no specialized procurement unit that can control and support procurement activities in the province. As a result, there is no standardized method of conducting procurements at a provincial level. The procuring entities sometimes add steps to the open tendering procedures or make the simpler procurement methods, such as shopping, more complicated. This lack of standardization causes confusion and inconsistent application of the national legal framework.

29. See, VietNews, "Workshop calls for longer-term plans to audit State entities" (Aug. 18, 2010), available at <http://www.dztimes.net/post/business/workshop-calls-for-longer-term-plans-to-audit-state-entities.aspx>.

## Methods of Procurement

The Law on Procurement provides for a number of different procurement methods described below. Special cases may also apply if none of these methods can be applied and the procuring entity obtains approval from the Prime Minister.

Open competitive bidding is mandatory for almost all procurement of goods, works and consulting services above certain thresholds and there is no restriction on the number of bidders.

Limited competitive bidding requires the direct invitation of at least five bidders and can be used only in the following circumstances: (i) the procurement is for research or of an experimental nature and only a limited number of bidders are capable of participating; (ii) the foreign donor requires limited bidding; and (iii) the procurement is highly specialized.

Direct contracting (sole source) is used under special circumstances for procurement of goods, works and consulting services that (i) requires urgent action to respond to an event of force majeure; (ii) involves goods/services from a supplier that cannot be switched to other suppliers due to the need for technological compatibility; and (iii) involves national security or the safety and security of energy. In addition, direct contracting can be used only for procurements below certain thresholds. These thresholds originally set in the 2005 version of the Law on Procurement were repealed by the 2009 amendment. Higher thresholds were then adopted in the implementing regulation, Decree 85/2009.

	Law 61 (2005)	Decree 85/2009
Goods	VND 1 billion (\$50,000)	VND 2 billion (US\$ 100,000)
Services	VND 500 million (\$25,000)	VND 3 billion (US\$ 150,000)
Construction	VND 1 billion (\$50,000)	VND 5 billion (US\$ 250,000)
Routine office supplies	VND 100 million (\$5,000)	VND 100 million (\$5,000)

Shopping is for the procurement of less than VND 2 billion (US\$100,000) worth of common goods that are readily available on the market with standardized and uniform technical features at a small volume. In this type of procurement, the procuring entity must obtain at least three bids.

## Key Procurement Steps in Open Tender

The standard procedures for open competitive bidding contained in the Law on Procurement follow the United Nations Commission on International Trade Law model. Additionally, they are similar to the procurement guidelines of the multilateral development banks and aid agencies that actively operate in Vietnam, with minor revisions in order to match Vietnam's regulations in investment and state administration.<sup>30</sup> Generally, the following steps must be taken in the standard open competitive procedure for bidder selection:

Major steps	Require approval by Competent Person
Preparation of procurement plan and budget estimate	Yes
Preparation of technical requirements and bidding documents	Yes
Advertisement and issuance of bidding documents	No
Receiving bids and opening them publicly	No
Bid evaluation (and clarifications, if needed)	Yes
Finalizing a contract with the bid winner	No

30. Specifically, Asian Development Bank (ADB), Agence Française de Développement (Afd), Japan International Cooperation Agency (JICA), Korean Export Import Bank, Kreditanstalt für Wiederaufbau - Entwicklungsbank (KfW), and World Bank (WB).

## 4. Findings of the Legal Assessment

As demonstrated below, most of the principles set forth in the APEC Standards are present in the Vietnamese legal framework. However, an independent dispute settlement mechanism does not exist and a few other principles of the APEC standards are not present.

This section addresses the incorporation of the APEC Standards into the legal framework that governs public procurement in Vietnam on the national level. As noted above, provincial authorities have the authority to adopt implementing decisions which may or may not be consistent with the national framework.

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

The legal framework for procurement is available on a number of different websites and can be accessed easily:

- <http://www.thongtindauthau.com.vn> (Vietnam Public Procurement Review)
- <http://www.muasamcong.mpi.gov.vn> (Procurement Portal)
- <http://moj.gov.vn/qlduan/pages/home.aspx> (Ministry of Justice portal)
- <http://www.moc.gov.vn/site/moc/legal> (Ministry of Construction portal)
- <http://www.chinhphu.vn> (Government portal)
- <http://vietlaw.gov.vn/LAWNET/> (National Assembly portal)
- <http://www.thuvienphapluat.vn/archive/default.aspx> (library of legal documents)

The legal framework is also publicly available through the Official Gazette, which is sold at major bookstores and newspaper stands and is published in Vietnamese and English.

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

The Law on Procurement covers all governmental entities at the national, provincial, and local levels, as well as most SOEs. However, there are overlapping laws and regulations that make it difficult to determine which laws and regulations apply to which entities.

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

Technically, this standard is satisfied by the Law on Procurement. According to the Law on Procurement, any changes to the legal framework are published in advance in the “Notice box” or “Highlight news” on the MPI website ([www.mpi.gov.vn](http://www.mpi.gov.vn)) and on the Procurement Information website and Procurement Portal. These proposed changes are accompanied by a notice calling on the community to make comments and suggestions on the drafts. Interested persons are welcome to make comments and suggestions via email, regular mail, and fax as provided on such notices. It appears that practice is very

different. According to the consultations with the private sector, the 2005 Procurement Law and the 2009 amendment were adopted without public comment and the implementing Decree 85/2009 was issued without an opportunity to comment.

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

Article 68 of the Law on Procurement designated the Department of Public Procurement (“DPP”) as the main point of contact for all procurement-related matters.

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

The administration of public procurement duties, and notification of persons affected by administrative proceedings, are carried out by individual procuring entities.

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

Clause 72 of the Law on Procurement stipulates that every bidder who is participating in the tendering process has the right to file a complaint regarding the bidder selection results and other issues relating to the bidding process. Bidders who have participated in the tender at issue are notified of a complaint. However, the parties responsible for settling procurement complaints are the same entities that control the procurement process: the Procuring Entity, the Investment Owner, and the Competent Person. This lack of independent review mechanism is a serious shortcoming in the transparency of public procurement review procedures.

As regulated by Clauses 72 and 73, the Procuring Entity has five working days to respond to a bidder’s complaint. If the Procuring Entity is unable to settle or the settlement is unsatisfactory to the bidder, the bidder has the right to file the complaint with the Investment Owner, who then has an additional seven working days to resolve the complaint. The decision of the Investment Owner can be appealed to the Competent Person, who has 15 working days to settle the complaint. If the Competent Person is unable to settle or the settlement is unsatisfactory to the bidder, the bidder has the right to sue in court.

If a bidder contests the award of a contract to another bidder, and the bidder is not satisfied with the decision of the Investment Owner, the bidder may file the complaint with the Competent Person and the chairperson of the Consulting Council on Complaint Settlement (“Consulting Council”). The Consulting Council is responsible for requesting the bidder, the Investment Owner, and other agencies involved in the procurement to provide the information, documents, and comments necessary to produce a report on the results of the review. The Consulting Council may work directly with the involved individuals as necessary to clarify the issues. The maximum time for the Consulting Council to do its work and issue its report is 20 days from receipt of the procurement complaint. The Consulting Council is comprised of a representative of MPI, representatives of the Competent Person, and representatives of the relevant

professional association.<sup>31</sup> No later than five days after receipt of the Consulting Council's report, the Competent Person must issue a decision on the settlement of the bidder's complaint. If the settlement is not satisfactory to the bidder, the bidder has the right to sue in court.

As demonstrated above, there is no independent body that reviews procurement decisions in Vietnam and the review is carried out by the same entities that have made the procurement decisions. There are two state agencies, which are independent of other ministries and procuring entities, but neither focuses on the implementation of the procurement process. The scope of the State Audit Office is limited to financial audits. The Government Inspectorate is charged with inspection and settlement of complaints and denunciations, as well as actions to prevent and combat corruption, but its scope is much broader than procurement. In addition, the Government Inspectorate can make recommendations but has no independent enforcement powers.

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

The Law on Procurement mandated the establishment of a Procurement Bulletin for advertising procurement opportunities and other procurement-related information, including procurement plans, invitations to bid, calls for proposal, award results, relevant legislation, and the list of firms that are prohibited from being awarded contracts due to past improper behavior. A Procurement Bulletin titled "Vietnam Public Procurement" was published twice a week starting December 14, 2004 and became a daily newspaper on January 1, 2008. It is now known as the "Procurement Newspaper." Published information includes:

- Procurement plans;
- Invitations for prequalification and the results thereof;
- Invitations for open bidding;
- Lists of bidders invited to participate (limited open bidding and direct appointment);
- Bidder selection results (including main contract information);
- Information on the treatment of violations of current procurement legislation;
- Current legislation on procurement; and
- Other related information.

All contact information of the purchaser (procuring entity) must be published together with procurement plans and invitations to tender. Potential bidders are free to contact the purchaser to register their interest in being notified of relevant bidding opportunities.

Every procurement package must be advertised in three consecutive issues of the Procurement Newspaper at a very low cost. After posting procurement opportunities in the procurement newspaper and on the procurement-related websites, this information may also be published in other mass media to facilitate the access of interested organizations and individuals.

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31. Vietnam has numerous professional associations, such as for construction, architecture, bridge and road engineers, consulting, and many others.



The DPP of the MPI is responsible for issuing the Procurement Newspaper and maintaining the Vietnam Public Procurement Review web site, <http://www.thongtindauthau.com.vn>, and the procurement portal at <http://muasamcong.mpi.gov.vn> (“Procurement Portal”). These two websites contain all the information published in the Procurement Newspaper, as well as all related regulations on procurement (laws, decrees, circulars, decisions, templates). The second website, launched in 2010, is Vietnam’s pilot electronic procurement system, currently under testing and not yet fully operational.<sup>32</sup>

As regulated by Clause 31 of the Law on Procurement, once a procurement opportunity is advertised, potential bidders have:

- For pre-qualification, a maximum of 30 days for national bidding and 45 days for international bidding.
- The minimum time allowed for bid preparation is 15 days for national bidding and 30 days for international bidding.

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

Tender specifications are available as a separate chapter in the bidding documents. Potential bidders may visit the individual procuring entities to examine and purchase bidding documents right after the advertisements appear. Procuring entities are not allowed to refuse or delay a request from a bidder to purchase the bidding documents. The requirements and procedures for pre-qualification and qualification, evaluation criteria, technical requirements, contract conditions, etc. are all available in the pre-qualification documents and bidding documents.

As regulated by Clause 33 of the Law on Procurement, if the bidding documents need to be amended after issuance, bidders who have received the bidding documents shall be informed at least 10 days prior to the deadline for bid submission. Clause 34 stipulates that bidders may request clarification to bidding documents in writing and the procuring entity is mandated to provide written clarifications to all bidders who received bidding documents.

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

Article 14 of the Law on Procurement and Clause 4 of Decree 85/2009/ND-CP spell out the preferences in public procurement bidding. In tenders open to international bidders, there are domestic preferences with specified eligibility criteria.

In accordance with the Decree 85/2009/ND-CP, preferred bidders for consultancy services have their score increased by 7.5 percent. For construction contracts, the price of the bid is increased by 7.5 percent for bidders who are ineligible for preference. For procurement of goods, the price of the bid for bidders who are ineligible for preference is increased by a sum equal to import duties and fees, which would be payable up to a maximum of 15 percent of the goods price.

32. “E-bidding is now up and running,” *Vietnam Investment, Review* (March 1, 2010).

Article 29 stipulates that the method of bid evaluation must be reflected in the evaluation criteria stated in bidding documents. Previously, scoring evaluation (merit point system) was used in all procurement. Pass/fail evaluation is recommended for almost all procurement of goods, services, and works, while scoring evaluation is used only for very complicated procurements. This approach reduces the workload for the procuring entity's Procurement Specialist Team and allows them to speed up the selection process. It also enhances transparency, eliminating the weighting and scoring that previously applied. Pass/fail gives new entrants to the market a greater chance of selection. The scoring evaluation still applies to construction, EPC, and consultancy contracts.

There are some aspects of evaluation that lack transparency and jeopardize integrity in the procurement system. For example, although a procuring entity can request clarification of bids, there is no mechanism for a bidder to correct mistakes on its own initiative. Another issue arises in contract negotiations for goods and works procurement. If a bid is determined to be the "Lowest Evaluated Bid" through the open competitive bidding process, that bidder should be awarded the contract. In many cases, however, the procuring entity commences negotiations for a lower price, even though such negotiations are not specified in the Law on Procurement. This defeats the legitimate benefit provided by competitive bidding and discourages bidders from correctly pricing their bids.

#### 10. Awarding contracts in a transparent manner

As regulated by Articles 5 and 33 of the Law on Procurement, notification of the bidder selection results must be published in the Procurement Newspaper and on the Procurement Information Website.

Per Article 41, notification of the bidder selection results are provided right after the award decision is made. However, the notification does not have to contain an explanation of the reasons why other bids were unsuccessful. The unsuccessful bidders have the right to request a debriefing of the bidder selection result and the procuring entities must respond to any such request.<sup>33</sup>

#### 11. Treatment of confidential information

The Procurement Law requires procurement-related bodies to treat all procurement-related information as confidential. Contents of the bids, handbooks, minutes of bid evaluation sessions, expert opinions, and commercially sensitive information provided are all protected.<sup>34</sup> In addition, a business' confidential information is protected under Ministerial Decision No. 995/2008/QD-BKH, which regulates the confidential treatment of information in the planning and investment sector.

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33. Articles 62-64.

34. Articles 61, 62, 63, and 65.

## 5. Results of the Private Sector Consultation

TI-USA, CIPE, and Towards Transparency conducted two business consultations in Vietnam, one in Hanoi and one in Ho Chi Minh City, plus separate interviews with public procurement experts. The American Chamber of Commerce in each city organized the consultations, inviting representatives of Vietnamese and foreign law firms and companies involved in consulting, engineering, oil and gas, real estate, accounting, and manufacturing to attend.

The overall tone of the consultations showed a mixed picture. There has been significant progress in implementing a legal framework for public procurement in Vietnam. Yet, implementation in practice is only just beginning. There was general agreement that the law and regulations on the books by and large are not applied in practice due to factors ranging from insufficient training of public officials to the lack of proper incentives to comply on the part of both government and the private sector to the widespread practice of corruption.

### *Availability and Dissemination of Procurement Laws and Regulations*

The participants agreed that the procurement law and regulations are readily available. They have been translated into English and are available through a number of websites. However, the participants in the consultations noted that even though Article 4 of the Law on Laws provides that “individuals shall have the right to make comments regarding the drafts of all legal normative documents,” the government did not publish the procurement law or regulations in advance for comments. What is more, the government continues to make changes to the procurement regulations in ways that remove competitive practices without seeking public comment. The implementing regulations, Decree No. 85/2009, significantly changes the way procurement is executed.<sup>35</sup> As noted above, the decree enlarges the scope of exemptions from competitive open tender by increasing the threshold value that procuring entities can award directly from those set out in the 2005 Procurement Law.

The consultation participants were not aware of any public discussion prior to the issuance of this decree. They reported on some cases where public comment was sought on changes to or adoption of new procurement regulations, but did not think it was very easy to make comments and considered the time frame too short. Only a few of the consultation participants have ever made comments.

### *Advertisement of Procurement Opportunities*

Open tendering is supposed to be the default procurement method, but most participants felt that few procuring entities conducted open tenders in practice. As noted above, the threshold for sole source procurement was raised by Decree No. 85/2009 and the participants’ perception was that the use of sole source contracting increased dramatically.

35. Decree Guiding the Bidding Law and the Selection of Construction Contractors under the Construction Law, available at: <http://www.thuvienphapluat.vn/archive/Nghi-dinh/Decree-No-85-2009-ND-CP-of-October-15-2009-guiding-the-Bidding-Law-and-the-selection-of-construction-contractors-under-the-Construction-Law-vb98659t11.aspx>.

The Law on Procurement and its regulations require mandatory advertising of bidding opportunities and contract awards in print (Public Procurement Newspaper) and online (Procurement Portal). Yet, most participants expressed skepticism that the advertisement process was effective. Some found the Procurement Newspaper moderately useful but disagreed on how useful the procurement websites are. According to their understanding, the law does not require that procurement opportunities be published online and participants thought that procuring entities can choose where to advertise. They felt that advertisements were not always published in the official journals and obtaining information about procurement opportunities largely depends on maintaining direct privileged contact with a procuring entity's personnel.

Some participants also thought that even when tender opportunities are properly published, the procurement may not be truly open to competition. One of the participants thought that in a majority of published opportunities, the procuring entity had already decided which company would win the contract. Another participant cited cases where the procurement process began again if the "wrong" company won the bid.

This problem is compounded by two requirements of the Decree 85/2009. The first says that if there are fewer than three bidders, the Competent Person in the procuring entity can decide whether to allow those bids to be opened or to require additional time for new bidders to enter. The second imposes a ceiling on the contract price equal to the price proposed in the bid documents. According to participants, if all of the bidders exceed the ceiling, the Competent Person can increase the ceiling or require bidders to negotiate their pricing. Negotiations can be conducted with the bidder of choice, not necessarily the lowest bidder. According to participants, both of these provisions give procuring entities a great deal of discretion, allowing them to act without transparency.

### *Bidding Process*

The Law on Procurement specifies what has to be contained in a tender announcement, including evaluation criteria. Most of the participants agreed that when a procuring entity publishes a tender request, it contains sufficient information to respond, although they disagreed on whether the requests contained sufficient information on how the bids will be evaluated. Once a tender is issued, some foreign-owned company representatives felt they were at a disadvantage to Vietnamese companies. Some participants said that they experienced a delay in obtaining bidding documents.

Several participants felt that it is difficult to get procuring entities to clarify bidding documents. In many instances, the procuring entities did not respond to requests for clarification. What is more, when clarification is requested, the participants felt that there was not a systematic process to guarantee that other bidders are given the same information – even though the law requires that clarification of the tender invitation documents be sent to all the bidders who received the bidding documents.

Participants agreed that bid evaluation is the least transparent process in Vietnamese public procurement because it is the most subjective. Contracts are awarded in many cases by a merit point system, not a pass/fail system. The merit point system is very subjective and gives more discretion to the decision-makers

at procuring entities. These decision-makers are open to being lobbied and companies, including some of the participants, have gone to high levels of the Vietnamese government and their own governments for foreign-owned companies in cases involving important and large contracts.

As far as contract award notification, generally the winners are announced promptly. A few of the participants noted that they had also been notified in a timely manner that they lost a bid and one was given reasons. Others stated, however, that they had not been notified, or if they were notified, were not given reasons for losing.

### *Dispute Resolution*

The participants knew that a company can request a debriefing and file a complaint but were reluctant to use either mechanism. The general feeling seems to be that if a company requests a debriefing or complains, it will irritate the procuring entity and the company risks not being invited to bid in the future. More importantly, while the complaint mechanism exists, the experience of participants is that procuring entities do not meaningfully respond to complaints. A response is frequently limited to thanking the complaining party for their concern and assuring that it is taken under advisement, but no concrete steps to address the complaint follow.

The participants noted that there is no independent government agency to receive or adjudicate complaints, which poses a fundamental risk to the objective and transparent resolution of disputes. They also felt that there is no enforcement mechanism. None of the participants had ever heard of a successful challenge to a procurement decision. To quote one participant: “There is no independent agency to complain to; no hotline to call; no competent body with capacity, experience, and will to prosecute violations.”

Although there are anti-corruption specialized agencies at every level of government in Vietnam, participants have not had any experience in using those agencies to investigate questionable procurement practices. The problem, according to participants, is that these bodies have no independent enforcement power and have not been trained to investigate procurement problems. Although the Anti-Corruption Law created the National Central Steering Committee on Anti-Corruption as a body in charge of coordinating anti-corruption efforts, neither the Steering Committee nor its provincial entities have a mandate to enforce procurement law violations.

The three other specialized anti-corruption entities created by the 2005 Anti-Corruption Law within the Government Inspectorate (Anti-Corruption Bureau), the Ministry of Public Security (Bureau of Corruption Criminal Investigation), and the Supreme People’s Procuracy (Department of Prosecution and Corruption Investigation) do not seem to provide adequate alternatives and none of the participants have ever sought the involvement of one of these entities in a procurement case. Even though these entities have stronger mandates to combat corruption, they lack experience in investigating procurement problems and are not seen as really independent or effective. Consequently, the participants felt they had no recourse to an independent investigative body with the power to affect procurement decisions.

## *Procurement by Provincial Authorities*

A number of participants noted the detrimental impact on transparency of the decentralization of government procurement authority to provincial levels. This is particularly the case with procurements originating from the international donor institutions that implemented the Hanoi Core Statement on Aid Effectiveness. The decentralization empowered local officials to make procurement decisions, but the necessary training and oversight did not always follow.

Provincial officials receive limited training on the Procurement Law and regulations in a three day seminar. The participants all felt that the training was not sufficient to produce professional procurement officials. Moreover, local officials receive insufficient support from the national procurement authorities when it comes to advising on legal provisions or clarifying procedural questions. As a result, implementation on the provincial level is very uneven. The participants noted that more procurement now takes place at the provincial level without any standardized procurement practices.

The problem is exacerbated by the fact that provincial authorities are not subject to audits of procurement activities, only to financial audits. A financial audit does not show whether a procurement project has been implemented in accordance with the procurement plans or produced the quality of goods or services required. Without a mechanism to evaluate implementation and an independent body to receive complaints, provincial authorities have little incentive to implement transparent, competitive procurement procedures.

## *The Role of SOEs in Public Procurement*

Participants in the consultations also noted specific problems with SOEs, which make up a significant share of the economy. While subject to the national procurement rules,<sup>36</sup> SOEs enjoy subsidies and other favorable treatment. Their presence in the market raises significant issues relating to transparency and integrity in government procurement.<sup>37</sup> There is an inherent conflict of interest presented by SOEs competing with the private sector for procurement opportunities. Every SOE is controlled by a line ministry, either through controlling shareholdings or the ability to control the management. Information about shareholdings and managerial control of SOEs is not publicly available, so it is impossible to measure the danger of a conflict of interest in a given tender. Yet, SOEs are allowed to bid for tenders issued by their controlling entity. It is difficult for the private sector to compete under such circumstances.

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36. In some cases, procurement by SOEs is governed by a separate law that overrides the Procurement Law. For example, procurement by petroleum SOEs in the energy sector is governed by the Petroleum Law.

37. The Multilateral Trade Assistance Project (MUTRAP) Report notes the following benefits given to SOEs: forgiveness of debts by the government and state-owned banks, forgiveness and replenishment of losses from the budget, preferential access to finance by state-owned commercial banks, and preferential access to lands.

A lot of attention has been focused recently on the operations of SOEs in Vietnam. This resulted in part from a scandal involving the state-owned shipbuilding company, Vietnam Shipbuilding Industry Group (“Vinashin”). Vinashin incurred debts of more than \$4.2 billion, almost sending it into bankruptcy.<sup>38</sup> The company was bailed out, sparking debate on the extent to which SOEs waste public resources through inefficient operations and questionable business decisions. Some of the participants thought that the problems with Vinashin could lead to better management in the SOEs, possibly through more accountability, improved corporate governance, privatization, and enhanced leadership. However, the potential for reform remains unclear, given how firmly the current SOE management practices are entrenched in Vietnam’s economy.

There has been a significant amount of foreign investment in Vietnam over the past few years,<sup>39</sup> evidence that foreign companies believe there is money to be made in Vietnam. National government practices have improved, enabling foreign businesses to enter the Vietnamese market when in the past they would have been either overtly excluded by law or self-excluded by choice because of unacceptably high risk. However, consultation participants noted that when it comes to public procurement, foreign and private domestic companies alike are still experiencing many difficulties in selling to the government. These problems are caused by a lack of transparency and integrity in the procurement and contract award process.

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38. Reuters, “Vietnam to revamp debt-laden shipbuilder Vinashin,” (July 6, 2010), available at <http://www.reuters.com/article/idUSHAN2495320100706>.  
Vu Trong Khanh and Patrick Barta, “Vietnam Reins In State-Run Shipbuilder’s Expansion,” *Wall Street Journal Asia* (July 15, 2010), available at <http://online.wsj.com/article/SB10001424052748704518904575366060548946630.html>.

39. See, e.g., Vietnam’s Ministry of Planning and Investment’s Central Institute of Economic Management, “2007-2008 Report on Trade, Investment and Economic Activity in Vietnam: With a Focus on the First Eighteen Months of WTO Implementation,” available at [http://www.amchamhanoi.com/site/downloads/Economic\\_Report0708.pdf](http://www.amchamhanoi.com/site/downloads/Economic_Report0708.pdf).

## 6. Conclusions and Recommendations

Based on the legislative review and assessment and private sector consultations, the following fundamental issues with the transparency of Vietnam's public procurement system were identified.

### The Legal Framework

Vietnam's laws and regulations on public procurement largely conform to the transparency requirements of the APEC Standards. There are legal provisions that mandate publishing procurement laws and regulations, advertising tendering opportunities, and publicly announcing winning bids in a timely fashion. However, there are several areas where the legal framework falls short.

There are also more fundamental institutional issues that negatively affect transparency in Vietnam's public procurement. First and foremost, there is no government institution specifically charged with enforcing the procurement laws and regulations that is independent from the procuring entities. While MPI has the authority to "lead and coordinate with concerned agencies in conducting oversight and inspection in connection with procurement nationwide,"<sup>40</sup> it has no enforcement powers. Each procuring entity is in charge of resolving disputes arising from that entity's tenders. Second, no clear legal guidelines exist to guard against the conflict of interest involving SOEs and the procuring entities that are shareholders in the SOEs. Third, there are too many overlapping laws and regulations, making it difficult to understand the legal framework. Finally, the government has not provided an opportunity for public comment prior to the adoption of the Law of Procurement or the implementing regulations, even though the Law on Laws requires such an opportunity.

### Implementation of the Legal Framework

The key problem with Vietnam's national legislation on public procurement is that it remains poorly implemented, especially in the provinces, leading to inconsistencies and different rules applied by local officials. There is no manual that would provide procuring entities with standardized procedures on how to conduct procurements transparently. There is also a lack of Public Procurement Management Units with full-time specialists within provincial and local procuring entities to oversee and support procurement activities. Finally, at both the national and provincial levels there is no government-wide Code of Conduct for procurement personnel.<sup>41</sup>

The shortcomings in the implementation of the existing laws and regulations clearly came through during the private sector consultations. The business community is not yet convinced that it is treated equally in public procurement because the existing legal framework is not implemented uniformly and SOEs continue to receive extensive preferential treatment. As one of the participants put it, "the problem with public procurement in Vietnam is not outright corruption but rather pervasive conflict of interest involving SOEs bidding on state contracts." What is more, even though legal foundations

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40. Law on Procurement, Article 67.

41. Currently, there is only one Code of Conduct for procurement personnel working under ODA Projects financed by Japan Government, see [http://www.mpi.gov.vn/portal/page/portal/bkhd/1361463?pers\\_id=1582683&item\\_id=3324146&p\\_details=1](http://www.mpi.gov.vn/portal/page/portal/bkhd/1361463?pers_id=1582683&item_id=3324146&p_details=1).



for challenging unfair procurement decisions are in place, there is a reluctance among the business community to utilize those provisions for fear of antagonizing the procuring entity and a belief that the review process is not really impartial.

At the same time, lax implementation of the procurement law has led to a complacent attitude among businesses. Many companies do not have codes of conduct that prohibit corrupt activities and choose to “play the game” in non-transparent ways when it comes to procurement. The feeling of complacency is magnified by the fact that there are currently no independent civil society organizations that could serve as effective watchdogs in public procurement.

## Recommendations

It takes years to create a professional procurement staff within any government agency and to promote a business culture that has little tolerance for corruption. As the public’s awareness of procurement abuses grows, and as Vietnam becomes more integrated into the global economy through trade and investment, the domestic and international pressure for greater transparency and accountability in public procurement will grow - but it takes time. To make meaningful recommendations, therefore, TI-USA, CIPE, and TT focused on shorter-term suggestions to improve Vietnam’s implementation of the APEC Standards.

### Strengthen Government Capacity to Conduct Transparent Procurements

In order to improve transparency and integrity of public procurement, the Vietnamese Government should:

- Give the MPI the ability to review procurement complaints and settle disputes between procuring entities and bidders and the authority to enforce its decisions against a procuring entity.
- Reduce the number of legal instruments governing procurement by combining overlapping decrees and decisions into unified laws.
- Improve training and oversight, and enforce the requirement to provide asset declarations at the provincial and local levels among procurement officials.
- Improve SOE corporate governance to ensure greater accountability of their operations; adopt a code of conduct, training programs, and internal controls to deter corruption and clarify conflict of interest rules for SOE participation in public procurement.
- Enforce more seriously the requirement to seek comments from the public, and especially the business community, on any new procurement laws and regulations.
- Require companies which participate in public procurement to have in place codes of conduct, training programs, and internal controls to detect corruption.
- Encourage the development of civil society organizations focused on procurement and permit civil society to monitor procurement.

In particular, the Ministry of Planning and Investment should:

- Create a Procurement Manual to provide standard procedures and detailed guidance on performing procurement duties for procurement officials at all levels.
- Issue a common Code of Conduct that procurement officials at all governmental levels are required to sign prior to assuming their duties.
- Establish Public Procurement Management Divisions staffed with procurement specialists within each Provincial Department of Planning and Investment to oversee and support procurement activities.

### **Mobilize the Private Sector for Better Compliance**

- Companies participating in public procurement should adopt standard codes of conduct and incorporate them into everyday business practices.
- Businesses committed to transparency in public procurement, both foreign and domestic, should reach out to local business organizations and involve them in collective action against corruption.
  - Foreign companies subject to the U.S. Foreign Corrupt Practices Act and similar anti-bribery laws should work together on awareness and training campaigns to encourage local companies to make similar anti-corruption commitments.
  - Businesses should participate, for example, in the Integrity and Transparency in Business Initiative for Vietnam directed by the Vietnam Chamber of Commerce and Industry (VCCI) or other business-led initiatives to promote integrity and transparency in business.

### **Intensify Efforts by International Donors and Organizations to Improve Procurement Transparency**

- International donors should incorporate the use of Transparency International's integrity pacts in major projects on a pilot basis.
- The VCCI-U.S. Agency for International Development Provincial Competitive Index, a comparative rating of the ease of doing business in Vietnam's provinces based on business surveys and official sources, should be expanded to include the management of public procurement.<sup>42</sup>
- Any new ODA projects involving public procurement should include training for government officials on anti-corruption, financial management, and procurement procedures consistent with Vietnam's laws and regulations.
- International donors should require codes of conduct, training programs, and internal controls to detect corruption in all funded projects.
- The international community should contribute to the creation and promotion of a nationwide phone "hotline" or dedicated website for confidentially reporting public procurement abuses and instances of corruption

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42. The Index is currently comprised of the following sub-indices: entry costs, access to land, transparency and access to information, time costs of regulatory compliance, informal charges, proactivity of provincial leadership, business support service, labor training, legal institutions, and infrastructure. For details see <http://www.pcvietnam.org/index.php?lang=en>.

# ANNEX 1 – APEC TRANSPARENCY STANDARDS ON GOVERNMENT PROCUREMENT

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

- (b) provide parties to any proceeding with a reasonable opportunity to present their respective positions;
- (c) provide parties to any proceeding with a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority; and
- (d) ensure, subject to appeal or further review under domestic law, that such decisions are implemented by, and govern the practice of, the offices or authorities regarding the administrative action at issue.

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

- (a) where open tendering is adopted, publishing procurement opportunities in a medium readily accessible to suppliers (e.g., on the Internet);
- (b) making the same information on procurement opportunities available in a timely manner to all potential suppliers;
- (c) publishing contact details of purchasers, and their product/ service purchase interests, for suppliers wishing to register their interest in being notified of bidding opportunities that may not be publicly advertised;
- (d) making available early advice of complex high-value procurement needs through staged procedures such as public requests for information, requests for proposals and invitations for pre-qualification, and allowing adequate time for interested suppliers to prepare and submit a response;
- (e) making publicly available requirements and procedures for pre-qualification of suppliers; and
- (f) any time limits established for various stages of the procurement process.

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

- (a) providing in procurement notices the following information: the nature of the product or service to be procured; specifications; quantity, where known; time frame for delivery; closing times and dates; where to obtain tender documentation, where to submit bids, and contact details from which further information can be obtained;
- (b) providing any changes to participating suppliers; and
- (c) providing tender documentation and other information to suppliers promptly on request.

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

- (a) specifying in procurement notices or tender documentation all evaluation criteria, including any preferential arrangements; and
- (b) maintaining, for a predetermined period proper records of decisions sufficient to justify decisions taken in the procurement process.

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

- (a) publishing the outcome of the tender including the name of the successful supplier and the value of the bid; and
- (b) as a minimum promptly notifying unsuccessful suppliers of the outcome of their bids and where and when contract award information is published, and debriefing unsuccessful suppliers on request.

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

## ANNEX 2 – LEGAL DOCUMENTS RELATED TO PUBLIC PROCUREMENT

Laws issued by the National Assembly:

- Law No. 16/2003/QH11 dated 26 Nov. 2003 on Construction
- Number 61/2005/QH11 dated 29 Nov. 2005 on Tendering
- Number 38/2009/QH12 dated 19 June 2009, amending the Law on Procurement and the Construction Law

Decrees issued by the Government:

- Decree 85/2009/ND-CP dated 15 Oct. 2009 on the instructions for implementation of the Law on Procurement and the selection of contractors in accordance with Construction Law

Decisions issued by Prime Minister:

- Number 49/2007/QĐ-TTG dated 11 April 2007 on the regulation of special cases permitted for direct appointment of contractors

Administrative letters issued by the Minister of Ministry of Planning and Investment:

- Number 2820/BKH-QLĐT dated 21 April 2006 on the Implementation of Procurement Law
- Number 4073/BKH-QLĐT dated June 2008 on the information required for posting in Procurement Newspapers
- Number 1235/BKH-QLĐT dated 27 Feb. 2009 on the instruction for the listing of direct appointment contracts

Decisions issued by Minister of Ministry of Planning and Investment:

- Number 678/2008/QĐ-BKH dated 2 June 2008 on the regulation of Procurement Attendance Certificate
- Number 731/2008/QĐ-BKH dated 10 June 2008 on the issuance of Bidding Document Template for civil works
- Number 419/2008/QĐ-BKH dated 7 April 2008 on the issuance of Appraisal Report on Bidder Selection Report
- Number 1048/2008/QĐ-BKH dated 11 August 2008 on the issuance of Bidding Document Template for consulting services

Circulars issued by Minister of Ministry of Planning and Investment:

- Number 03/2009/TT-BKH dated 16 April 2009 on the instruction for selection of investors under projects requiring the land-use right
- Number 09/2010/TT-BKH dated 21 April 2010 on the regulation for preparing of Bidder Selection Report for procurement of goods and civil works

- Number 10/2010/TT-BKH dated 13 May 2010 on the regulation for procurement training and capacity building
- Number 11/2010/TT-BKH dated 27 May 2010 on detailed instructions for shopping
- Number 08/2010/TT-BKH dated 21 April 2010 on the regulation for preparing of Appraisal Report on Bidder Selection Report
- Number 06/2010/TT-BKH dated 9 March 2010 on the regulation for preparing of bidding document for consulting services
- Number 05/2010/TT-BKH dated 10 Feb. 2010 on the regulation for preparing of bidding document for procurement of goods
- Number 04/2010/TT-BKH dated 1 Feb. 2010 on the regulation for preparing of requirement for procurement of civil works under direct appointment method
- Number 03/2010/TT-BKH dated 27 Jan. 2010 on the regulation for preparing of pre-qualification document of civil works;
- Number 02/2010/TT-BKH dated 19 Jan. 2010 on the regulation for preparing of bidding document for procurement of small scale civil works
- Number 01/2010/TT-BKH dated 6 Jan. 2010 on the regulation for preparing of bidding document for procurement of civil works
- Number 03/2009/TT-BKH dated 16 April 2009 on the instruction for the selection of investor

Circulars issued by other Ministries:

- Number 13/2006/TT-BTM dated 29 Nov. 2006 by the Ministry of Trade on the guidance on the import/export procedures for successful bidders
- Number 63/2007/TT-BTC dated 15 June 2007 by the Ministry of Finance on the guidance on procurement of goods for the recurrent operation of government bodies
- Number 10/2007/TTLT-BYT-BTC dated 10 August 2007 by Ministry of Health and Ministry of Finance on the guidance on procurement of medicines for the state-owned hospitals and health care services stations



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