

An Introduction to U.S. Procurement Day 3

Professor Christopher Yukins
George Washington University Law School
Washington DC

Monday-Wednesday
December 12-14, 2022
University of Paris Nanterre



Essay Assignment – December 2022

2

Please prepare a memorandum outlining a compliance plan for a U.S. corporation which regularly works with the U.S. government, which intends to bid on EU Member State procurements in 2023. The corporation is concerned that, under the European Union's 16 November 2022 regulation on foreign subsidies distorting the internal market (available at <https://data.consilium.europa.eu/doc/document/PE-46-2022-INIT/en/pdf>), in order to bid the corporation must give notice of any subsidies the corporation may receive from the U.S. government. The memorandum, from counsel to U.S. managers, should explain in summary form:

- The purpose and requirements of the EU regulation.
- How the regulation could be addressed and complied with through a compliance program which meets the elements of FAR 52.202-13(c) (describing a “business ethics awareness and compliance program and internal control system”).

Please limit your essay to no more than 1200 words. Please include your name and the word count in the upper right-hand corner of the page.

Publicprocurementinternational.com/nanterre2022

Solicitation for Mock Auction

University of Paris Nanterre – December 2022

Introduction to U.S. Procurement – Course Materials

Slides for Days 1 and 2:



[Paris-Dec-12-14-2022-Part-I-US-Procurement-Chris-Yukins](#)

DOWNLOAD

Slides for Day 3:



[Day-3-Sustainability-Anti-Corruption-Rev-Auction-Chris-Yukins](#)

DOWNLOAD

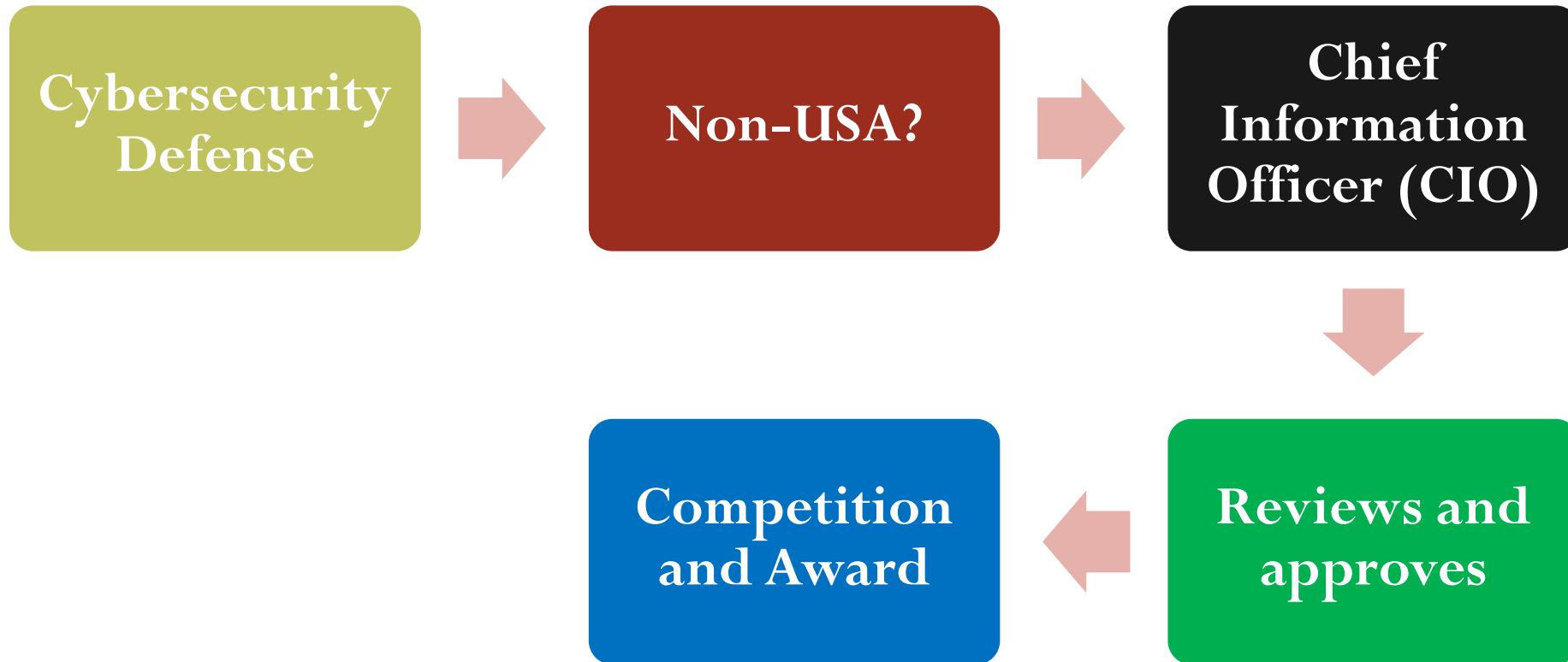
Solicitation for Mock Reverse Auction on Day 3:

[Mock-Auction-Solicitation-2022](#)

DOWNLOAD

Wrapping Up Trade Issues

Administrative Cooperation: U.S. Defense Department Cybersecurity for Unclassified Information Technology



Security of Supply: Angela Merkel's Mobile Phone



Germany Canceled Verizon Contract

Thu Jun 26, 2014

German government cancels Verizon contract in wake of U.S. spying row

BERLIN

REUTERS/RICK WILKING

The German government has cancelled a contract with U.S. telecoms firm Verizon Communications Inc VZ.N as part of an overhaul of its internal communications, prompted by revelations last year of U.S. government spying.

Reports based on disclosures by former U.S. intelligence contractor Edward Snowden alleged Washington had conducted mass surveillance in Germany and had even eavesdropped on Chancellor Angela Merkel's mobile phone.

Berlin subsequently demanded talks with Washington on a "no-spy" deal, but these collapsed after the United States appeared unwilling to give the assurances Germany wanted.

Germany also launched an overhaul of its internal communications and secure government networks. This is one of the first actions involving a U.S. firm to result.



GPA, Art. III Leaves Discretion To Discriminate Regarding Classified Work

8

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information **that it considers necessary for the protection of its essential security interests** relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.



GPA, Art. III Leaves Discretion To Discriminate Regarding Classified Work

9

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“Essential Medicines”:

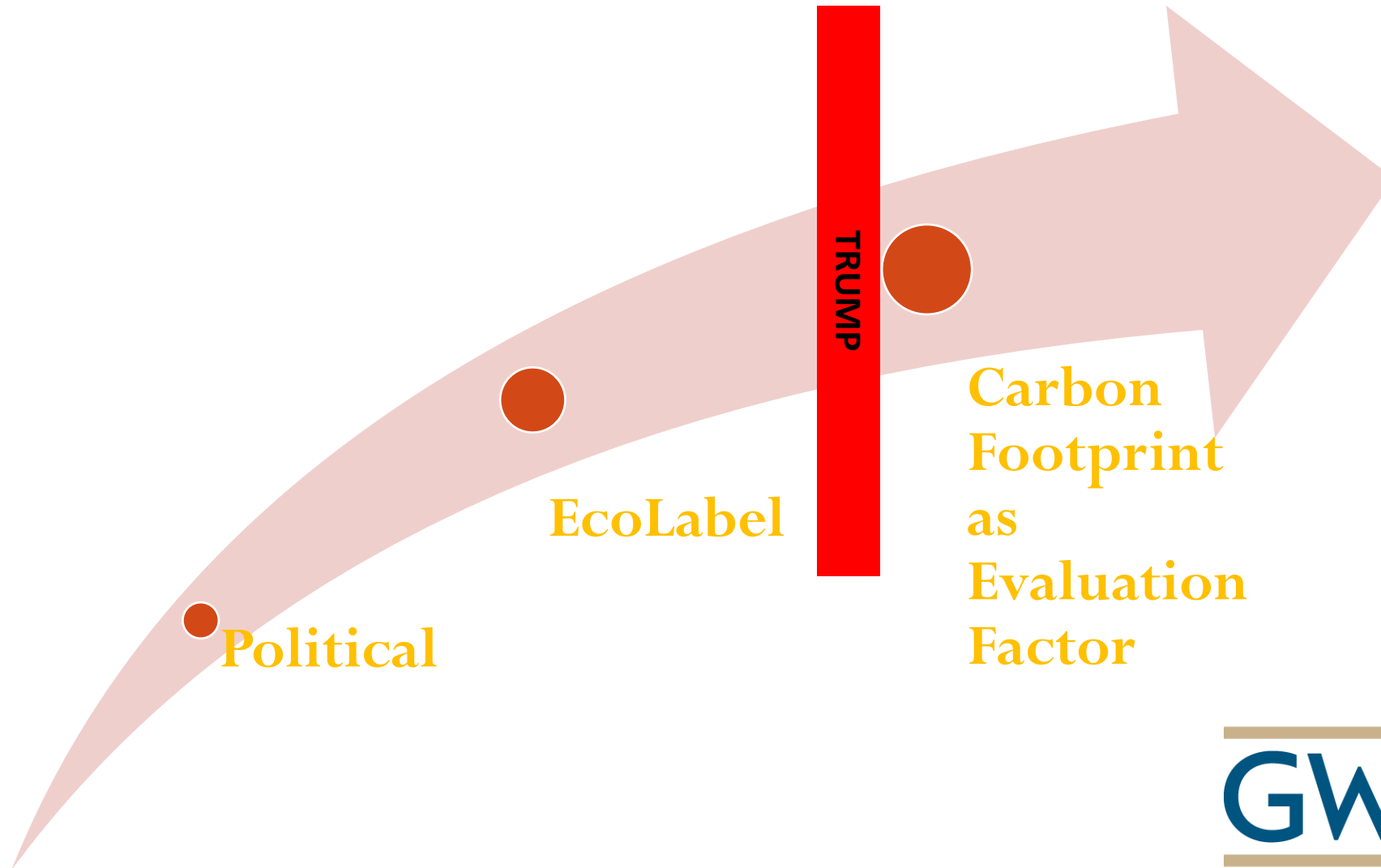
Trump wanted to remove pandemic-essential medicines and supplies from GPA, angered EU; Biden will exercise Article III exception to favor domestic producers

“Huawei” Ban:

U.S. bans contractors from using Huawei and other Chinese companies – or from relying on systems that use Huawei and other companies

Sustainable Public Procurement

Sustainability in Public Procurement: Trajectory

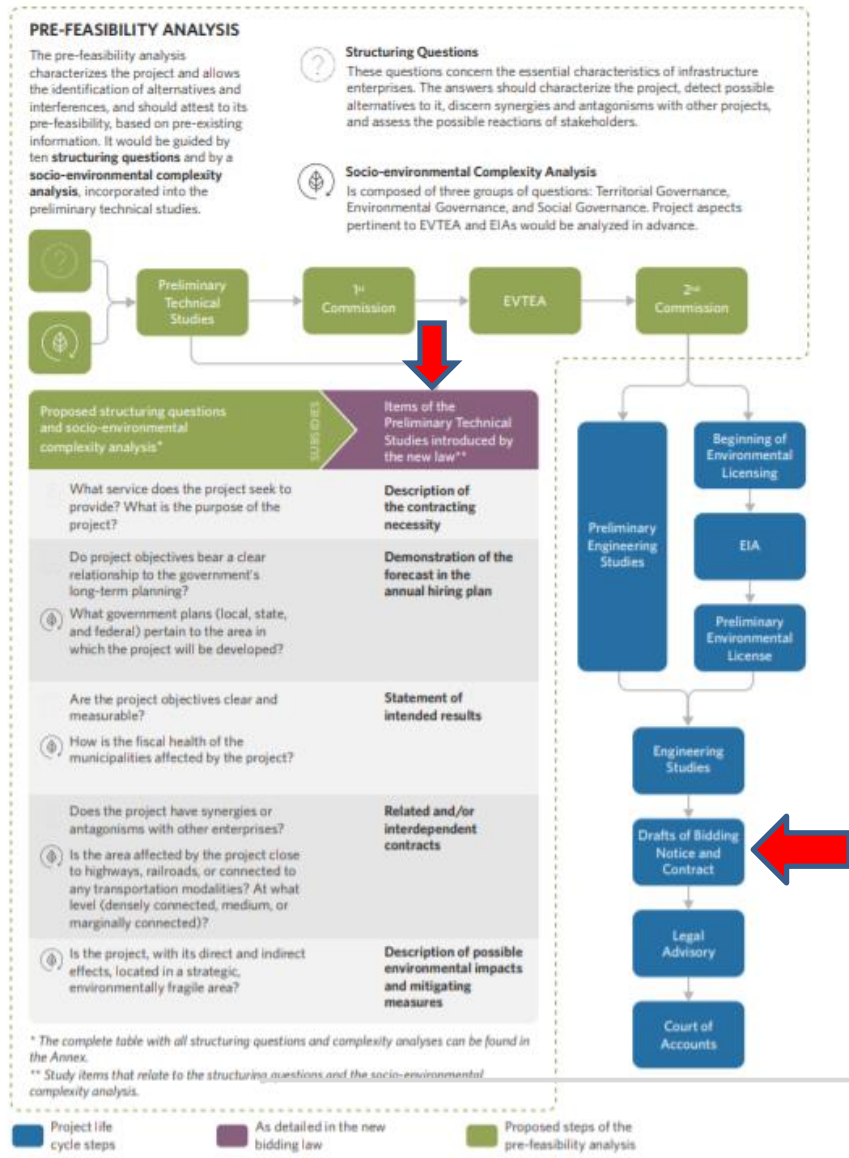




Brazil's New Law – Sustainability – Assessing Social and Environmental Impacts As Part of Infrastructure Planning

- Article 18: Procurement planning to include **“description of possible environmental impacts and respective mitigating measures**, including requirements for **low consumption of energy and other resources**, as well as **reverse logistics for undoing and recycling goods and waste**, when applicable”
- Subject to review by Court of Account

Figure 1. Pre-Feasibility Analysis Introduced into the Preparatory Phase



Environmental provisions in the
Brazilian law

Brazil's New Law – Sustainability – Assessing Environmental Impact in Bid Price



Art. 34. Assessing by the lowest price or highest discount and, when applicable, by technique and price will consider the lowest expenditure for the Administration, in compliance with the minimum quality parameters defined in the bidding notice.

§ 1 The **indirect costs**, related to the expenses of maintenance, use, replacement, depreciation and **environmental impact** of the bid object, among other factors related to its life cycle, may be considered for the definition of the lowest expenditure, whenever objectively measurable, as provided for in regulation.

§ 2 The assessment for the highest discount will be based on the global price established in the bidding notice, and the discount will be extended to any additional terms.



**SUSTAINABILITY
IN THE EUROPEAN
UNION**

Key Goals in European Procurement Directives – Are These Inherent to Procurement?

16

- “The principles of transparency and equal treatment of bidders, best value for money and the free movement of goods and services form the basis of the Public procurement Directives.”



Three “Pillars” to European Sustainable Procurement

17



• Economy



• Society



• Environment

Three “Pillars” to European Sustainable Procurement

18



● Economy

Public Procurement spending amounts to as much as **16% of the EU's gross domestic product, which is a sum equivalent to the GDP of Germany.** This purchasing power can have a significant impact on the market by influencing the suppliers and setting an example for private procurements. **Through adopting the principles of sustainable development to the public procurement procedures, public authorities can provide the industry with incentives to develop new and better technologies and encourage sustainable patterns of behaviour**

Compare: Portland, Oregon

Sustainable Procurement



Sustainable procurement means taking sustainability considerations into account in your procurement actions. At the City of Portland this means thinking carefully about what we buy, buying only what we really need, purchasing products and services with high environmental performance and considering the social and economic impacts of a purchasing decision.

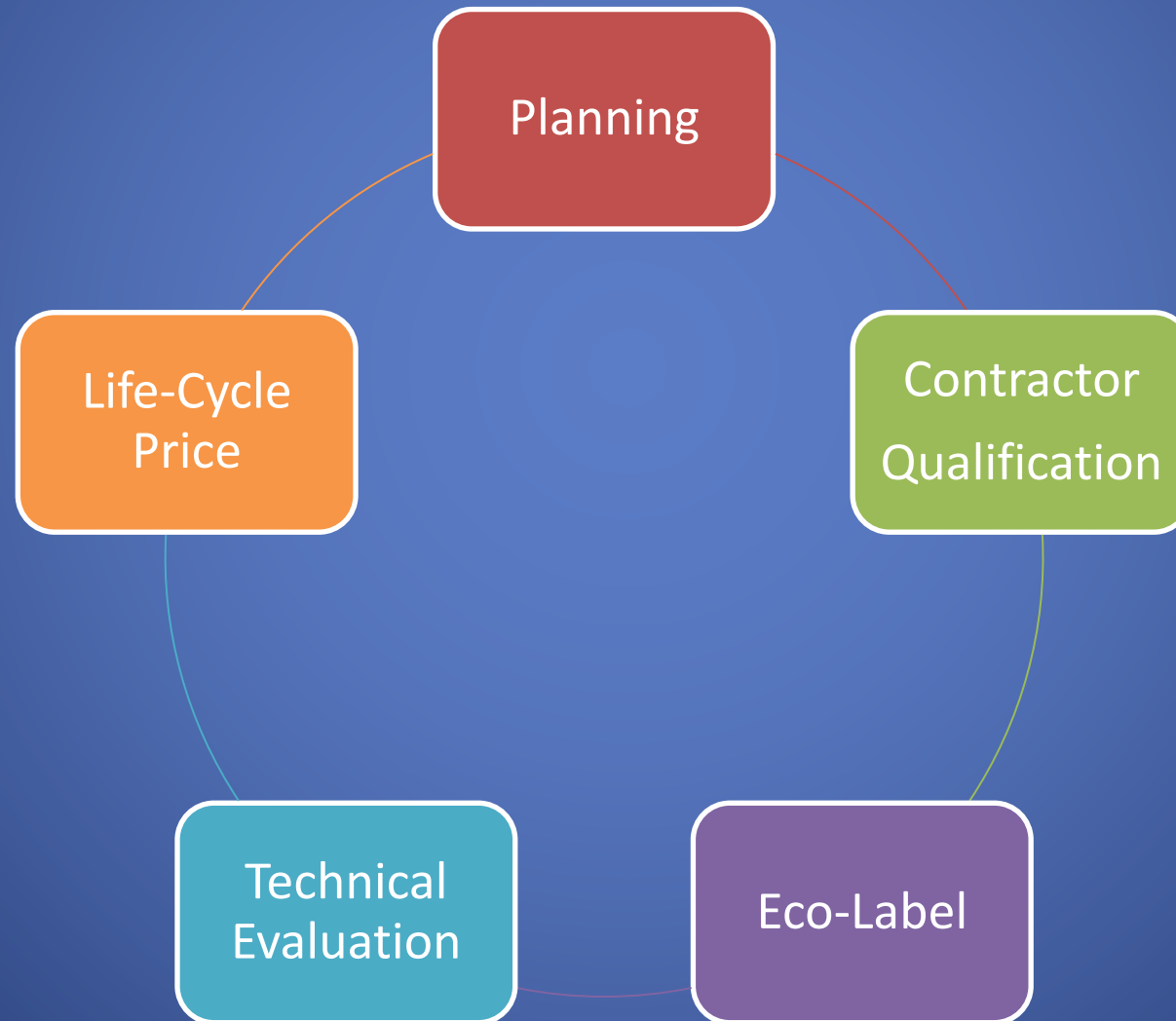
Sustainable procurement activities at the City of Portland range from small scale actions such as buying recycled paper or less-toxic cleaning products, to the retrofitting of public buildings with high energy efficiency standards or developing an alternative fuel fleet. With such a large market share public buyers can have a big influence in driving the market towards sustainable solutions.



Sustainable Procurement in U.S. Federal Procurement

Strategies for Environmental Sustainability

21

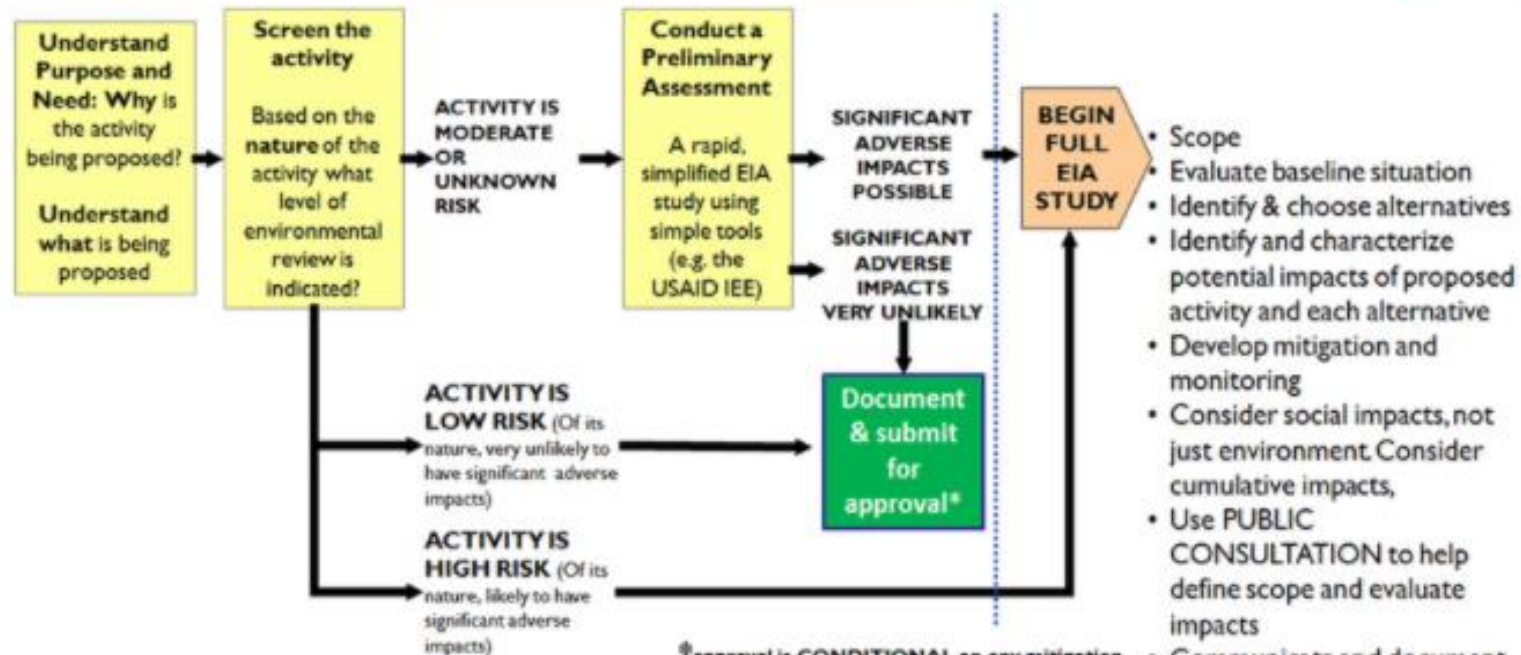




USAID
FROM THE AMERICAN PEOPLE

Phase 1 of the EIA Process

Phase 1: Screening and Preliminary Assessment



Phase 2: Full EIA Study

- Scope
- Evaluate baseline situation
- Identify & choose alternatives
- Identify and characterize potential impacts of proposed activity and each alternative
- Develop mitigation and monitoring
- Consider social impacts, not just environment. Consider cumulative impacts,
- Use PUBLIC CONSULTATION to help define scope and evaluate impacts
- Communicate and document throughout

Energy Savings Performance Contracts (ESPCs)

23

- “Energy-savings performance contracts (ESPCs) are unlike other federal contracts in that they have substantially longer terms (up to 25 years) and the agency pays the contractor a percentage of the savings realized from energy savings measures it proposes and implements for the agency.” - CRS





PRESIDENTIAL POLICIES

- Executive Order (EO) 13423, “Strengthening Federal Environmental, Energy, and Transportation Management,” was signed by President Bush on January 24, 2007. EO 13423 instructs Federal agencies to conduct their environmental, transportation, and energy-related activities under the law in support of their respective missions in an environmentally, economically and fiscally sound, integrated, continuously improving, efficient, and sustainable manner

A photograph of President Barack Obama speaking into a microphone outdoors. He is wearing a dark suit and a white shirt. A large, bright yellow rectangular stamp with the word "SUPERSEDED" in bold red capital letters is diagonally placed over the center of the image, partially obscuring his face and the microphone. The background consists of lush green trees.

SUPERSEDED

President Obama – E.O. 13514
Federal Leadership in Environmental, Energy, and
Economic Performance
(Oct. 5, 2009)

- Sec. 13. Recommendations for Vendor and Contractor Emissions. Within 180 days of the date of this order, the General Services Administration, in coordination with the Department of Defense, the Environmental Protection Agency, and other agencies as appropriate, shall review and provide recommendations to the CEQ Chair and the Administrator of OMB's Office of Federal Procurement Policy **regarding the feasibility of working with the Federal vendor and contractor community to provide information that will assist Federal agencies in tracking and reducing scope 3 greenhouse gas emissions** related to the supply of products and services to the Government. These recommendations should consider the potential impacts on the procurement process, and the Federal vendor and contractor community including small businesses and other socioeconomic procurement programs. Recommendations should also explore the feasibility of:
 - (a) requiring vendors and contractors to register with a voluntary registry or organization for reporting greenhouse gas emissions;
 - (b) requiring contractors, as part of a new or revised registration under the Central Contractor Registration or other tracking system, to develop and make available its greenhouse gas inventory and description of efforts to mitigate greenhouse gas emissions;
 - (c) using Federal Government purchasing preferences or other incentives for products manufactured using processes that minimize greenhouse gas emissions; and
 - (d) other options for encouraging sustainable practices and reducing greenhouse gas emissions.

Executive Order 13514 Section 13:
Recommendations for Vendor and
Contractor Emissions

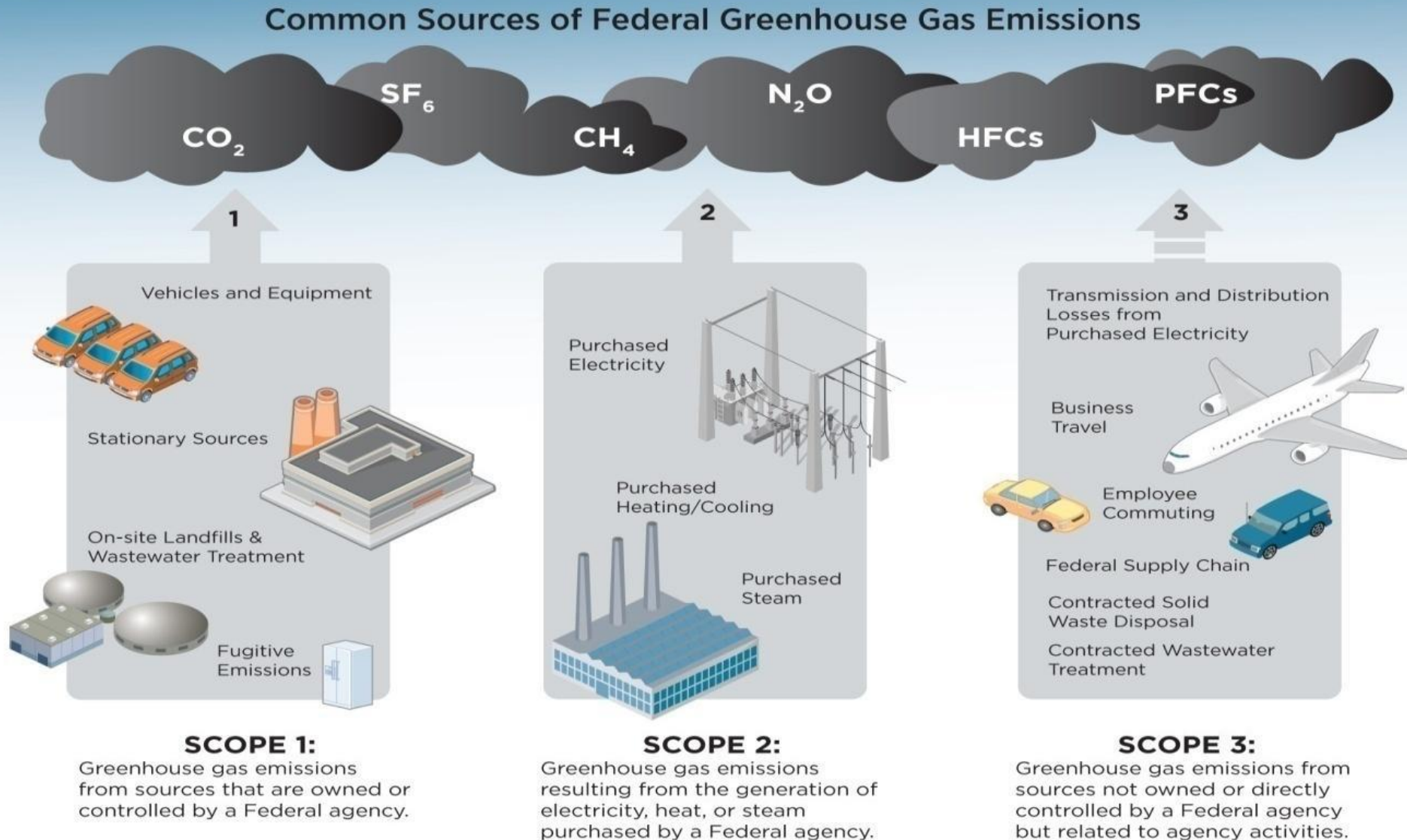
General Services Administration

April 2010



Goal: Reduce Government Scope 3 Emissions

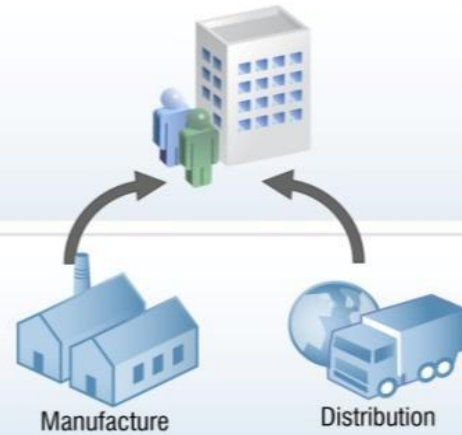
29



Agency Use

30

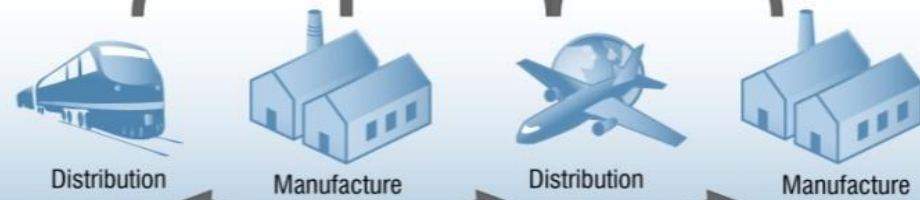
Tier1 Suppliers



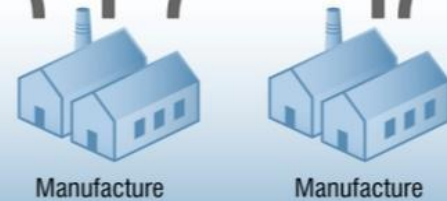
Tier2 Suppliers



Tier3 Suppliers



Tier4 Suppliers



GSA concluded that it is feasible, if employing the recommended phased approach, for the Federal Government to track and reduce its scope 3 supply chain emissions through coordination with suppliers and other stakeholders. **The reporting of scope 3 supply chain emissions is an emerging field**, and all stakeholders will need time and resources to adjust to a steep learning curve. Adopting a phased approach should allow the Government to incorporate leading practices as they develop. The recommended mechanism for achieving scope 3 supply chain emissions tracking is based on existing requirements for agencies to measure and set reduction goals for scope 3 GHG emissions. Specifically including supply chain emissions in agency scope 3 inventories should provide the incentive for agencies to track supplier emissions and possibly use emissions information in procurement decisions.

Government supply chain GHG emissions tracking should be done in partnership with the supplier community to reduce any duplication of effort across agencies and industry and to leverage existing GHG emissions programs. **Any Government GHG emissions tracking approach should strive to minimize the burden placed on industry—especially small and disadvantaged businesses and other socioeconomic groups—while facilitating measurable scope 3 supply chain emissions reductions.** Most importantly, reporting of scope 3 emissions should be done with the recognition that it is an emerging management concept, and any initiative should be flexible enough to work with changing practices.

- ***Ease of use.** Strive to be easily understood and used by both suppliers and agencies, keeping in mind that most users are not experts in sustainability.*
- ***Transparency.** Ensure the data and goals are clearly understood and available to key stakeholders while protecting sensitive supplier and agency information.*
- ***Parity.** Do not favor a specific industry sector, company, or region.*
- ***Realizing Federal GHG reductions.** Foster effective improvements to assist Federal agencies in tracking and reducing scope 3 GHG emissions . . .*
- ***Leveraging existing systems and mechanisms. . . .***

It is feasible to have suppliers report to a voluntary registry, but it is not necessary. As long as suppliers make their emissions information available to the Government, the storage location of that information is not important. **Ultimately, emissions information disclosed to the Government should be calculated using an acceptable standard and then verified.** Voluntary registries offer significant value in terms of inventory calculation assistance and data management to the supplier community; however, that value does not clearly translate to equal value for the Government.

- GSA found **no product standard or label** for GHG emissions
- Government ***could* use preferences** as in other socioeconomic programs
- But **until product standards available, preferences not effective at product level**
- Government should **define criteria for identifying reliable product standards**
- When sufficient suppliers voluntarily disclose GHG emissions, **corporate-level GHG emissions can be used as an evaluation factor**, until product-level standards are available as evaluation factors

- GSA found no product standard or label for GHG emissions

36



ICS > 13 > 13.020 > 13.020.40

ISO 14067:2018

Greenhouse gases — Carbon footprint of products — Requirements and guidelines for quantification

- Government reliable product
- When sufficient emissions, used as an standards a

E C O L A B E L
I N D E X

All ecolabels

Alphabetical index of 456 ecolabels.

Why use corporate GHG emissions as an evaluation factor:

37

*The reasoning behind recommending an **evaluation factor instead of a purchasing preference or mandatory contracting goal is an evaluation factor allows agencies the discretion to trade the price of a given procurement against the GHG emissions** associated with that procurement and thereby enable reductions in agency scope 3 GHG emissions through the acquisition system.*

The GHG emissions reporting status evaluation factor should be made mandatory for all acquisitions using the recommended phased approach. **Agencies should retain discretion over the weight given to the evaluation factor in each solicitation, and an offeror should be evaluated as neither favorable nor unfavorable if they have not reported completion of a GHG emissions inventory.**

- In the initial use of the evaluation factor, the GHG emissions reporting status of an offeror should be evaluated by comparing offerors based on their answer to a series of yes or no questions (e.g., check-box answer to whether the supplier measures and verifies its GHG emissions). These —yes or no check-box questions could include:
 - Has a GHG emissions inventory been completed?
 - Does the inventory include just scopes 1 and 2, or also scope 3?
 - What verification level is used by the inventory: 1st, 2nd, or 3rd party?
 - Where is the GHG emissions inventory located (name of registry or online location of data if not in a registry)?

Executive Order 13693 of March 19, 2015 - Planning for Federal Sustainability in the Next Decade

40

- Initiatives to encourage use of **eco-labels**
- Council on Economic Quality (CEQ) to publish **whether major suppliers have published a GHG emissions target**
- Largest agencies to undertake **pilot** – 5 procurements annually – with **contract requirements or evaluation criteria which address GHG**



EPA head Scott Pruitt says global warming may help 'humans flourish'

EPA administrator says 'There are assumptions made that because the climate is warming that necessarily is a bad thing'



US edition ▾
The Guardian


Oliver Milman *in New York*





🐦 @olliemilman


Wed 7 Feb 2018 13.28 EST

▲ Scott Pruitt: 'It's fairly arrogant for us to think we know exactly what [the ideal surface temperature] should be in 2100.' Photograph: Michael Reynolds/EPA

During Trump Administration

**Vendor Support Center**
Federal Acquisition Service

I Want a Contract  All Things Green  Marketing  Administration 

 **Products**

Find Out about Being Green

There are a couple handy, accessible tools to help vendors determine if their product has an environmental attribute and what requirements may apply to that type of product.

The [GSA Advantage!](#) web site's Environmental Program page has a searchable database of products other contractors have listed as meeting environmental requirements. It also provides information on programs with icons that can be used to show your product has specific environmental attributes. These programs are summarized in fact sheets.

- [BioPreferred](#)
- [Comprehensive Procurement Guidelines \(CPG\)](#)
- [Energy Star](#)
- [Environmental Protection Agency Prime Metals Free](#)
- [Electronic Product Environmental Assessment Tool \(EPEAT\)](#)
- [Federal Energy Management Program \(FEMP\)](#)
- [Low Volatile Organic Compounds \(VOC\)](#)
- [National Emission Standards for Hazardous Air Pollutants \(NESHAP\)](#)
- [Plastics Removal in the Marine Environment \(PRIME\)](#)
- [Significant New Alternatives Policy \(SNAP\)](#)
- [WaterSense](#)

U.S. “Eco-Label” Requirements

43

23.103 -- Sustainable Acquisitions.

- (a) Federal agencies shall advance sustainable acquisition by **ensuring that 95 percent of new contract actions for the supply of products and for the acquisition of services** (including construction) **require that the products are—**
 - (1) Energy-efficient (ENERGY STAR® or Federal Energy Management Program (FEMP)-designated);
 - (2) Water-efficient;
 - (3) Biobased;
 - (4) Environmentally preferable (e.g., EPEAT-registered, or non-toxic or less toxic alternatives);
 - (5) Non-ozone depleting; or
 - (6) Made with recovered materials.
- (b) The required products in the contract actions for services include products that are—
 - (1) Delivered to the Government during performance;
 - (2) Acquired by the contractor for use in performing services at a Federally-controlled facility; or
 - (3) Furnished by the contractor for use by the Government.
- (c) The required products in the contract actions must meet agency performance requirements.
- (d) **For purposes of meeting the 95 percent sustainable acquisition requirement, the term “contract actions” includes new contracts (and task and delivery orders placed against them) and new task and delivery orders on existing contracts.**



EU Directive – On Eco-Labels

44

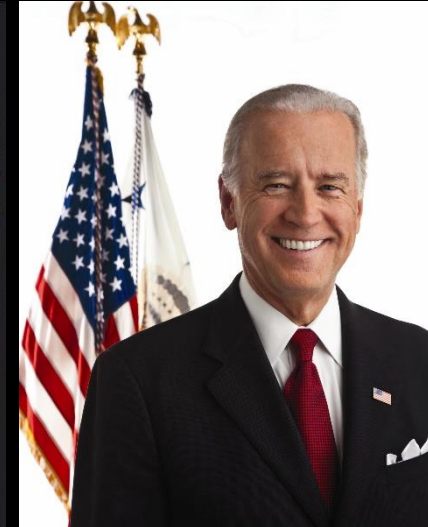
Article 43 - Labels

1. Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics **they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label** as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled:
 - (a) the label requirements **only concern criteria which are linked to the subject-matter of the contract** and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;
 - (b) the label requirements are based on **objectively verifiable and non-discriminatory criteria**;
 - (c) the labels **are established in an open and transparent procedure** in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;
 - (d) **the labels are accessible** to all interested parties;
 - (e) the label requirements are set by a third party over which the economic operator applying for the label **cannot exercise a decisive influence**.

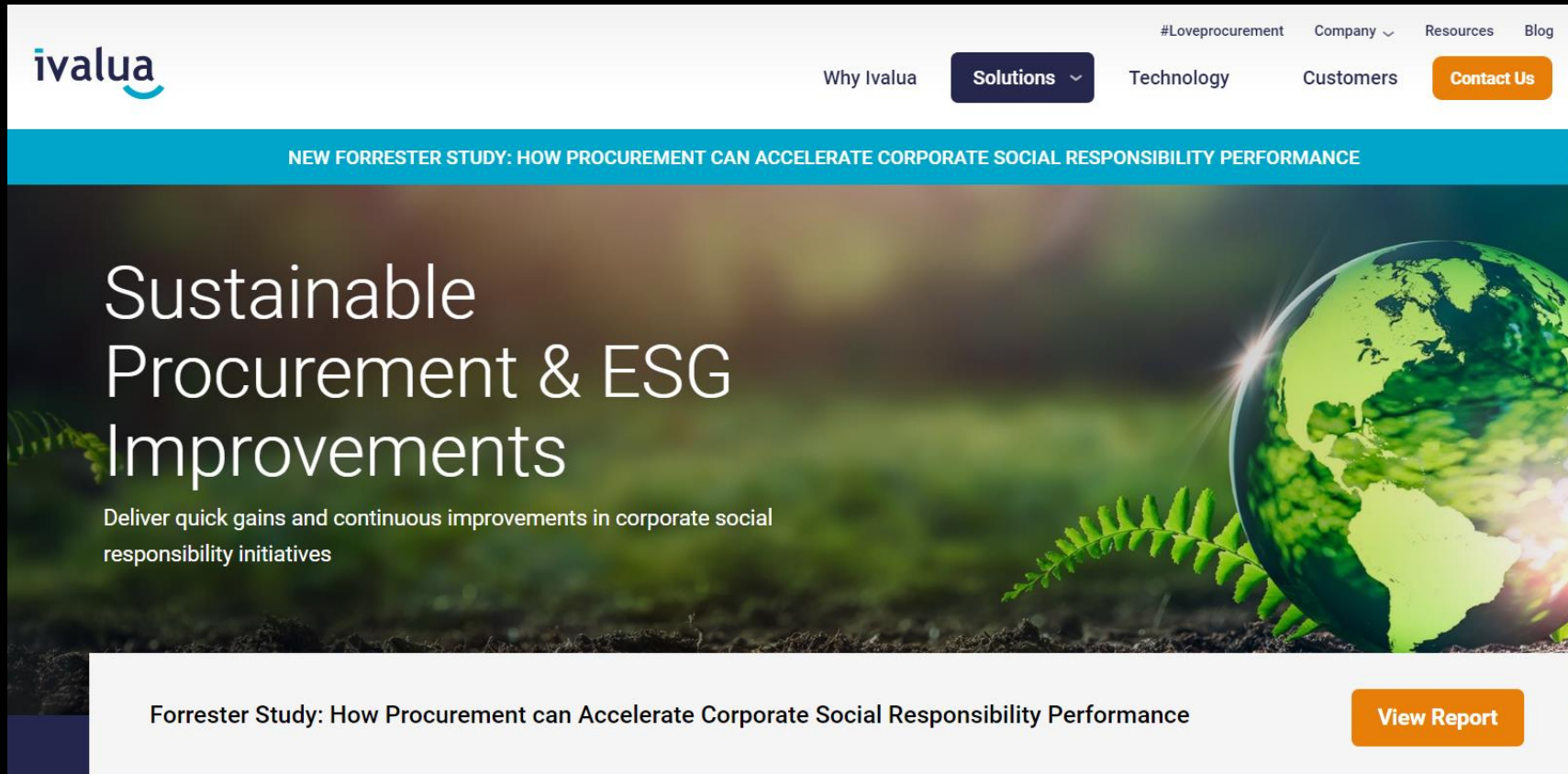


Ecolabel Index is the largest global directory of ecolabels, currently tracking **455 ecolabels** in **199 countries**, and **25 industry sectors**.

ENVIRONMENTAL SUSTAINABILITY IN THE BIDEN ADMINISTRATION



Environmental, Social Governance



The image shows the top portion of the Ivalua website. The header is white with the Ivalua logo on the left. Navigation links include '#Loveprocurement', 'Company', 'Resources', and 'Blog' on the right, and 'Why Ivalua', 'Solutions', 'Technology', and 'Customers' in the center. A blue 'Contact Us' button is on the far right. Below the header is a blue banner with white text about a Forrester study. The main hero section features a background image of a green globe with a fern sprout growing from it. Large white text reads 'Sustainable Procurement & ESG Improvements', followed by a subtitle 'Deliver quick gains and continuous improvements in corporate social responsibility initiatives'. At the bottom, a white bar contains the text 'Forrester Study: How Procurement can Accelerate Corporate Social Responsibility Performance' and an orange 'View Report' button.

ivalua

#Loveprocurement Company Resources Blog

Why Ivalua Solutions Technology Customers **Contact Us**

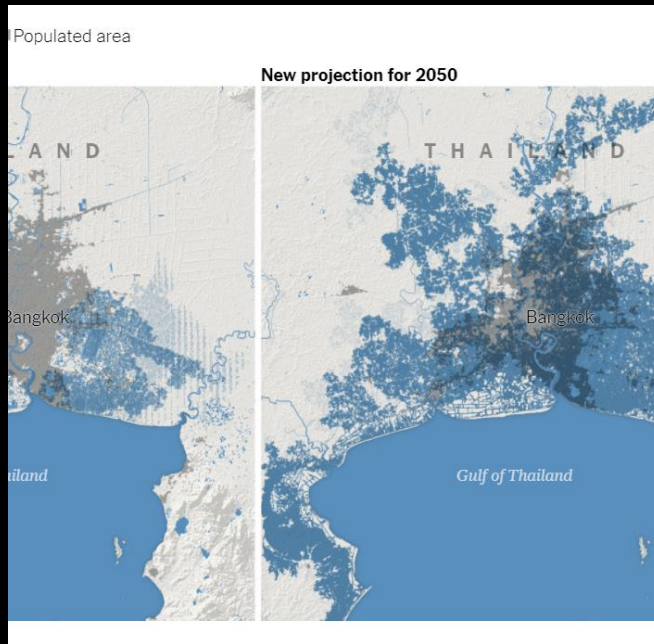
NEW FORRESTER STUDY: HOW PROCUREMENT CAN ACCELERATE CORPORATE SOCIAL RESPONSIBILITY PERFORMANCE

Sustainable Procurement & ESG Improvements

Deliver quick gains and continuous improvements in corporate social responsibility initiatives

Forrester Study: How Procurement can Accelerate Corporate Social Responsibility Performance

View Report



search text ...

COVID-19 PANDEMIC VOA NEWS ON CHINA VOA NEWS ON IRAN

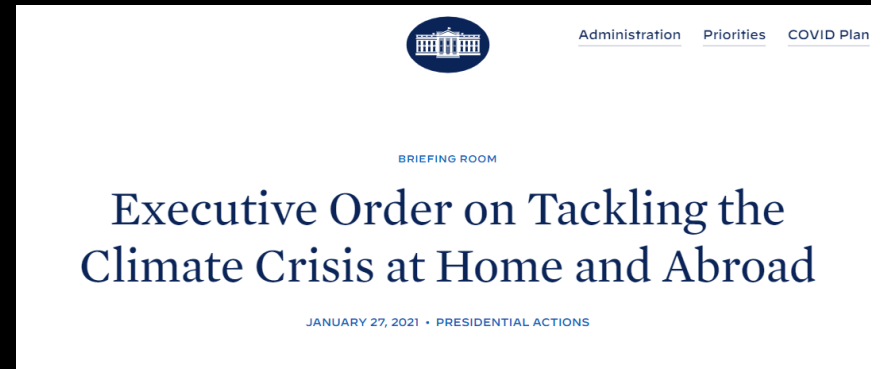
Sea Levels Threaten to Submerge Southern Vietnam by 2100



IMPACT OF RISING WATERS

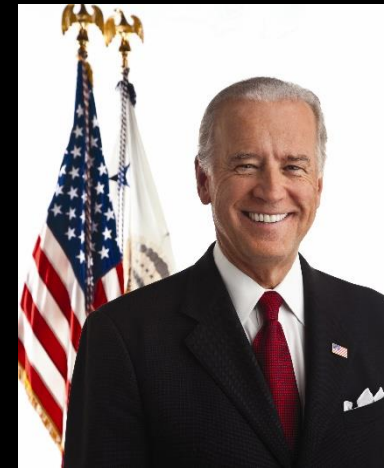
EO 14008

Jan. 27, 2021



USE OF THE FEDERAL GOVERNMENT'S BUYING POWER AND REAL PROPERTY AND ASSET MANAGEMENT

Sec. 204. Policy. It is the policy of my Administration to lead the Nation's effort to combat the climate crisis by example — specifically, by **aligning the management of Federal procurement and real property, public lands and waters, and financial programs to support robust climate action.** By providing an **immediate, clear, and stable source of product demand, increased transparency and data, and robust standards for the market, my Administration will help to catalyze private sector investment** into, and accelerate the advancement of America's industrial capacity to supply, domestic clean energy, buildings, vehicles, and other necessary products and materials.



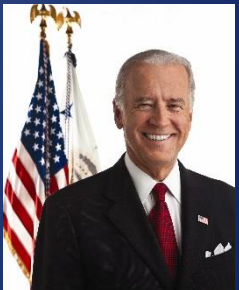
Executive Order 14030: Climate-Related Financial Risk (May 2021)

49

(b) The Federal Acquisition Regulatory Council, in consultation with the Chair of the Council on Environmental Quality and the heads of other agencies as appropriate, **shall consider amending the Federal Acquisition Regulation (FAR) to:**

(i) **require major Federal suppliers to publicly disclose greenhouse gas emissions and climate-related financial risk and to set science-based reduction targets;** and

(ii) **ensure that major Federal agency procurements minimize the risk of climate change, including requiring the social cost of greenhouse gas emissions to be considered in procurement decisions and, where appropriate and feasible, give preference to bids and proposals from suppliers with a lower social cost of greenhouse gas emissions.**



DoD Request for Information (July 7, 2021)

50

A. Disclosure of Greenhouse Gas (GHG) Emissions


- Does your organization measure and report Scope 1 and Scope 2 GHG emissions in line with the GHG Protocol Corporate Standard or equivalent? If not the GHG Protocol, which standard(s) are used?
- Does your organization currently report Scope 3 GHG emissions? If so, which Scope 3 categories are reported and which methodologies and/or standards are used?
- Does your organization publicly report your GHG results either through a third-party organization or as part of an external corporate sustainability report?
- Does your organization disclose its GHG emissions inventory on an annual basis? If so, where or by what platform?
- Does your organization set and disclose targets for GHG emissions reduction and/or science-based targets? If so, are these targets reviewed or verified by a third party?
- Does your organization report climate risk-related information as part of your standard financial reporting disclosures?
- Would your organization be willing to participate in a pilot program involving voluntary disclosure of actual GHG emissions and GHG emission targets?

B. Environmental, Social, and Governance (ESG)—General

- Does your organization participate in ESG reporting? If so, which sustainability standards or platforms does your organization use (e.g., Carbon Disclosure Project (CDP), Global Reporting Initiative (GRI), Science Based Targets initiative (SBTi), Supplier Ethical Data Exchange (SEDEX))?
- What is the role of third-party verification in your ESG activities?
- Does your organization's ESG-related reporting include accounting for and addressing disparate impacts on disadvantaged communities and communities of color?
- Does your organization's ESG-related reporting include creation of jobs associated with the shift away from carbon-intensive energy sources?

C. Supply Chain GHG and Risk Management

- Does your organization have the ability to provide customers with GHG emissions information specific to their purchases or contracts? If so, at what level can your organization provide this information (e.g., by customer on an annual basis, contract, item)?
- Does your organization collect GHG emissions information from your suppliers? If so, what systems, standards, or instruments are used to collect this information? If so, how is this information used?
- Do you require your suppliers to set GHG emissions reduction targets or related targets (e.g., energy efficiency, clean electricity)?



**GREENHOUSE
GAS PROTOCOL**

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[GUIDANCE](#)
[CALCULATION TOOLS](#)
[EVENTS](#)
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New comprehensive cross-sector calculation tool available for beta testing.

[CLICK HERE](#)

The Greenhouse Gas Protocol




A Corporate Accounting and Reporting Standard
REVISED EDITION


World Business Council for
Sustainable Development

WORLD
RESOURCES
INSTITUTE

Corporate Standard








The GHG Protocol Corporate Accounting and Reporting Standard provides requirements and guidance for companies and other organizations preparing a corporate-level GHG emissions inventory.

The standard covers the accounting and reporting of seven greenhouse gases covered by the Kyoto Protocol – carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PCFs), sulphur hexafluoride (SF₆) and nitrogen trifluoride (NF₃). It was updated in 2015 with the Scope 2 Guidance, which allows companies to credibly measure and report emissions from purchased or acquired electricity, steam, heat, and cooling.


[Click to download \(GHG Protocol Corporate Standard Revised \(English\), 3.51 MB\)](#)

[Go to all documents](#)

Available in the following languages

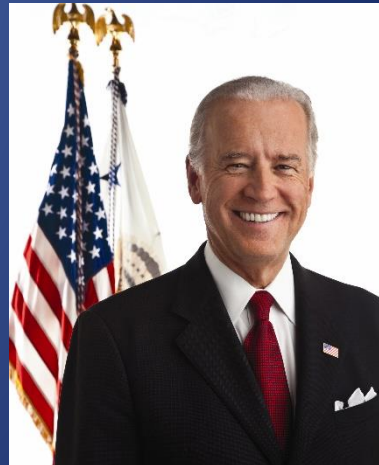








Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk

52

Proposed Rule, 87 Fed. Reg. 68312 (14 Nov 2022)

- Contractors with over \$7.5 million in annual contracts will need to **compile and disclose greenhouse gas emissions**
- If not, **presumptively non-qualified** (“non-responsive”)
- Contractors must set reduction goals
- “The foundation to properly analyze and mitigate climate risks is **public and standardized disclosure**, which will enable the Federal Government to conduct prudent fiscal management of all major Federal suppliers.”



TRADE AGREEMENTS

Government Procurement Agreement (2014) on Social and Environmental Criteria

54

- “The **evaluation criteria** set out in the notice of intended procurement or tender documentation **may include**, among others, price and other cost factors, quality, technical merit, **environmental characteristics** and terms of delivery.”

Art. III “Measures [may] not [be] applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade”

GPA – Article X

55

Article X — Technical Specifications and Tender Documentation

Technical Specifications

A procuring entity **shall not prepare, adopt or apply any technical specification** or prescribe any conformity assessment procedure with **the purpose or the effect of creating unnecessary obstacles** to international trade.

In prescribing the technical specifications for the goods or services being procured, a procuring entity **shall, where appropriate:**

- set out the technical specification in terms of performance and functional requirements**, rather than design or descriptive characteristics; and

- base the technical specification on international standards, where such exist;** otherwise, on national technical regulations, recognized national standards or building codes.

Where design or descriptive characteristics are used in the technical specifications, a procuring entity should indicate, where appropriate, that **it will consider tenders of equivalent goods or services that demonstrably fulfil the requirements of the procurement by including words such as “or equivalent” in the tender documentation.**

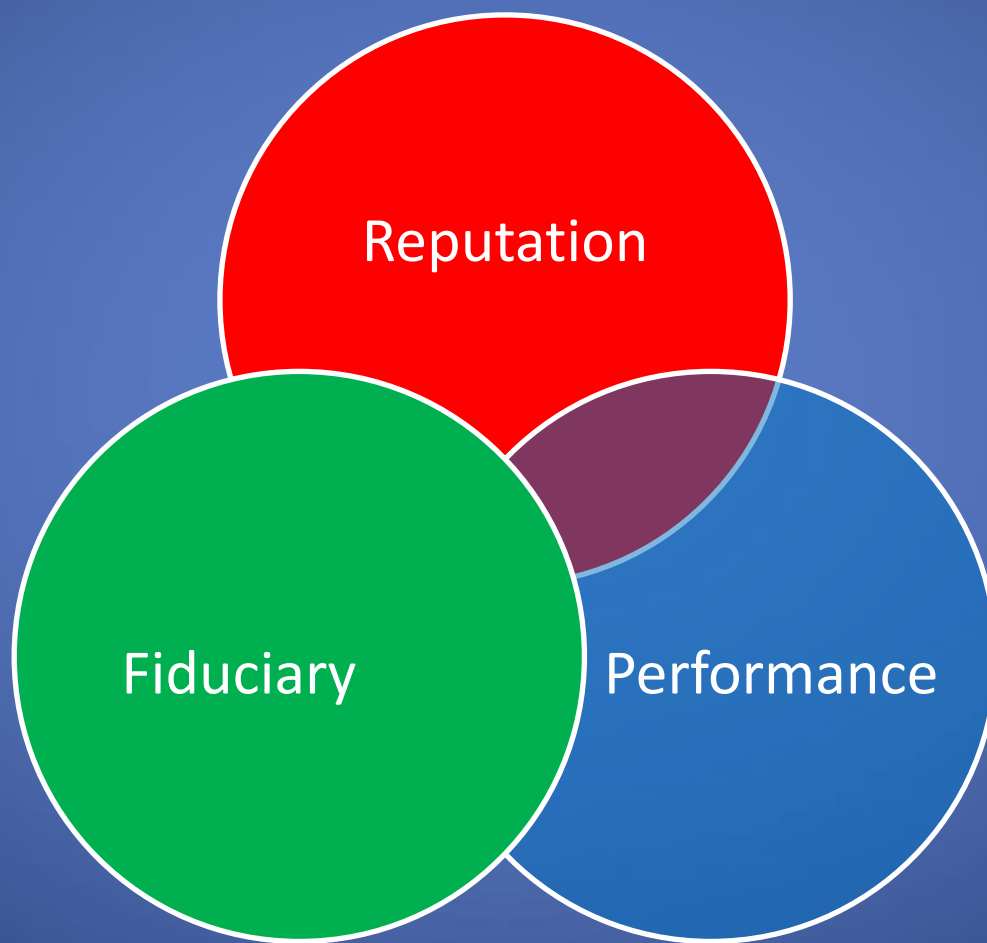
A procuring entity **shall not prescribe technical specifications that require or refer to a particular trademark or trade name**, patent, copyright, design, type, specific origin, producer or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, the entity **includes words such as “or equivalent”** in the tender documentation.

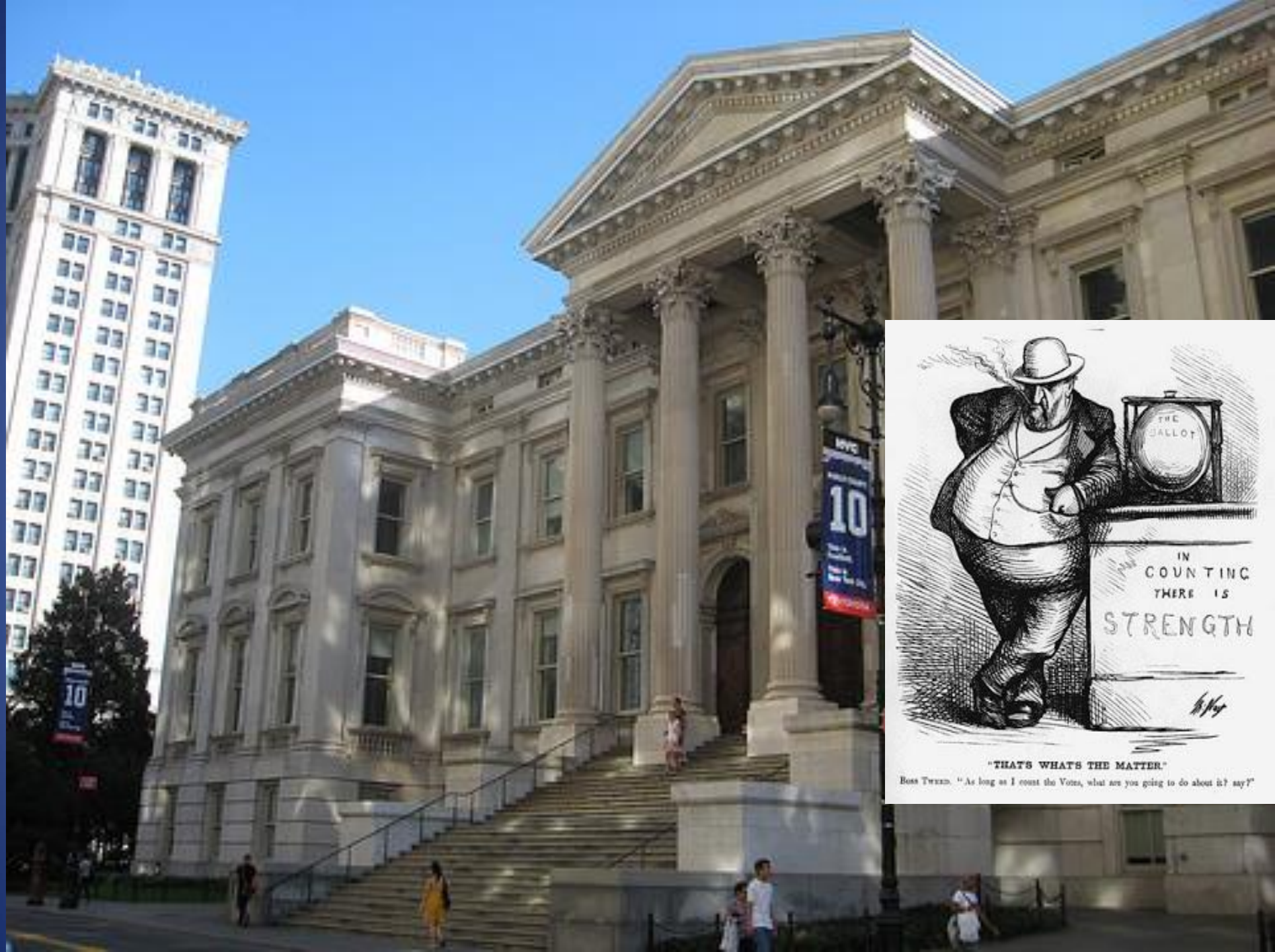
A procuring entity **shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification** for a specific procurement from a person that may have a commercial interest in the procurement.

For greater certainty, a Party, including its procuring entities, **may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment.**

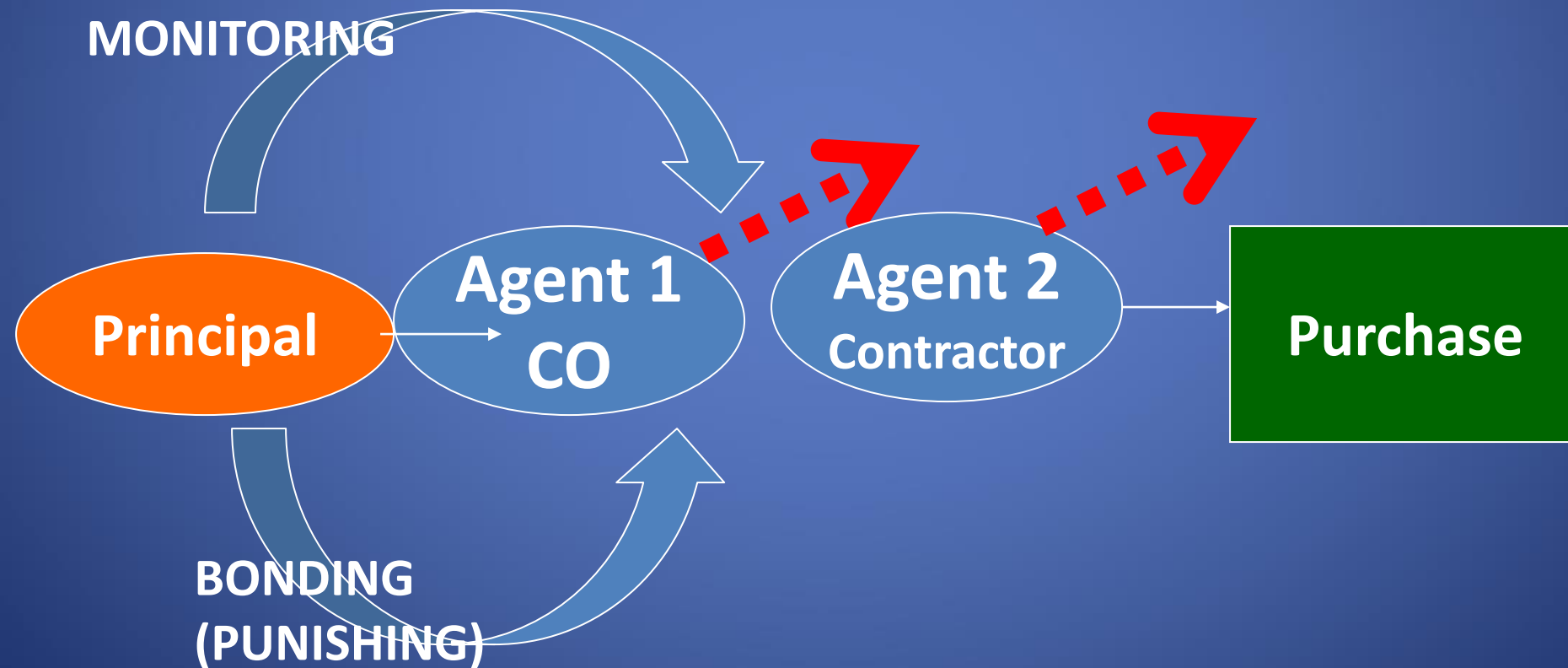
Anti-Corruption

Risks of Corruption

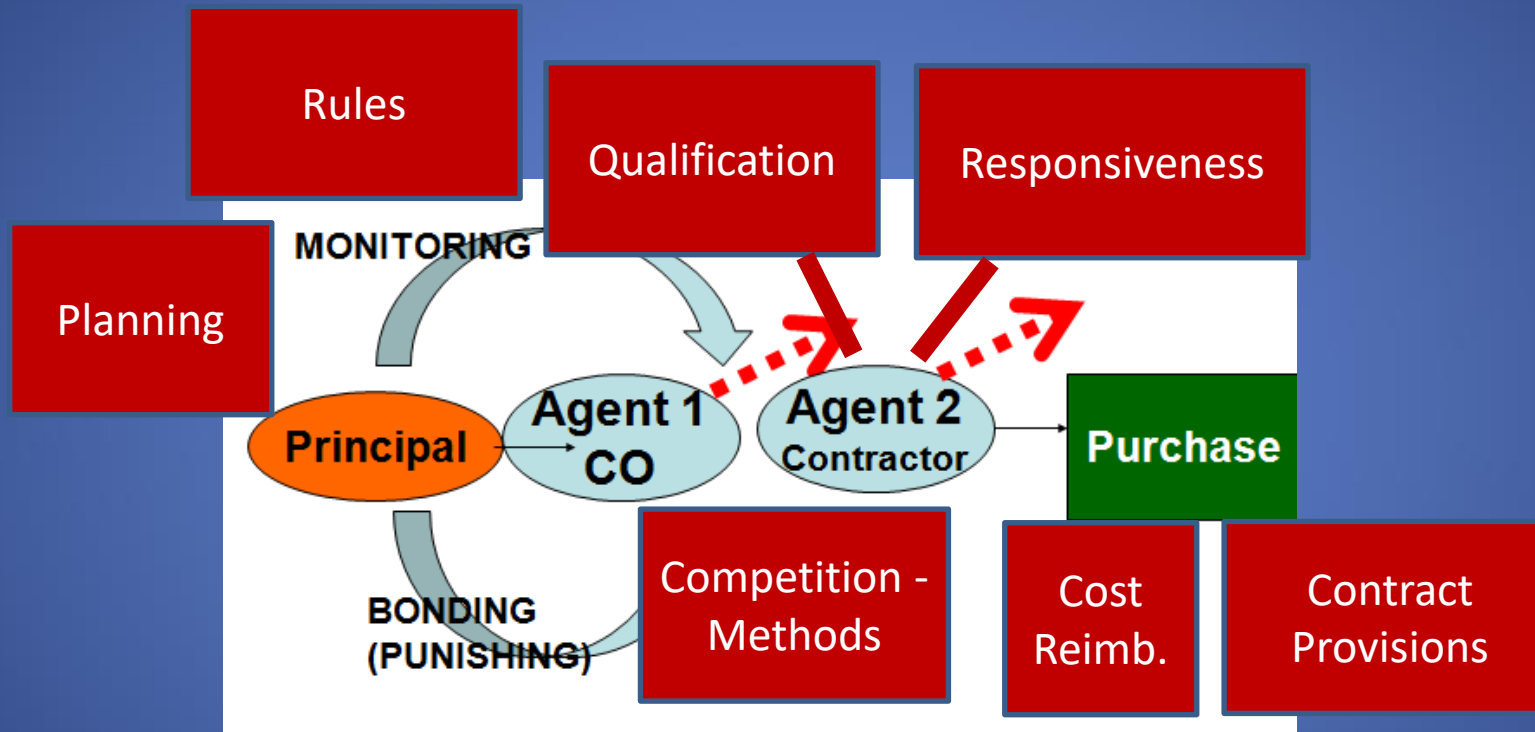




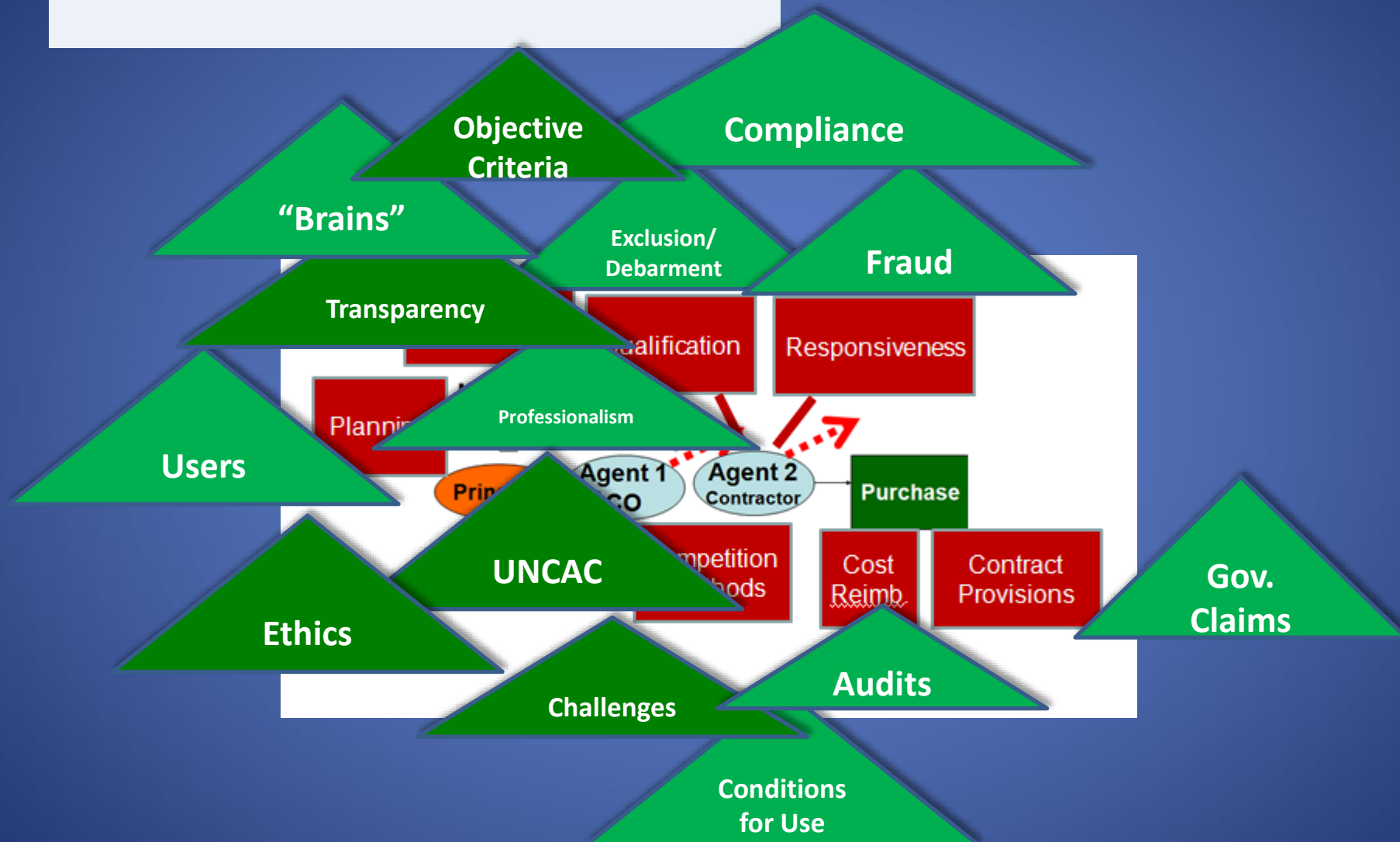
- Public corruption occurs when an office-holder or other governmental employee acts in an official capacity for personal gain.



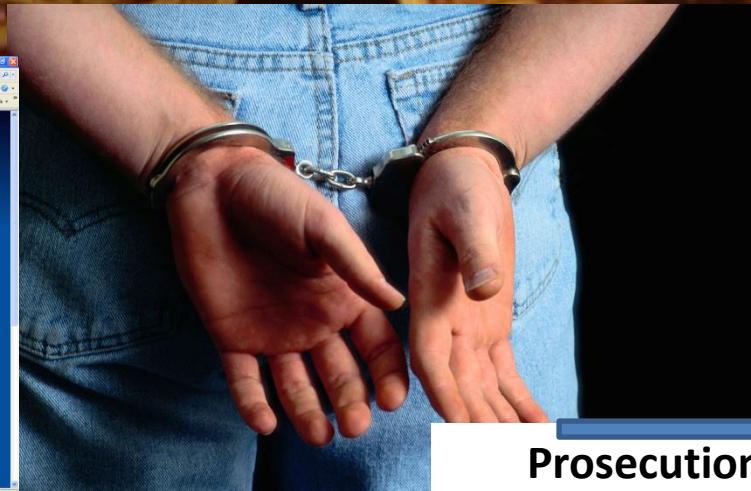
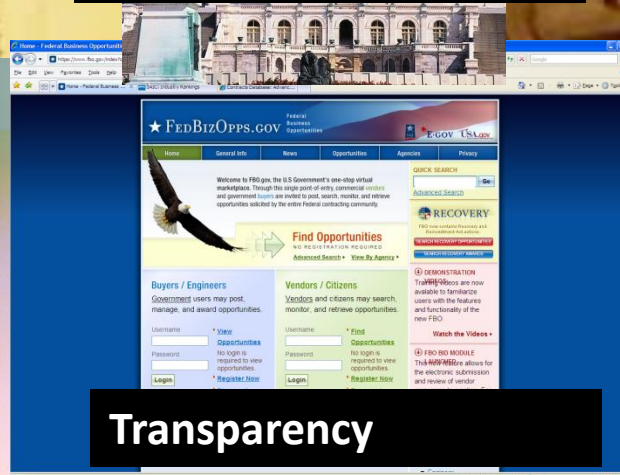
Processes



Anti-Corruption



Tools for Fighting Corruption





Red Flags – Third Parties

Excessive
Commissions

Unreasonably large
discounts

Vague Consulting
Agreements

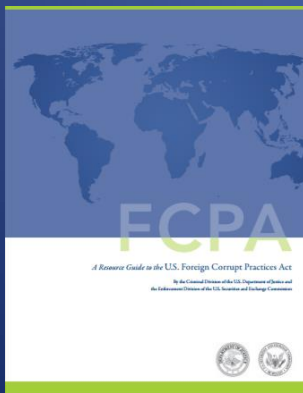
Consultant in
Different Line of
Business

Consultant Related
to Official

Third Party Added
at Official
Insistence

Third Party Is Mere
Shell Company

Third Party
Requests Payment
to Offshore
Accounts





UK Bribery Act of 2010

- Strict liability – unless compliance plan
 - UK Ministry of Justice guidance (2011)
- Extraterritorial application
- Covers commercial bribery



A low-angle, upward-looking photograph of several modern skyscrapers with glass facades. The buildings are set against a bright blue sky filled with large, white, fluffy clouds. The sun is visible in the upper center of the frame, creating a lens flare effect. The perspective makes the buildings appear to converge towards the top of the image.

CORPORATE COMPLIANCE

U.S. Sentencing Commission Sentencing Guidelines - § 8B2.1	U.S. Contractor Compliance System: Final Federal Acquisition Regulation Rule (73 Fed. Reg. 67064 (Nov. 12, 2008) (effective 12/12/08)	UK Ministry of Justice Guidance for Corporate Compliance (March 2011)
1. Standards and procedures	W/in 30 days: written code of business ethics and conduct 	 <ul style="list-style-type: none"> • “Clear, Practical and Accessible Policies and Procedures” • A Code of Ethics; principles applicable regardless of local laws or culture. • A policy concerning political contributions and lobbying activities. • A policy on gifts and hospitality and facilitation payments. • A commitment to making it explicit that the anti-bribery code applies to business partners
2. Knowledgeable leadership	No explicit reference.	<ul style="list-style-type: none"> • “Top Level Commitment” • Board expected to take a strong anti-bribery stance; CEO should take leading role. • Senior officer should be in charge of compliance function. • Decisionmaking structured to address risk.
3. Exclude risky personnel	W/in 90 days: “reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with Contractor’s code	<ul style="list-style-type: none"> • Where appropriate, employees should be vetted. • A policy on outside advisers/third parties including vetting and due diligence and appropriate risk assessments.
4. Training	W/in 90 days: business ethics awareness , compliance program	<ul style="list-style-type: none"> • Training to ensure dissemination of the anti-corruption culture to all staff at all levels within the corporate.
5. Monitor, evaluate, reporting hotline	W/in 90 days: internal control system to facilitate timely discovery	<ul style="list-style-type: none"> • “Due diligence” and “Monitoring and Review” • Regular checks and auditing in a proportionate manner. • A helpline which enables employees to report concerns; safeguards for whistleblowers • Financial controls • Supply chain partners to have codes of conduct
6. Incentives and discipline	W/in 90 days: internal control system to ensure corrective measures	<ul style="list-style-type: none"> • “Effective Implementation” • Individual accountability • Appropriate and consistent disciplinary processes.
7. Adjust program to risk	W/in 90 days: review and adjust	<ul style="list-style-type: none"> • “Risk Assessment”: Risk management to address corruption. • Whether there have been previous cases of corruption within the corporate and, if so, the effect of any remedial action. • Due diligence and risk assessments.

Brazil's Anti-Corruption Law

Art. 5th. For the purposes of this Law, acts harmful to the public administration, national or foreign, are those performed by the legal persons cited in the paragraph of Art. 1st, which violate the national or foreign public patrimony, principles of the public administration, or the international commitments assumed by Brazil, defined thus:

...

IV – insofar as requests for bids and contracts:

...

- f) to obtain an improper advantage or benefit, **fraudulently**, for modifications or extensions in contracts entered into with the public administration, not authorized by law, the invitation to the public request for bid, or the respective contractual instruments; or
- g) to **manipulate or defraud the economic and financial balance** of contracts entered into with the public administration;



France's Law "Sapin II" (2016)

- The new law “also lays down an obligation to implement a **corruption prevention plan** in large companies. The National [Anti-Corruption] Agency will ensure that **companies with a workforce of over 500** and whose **annual turnover exceeds €100 million** put in place procedures to guard against the risk of corruption, for example by training their employees. This obligation already exists in a number of countries, including the United Kingdom and Switzerland. The Agency will be able to penalise any failings in the 1,600 companies in France in this bracket. In this way, it will be able to issue a formal warning or impose a fine of up to €1 million for legal entities and €200,000 for natural persons, and make the proposed penalty public.”



France's Law "Sapin II"

- **Corporate compliance system must include (Art. 17)**
 1. Code of Conduct
 2. Internal alert system
 3. Risk-mapping
 4. Customer and supplier assessment
 5. Internal accounting controls
 6. Training for those at risk
 7. Discipline
 8. Evaluation and oversight of system



Mexico's General Law of Administrative Accountability (2017)

- However, Mexico's new law also provides that **sanctions shall be mitigated by 50-70 percent where a company self-reports past or ongoing misconduct** and has implemented and enforced an **adequate "Integrity Policy."** An "Integrity Policy" is defined to include, at a minimum: **(1) a document** setting forth the functions and responsibilities of each of the company's areas, the leadership throughout the company and a clear chain of command; **(2) a code of conduct with enforcement protocol**; **(3) control and audit systems** that regularly supervise standards of compliance within the organization; **(4) internal whistleblower and reporting systems** that allow for appropriate reporting to enforcement authorities and disciplinary procedures for employees acting contrary to company policy or Mexican law; and **(5) human resources policies for preventing the hiring of persons that may pose compliance risks** to the organization.

<https://www.corporatecomplianceinsights.com/anti-corruption-enforcement-mexico/>



What Is a Compliance System?



See
Reading
List

1. Standards and procedures

2. Knowledgeable leadership






3. Exclude risky personnel

4. Training

**5. Monitor, evaluate,
reporting hotline**

6. Incentives and discipline

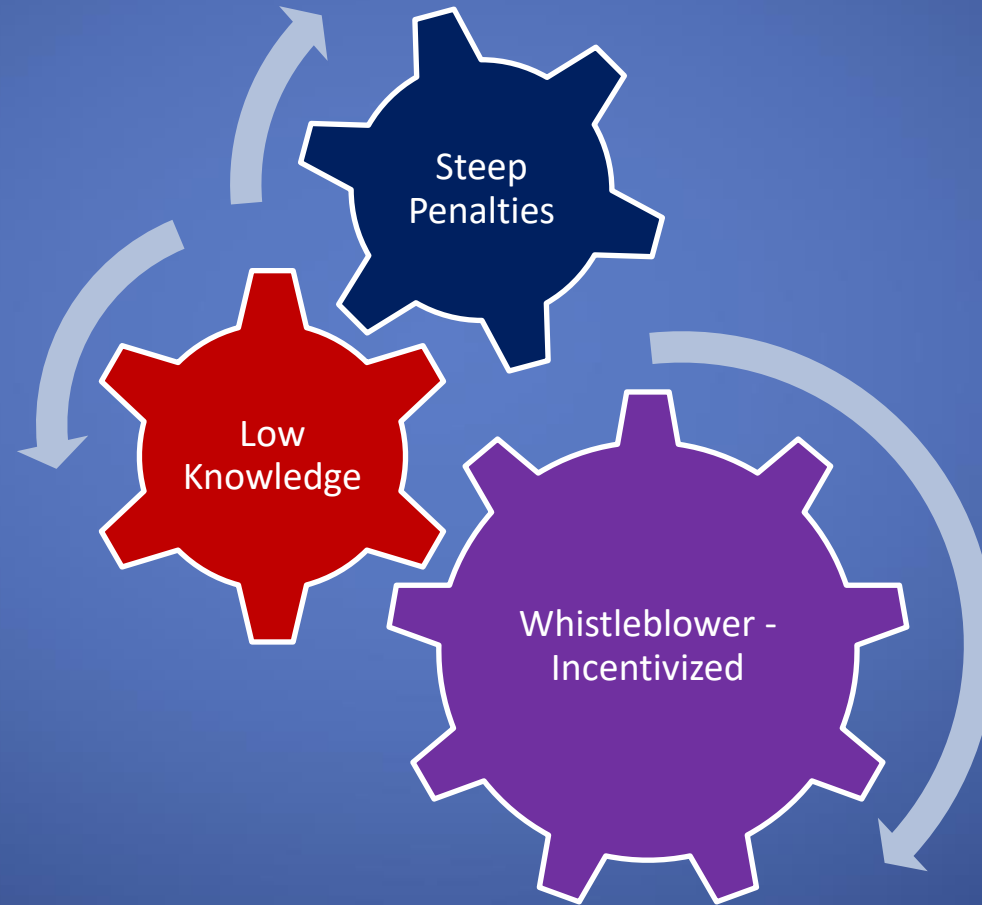
7. Adjust program to risk

				
1. Standards and procedures	✓	✓	✓	✓
2. Knowledgeable leadership		✓	✓	✓
3. Exclude risky personnel	✓	✓	✓	✓
4. Training	✓	✓	✓	✓
5. Monitor, evaluate, reporting hotline	✓	✓	✓	✓
6. Incentives and discipline	✓	✓	✓	✓
7. Adjust program to risk	✓	✓	✓	✓

Issues in Compliance

- Framing system:
 - Gifts
 - Revolving door
 - Conflicts of interest (personal)
 - Integrity of the procurement process
 - Bid & proposal
 - Internal government procurement information
 - Oversight by compliance officers
- Disclosure – voluntary or mandatory?

U.S. Anti-Fraud Law



UN Convention Against Corruption (Art. 9)

Public Information

Advance award criteria and publication

Objective and predetermined criteria for award

Bid protest and appeal

**Measures to control procurement personnel –
e.g., rules and codes**

**Transparency, including in budgeting and
accounting**





UNODC

United Nations Office on Drugs and Crime

Search

Home

About UNODC

Quick Links

Field Offices

Site Map

UNODC Everywhere

Topics

- Alternative development
- Corruption
- Crime prevention and criminal justice
- Drug prevention, treatment and care
- Drug trafficking
- Firearms
- Fraudulent medicines
- HIV and AIDS
- Human trafficking and migrant smuggling
- Money-laundering
- Organized crime
- Maritime crime and piracy
- Terrorism prevention
- Wildlife

Resources

- Campaigns
- Commissions
- Crime Conferences
- Data and Statistics
- eLearning
- Evaluation
- Laboratories and Forensic Science
- Legal tools
- Treaties

Information For ...

Mechanism for the Review of Implementation of the United Nations Convention against Corruption

In its [resolution 3/1](#), entitled "Mechanism for the Review of Implementation of the United Nations Convention against Corruption", the Conference deemed it necessary, any appropriate measures, in accordance with the Convention.

In the same resolution, the Conference, in the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption, contained in its [resolution 3/1](#), requested governmental experts and the country review reports, contained in the Review Group.

In its [resolution 4/1](#), entitled "Mechanism for the Review of Implementation of the United Nations Convention against Corruption", the Conference recalled its decision, contained in its [resolution 3/1](#), in which it was charged with following up and continuing the work initiated previously by the Open-ended Intergovernmental Working Group of Experts on Corruption, and taking into account the fact that, in paragraph 11 of the terms of reference, one of the goals of the Mechanism is to help States parties to identify and substantiate areas for technical assistance and to promote and facilitate the provision of technical assistance.

In the same resolution, the Conference recalled in particular, as laid out in its [resolution 3/4](#), its endorsement of country-led and country-based integrated and coordinated technical assistance programme delivery and its encouragement to donors to accord high priority to technical

UNCAC REVIEW MECHANISM -COUNTRY PAIRINGS

YEAR 1

Regional group	State party under review	Reviewing State party from same regional group	Other reviewing State party
Group of African States	Zambia	Zimbabwe	Italy
	Uganda	Ghana	Romania
	Togo	United Republic of Tanzania	Uganda
	Morocco	South Africa	Slovakia
	Sao Tome and Principe	Ethiopia	Mongolia
	Rwanda	Senegal	Lebanon
	Niger	Mauritius	Russian Federation
	Burundi	Egypt	Bolivarian Republic of Venezuela

UNCAC
Peer
Review



UNODC
United Nations Office on Drugs and Crime

Mechanism for the
Review of Implementation of the
United Nations Convention against
Corruption—Basic Documents



**SUSPENSION/DEBARMENT/
EXCLUSION**

US – Mexico – Canada Agreement (USMCA)

Article 13.17: Ensuring Integrity in Procurement Practices

1. Each Party shall ensure that criminal, civil, or administrative measures exist that can address corruption, fraud, and other wrongful acts in its government procurement.
2. These measures **may include procedures to debar, suspend, or declare ineligible from participation in the Party's procurements**, for a stated period of time, a supplier that the Party has determined to have engaged in corruption, fraud, or other wrongful acts relevant to a supplier's eligibility to participate in a Party's government procurement . . .

United States:

Procurement Suspension or Debarment =
“Meta”- Responsibility Determination

FAR 9.402 Policy.

(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with **responsible contractors only.**

Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

U.S. Federal Discretionary Debarment



Other problems:

- No uniform procedures
- Huge disparity in actions

Comparing Causes for Debarment/Exclusion

United States

- Conviction of a crime or civil fraud
- Poor contract performance
- Other serious misconduct showing the contractor is not responsible



World Bank

- Misconduct, as narrowly defined by Anti-Corruption, Guidelines, and Consultant and Procurement Guidelines: **fraud, corruption, collusion, coercion and obstruction**



European Union

Mandatory:

Corruption, fraud, money laundering

Non-Mandatory:

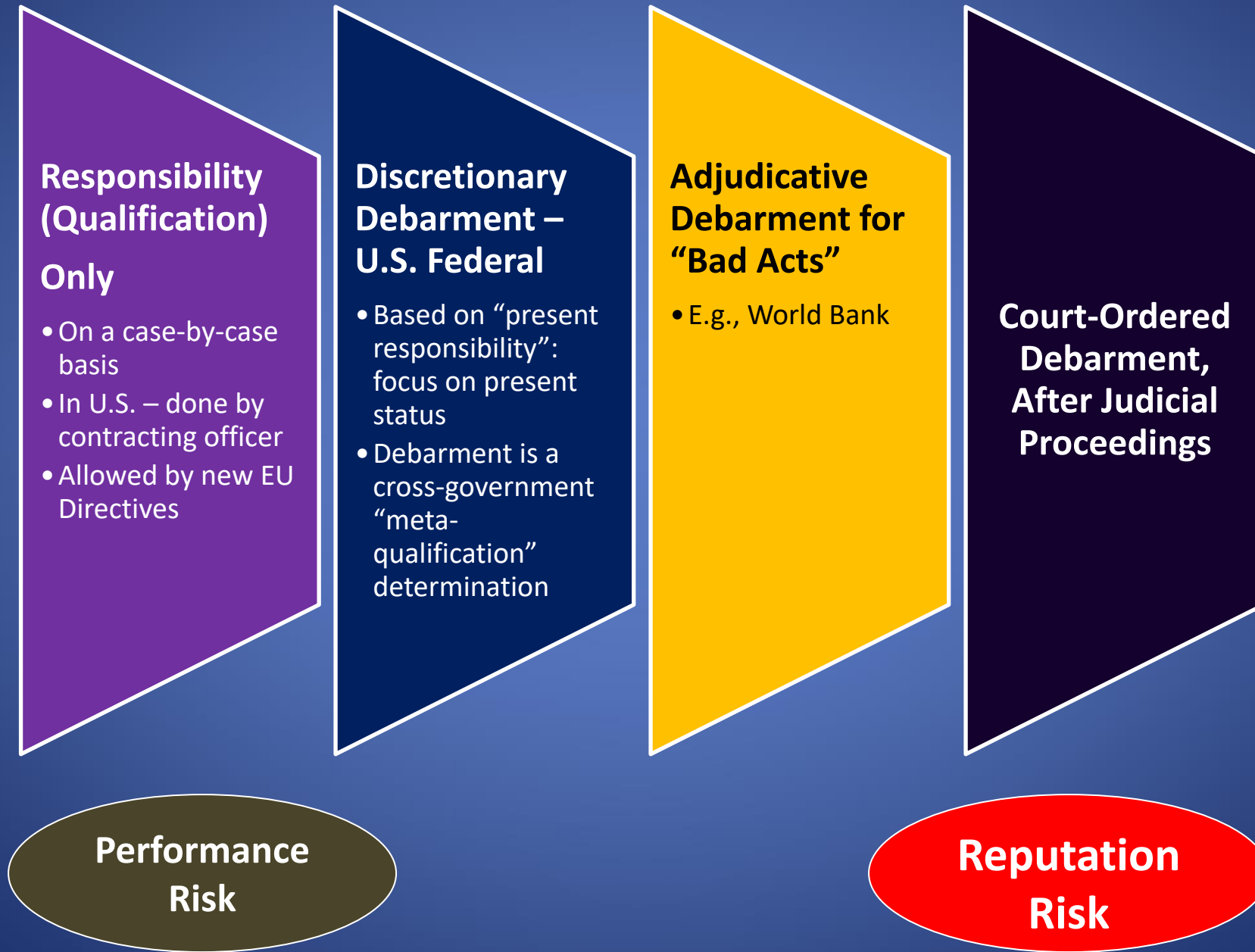
- Bankruptcy
- Convicted re: professional conduct
- Grave professional misconduct
- Social security / taxes



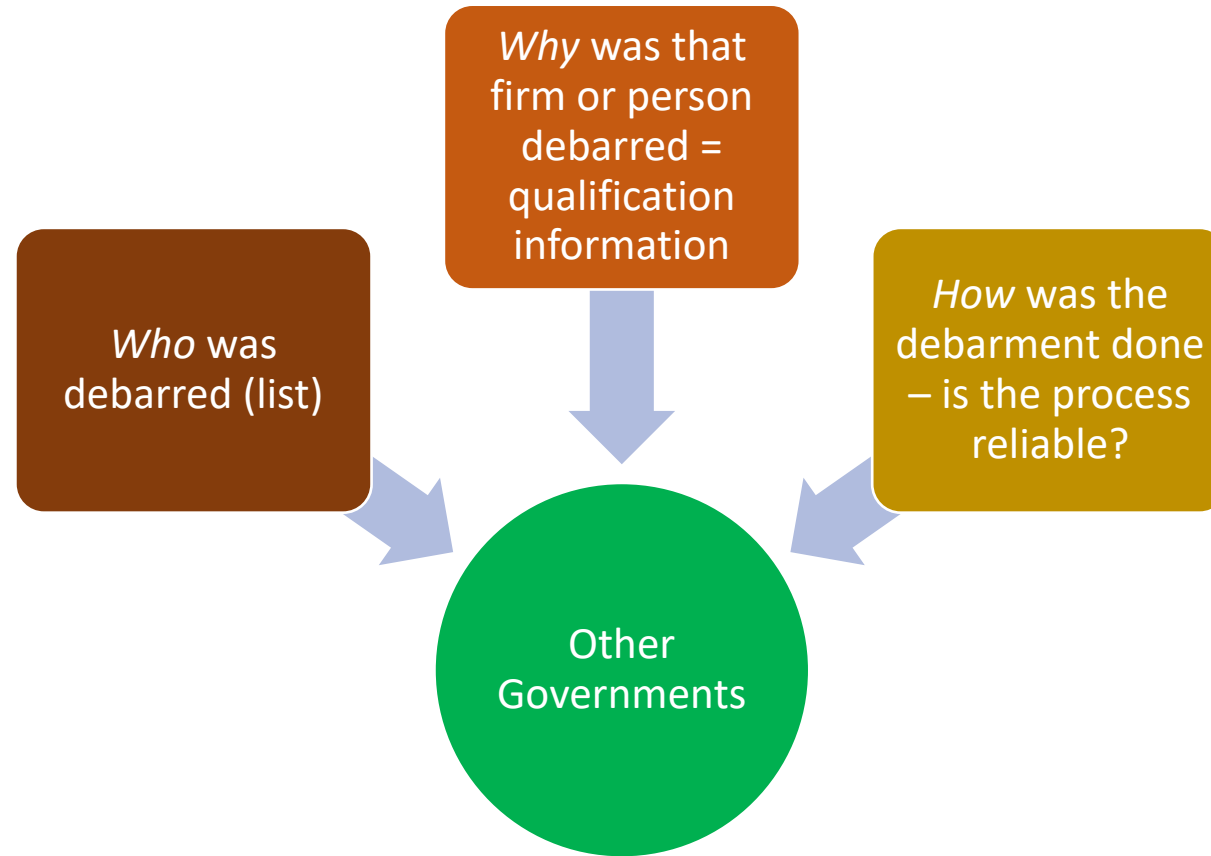
World Bank Sanctions System



Four Paradigms



Using Exclusion/Debarment Information Across Borders: Key Issues



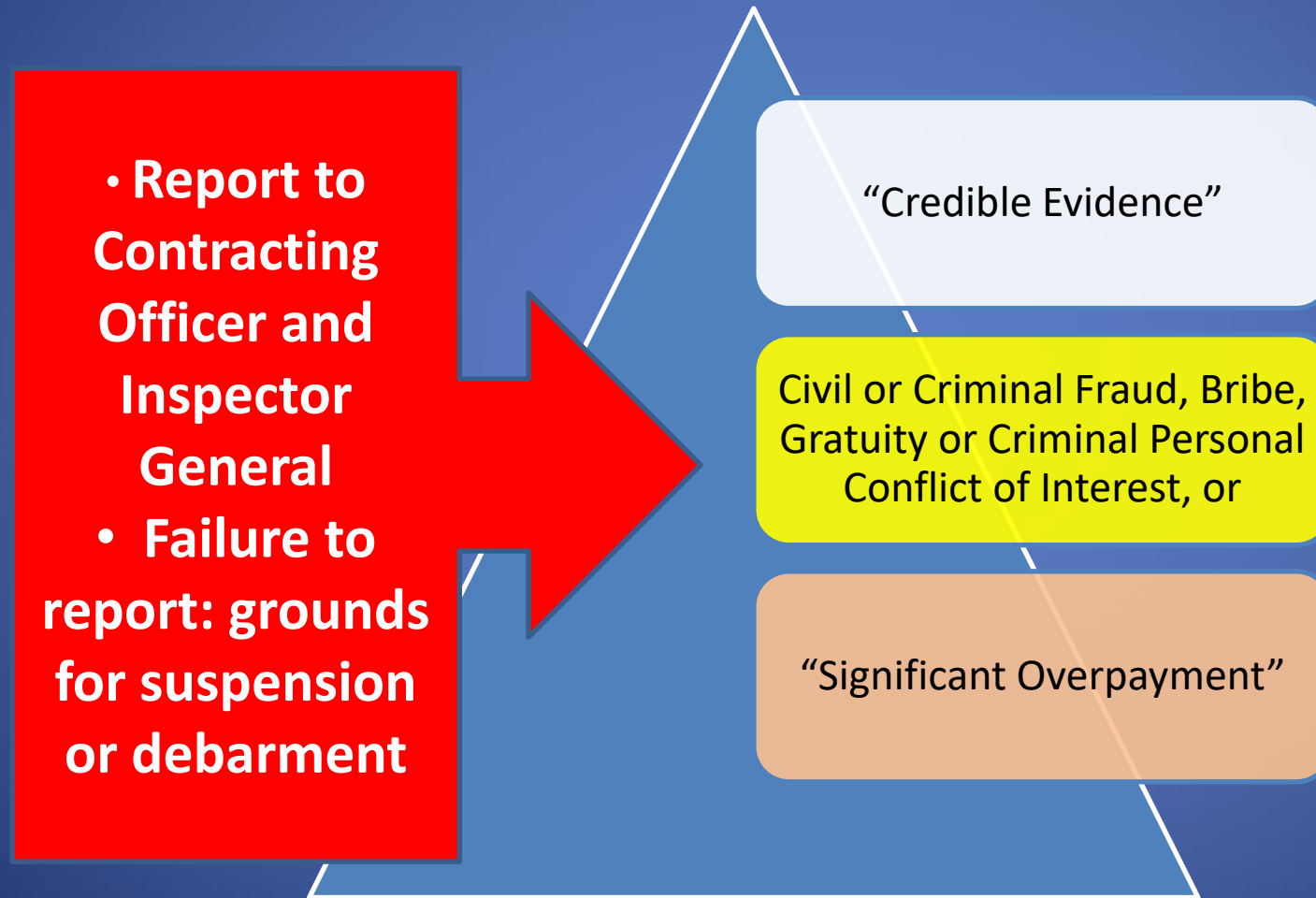
Cross-Debarment: Options

Options:

- Automatic cross-debarment
- Debarment list + Reasons
- Debarment list
- Do nothing

VOLUNTARY VERSUS MANDATORY DISCLOSURE

U.S. Federal Mandatory Disclosure: FAR 52.203-13



World Bank Voluntary Disclosure Program

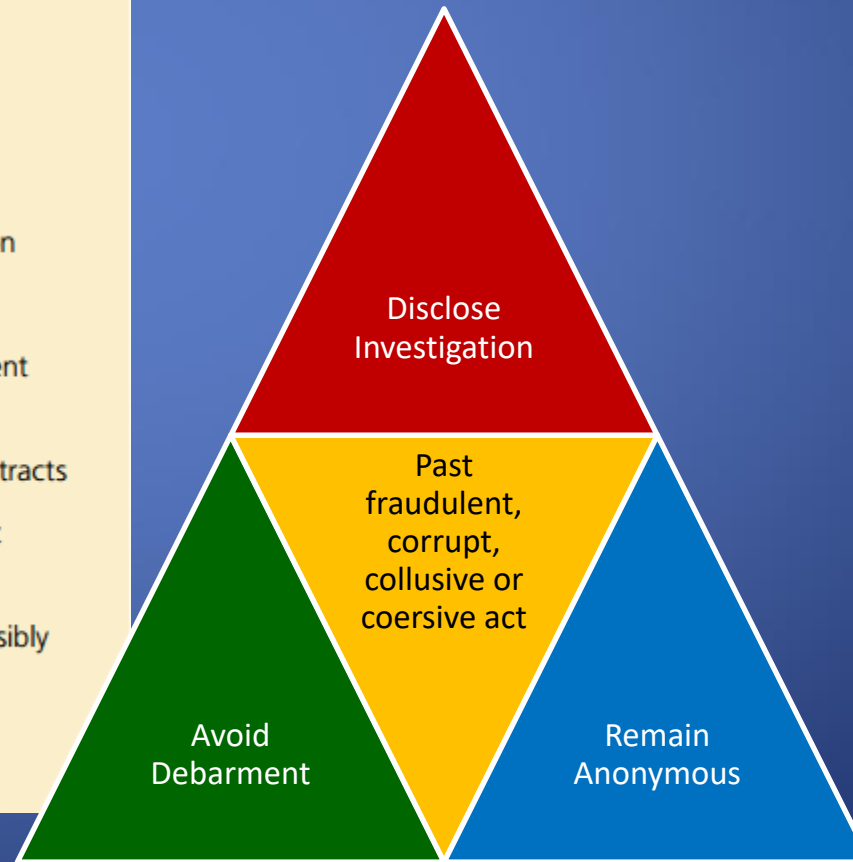
The Program

Firms, NGOs, individual consultants and contractors enrolled in the VDP disclose to the Bank the results of an internal investigation into past fraudulent, corrupt, collusive, or coercive acts in projects or contracts financed or supported by the Bank Group (IBRD, IDA, IFC, or MIGA). They must also commit to not engage in such misconduct in the future. Firms must implement a robust internal compliance program, monitored by a Bank-approved compliance monitor. Participants normally pay most of the costs associated with the VDP process.

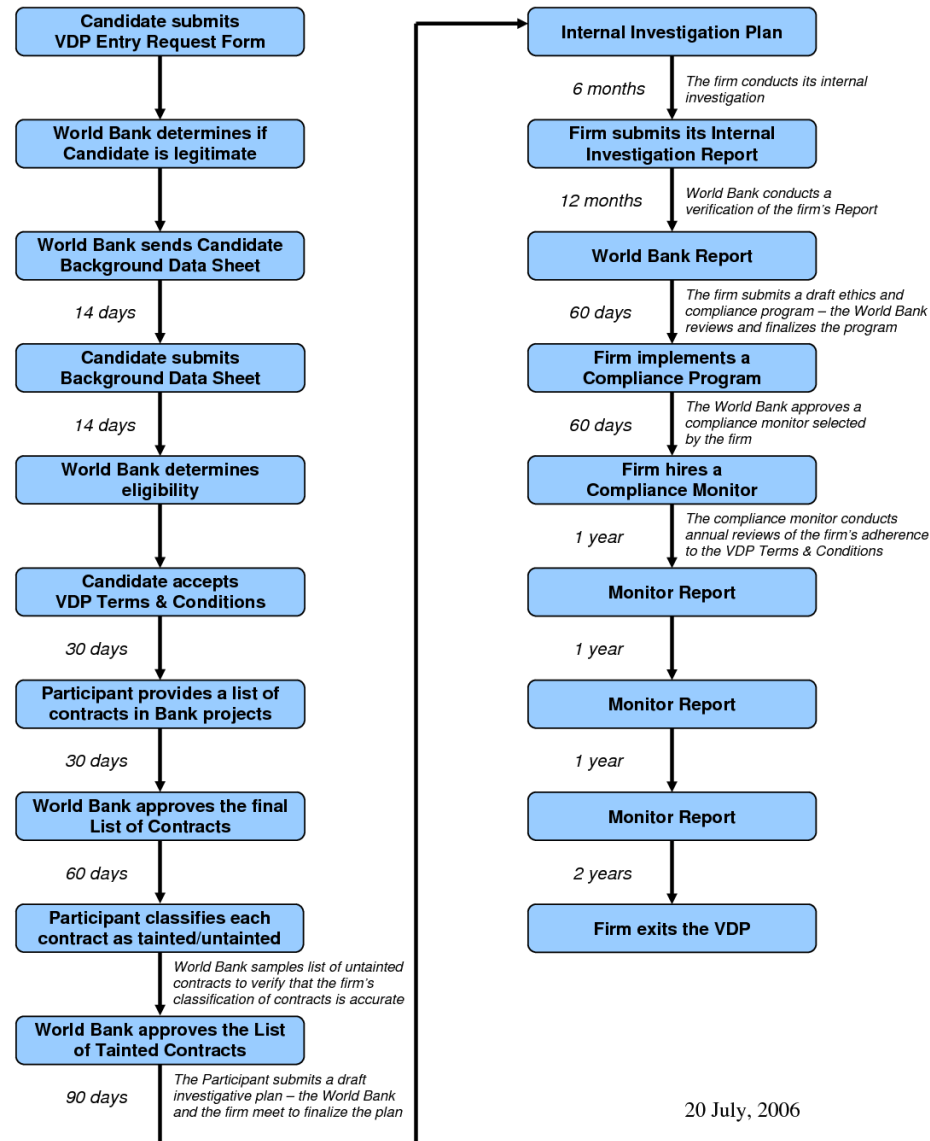
Benefits for Participants

In exchange for their full cooperation, participants:

- reduce the risk of being the subject of an INT investigation
- avoid the reputational damage of a public debarment
- remain anonymous as part of the confidentiality agreement which they sign with the Bank
- may continue to compete for Bank Group-supported contracts
- strengthen their corporate brand, building on a solid best practice compliance policy
- are able to work in a constructive framework and responsibly deal with “inherited” problems resulting from previous corporate acquisitions



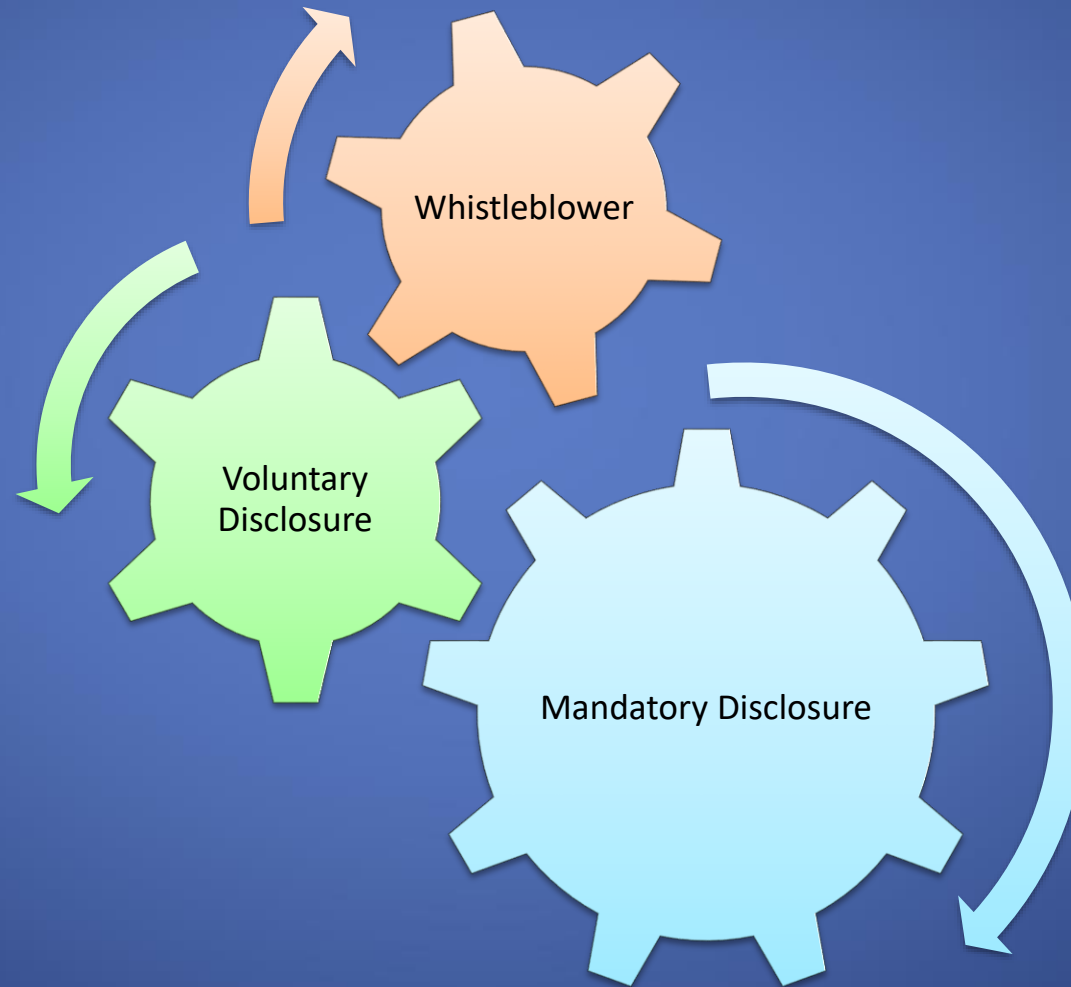
VDP Timeline



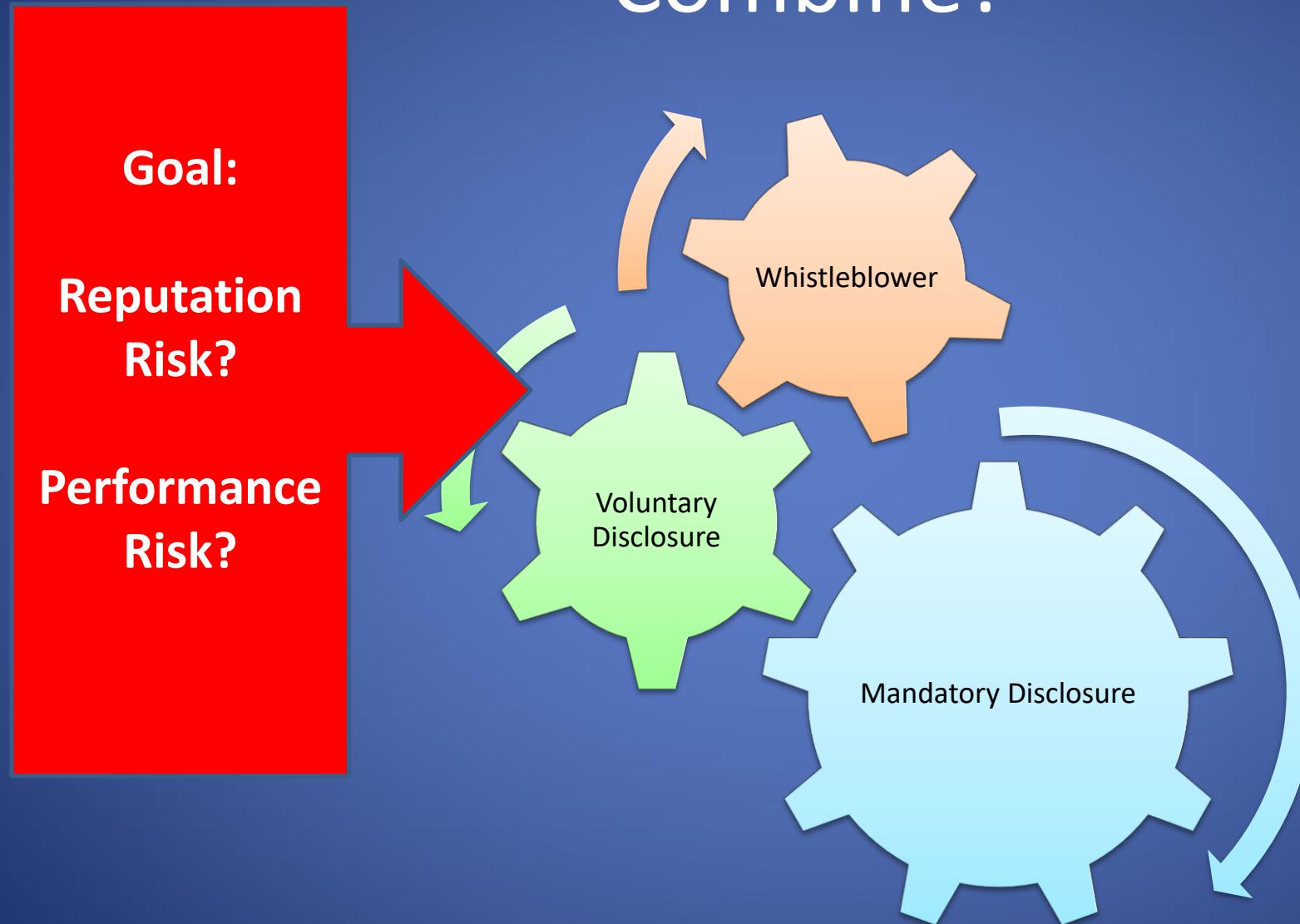
20 July, 2006

World Bank Voluntary Disclosure Program

Combine?



Combine?

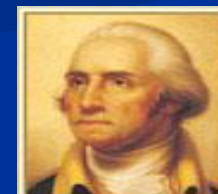


Reverse Auctions

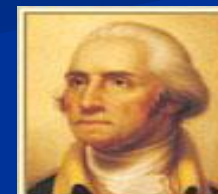


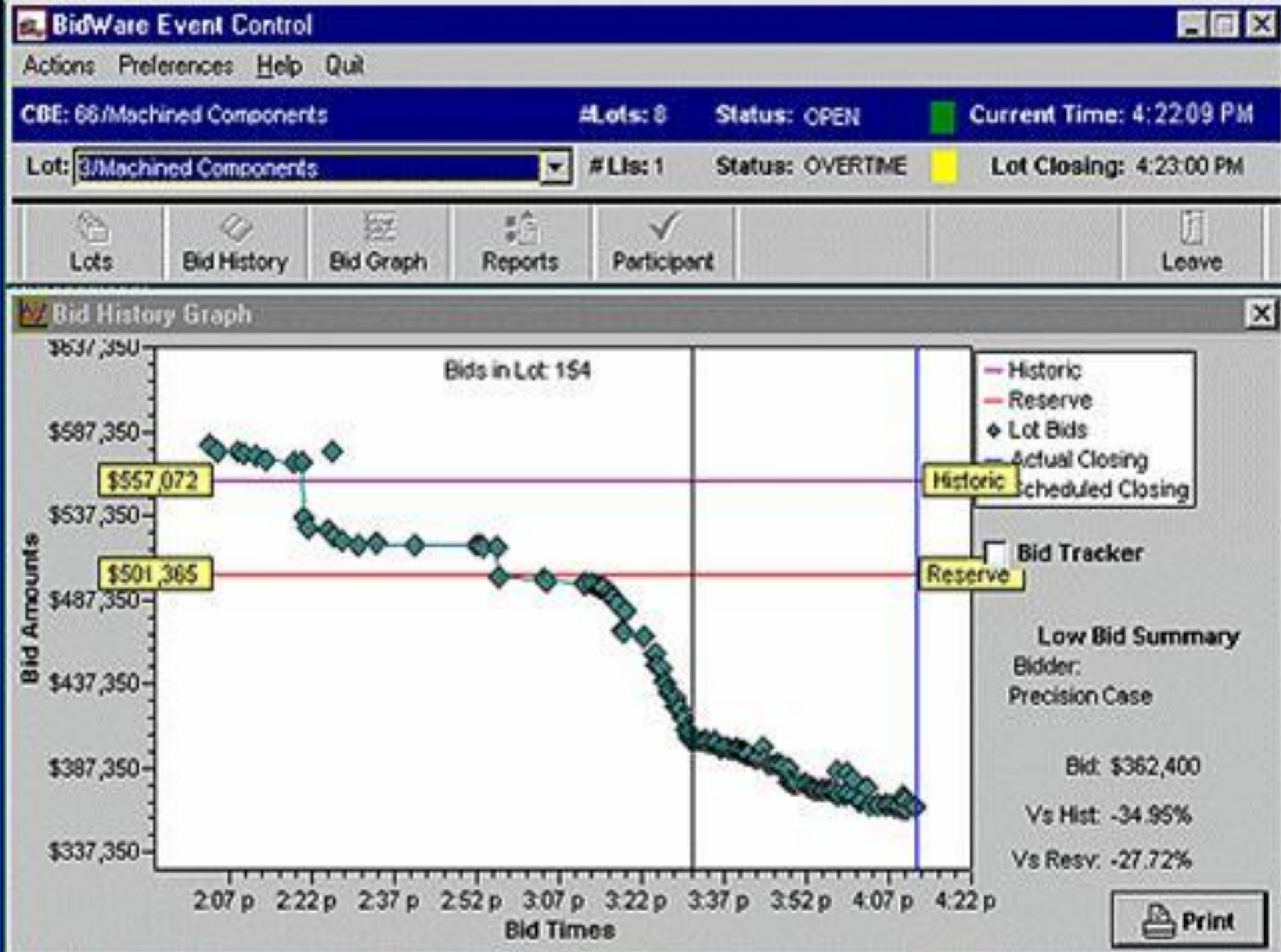
Assessing Electronic Procurement

- More efficient?
- More transparent?
- Discriminatory?
- Ready source of comparative lessons?



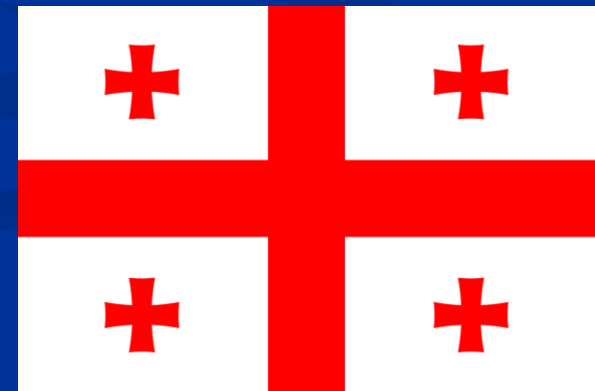
What Is a Reverse Auction?





Case study: Georgia – Using E-Procurement To Combat Corruption

- Link to presentation on Georgian e-procurement system:
 - <https://prezi.com/1yugudjld6rw/e-procurement-reform-in-georgia-everyone-sees-everything/>
- Transparency International – Georgia report on e-procurement system:
 - <http://www.transparency.ge/en/node/3117>



Georgia E-Procurement

← → ↺ 🏠 STATE PROCUREMENT AGENCY [GE] https://tenders.procurement.gov.ge/public/?lang=en

Apps FAR -- Part 9 C... Department of ... Towards Conve... King's College L... EU-Canada Co... ACC Faculty Ser... Other bookmarks

🏠 Sign in Users Exit

საპროცესო მენეჯერის სააგენტო
STATE PROCUREMENT AGENCY

Tender Registration Number

Procuring entities

Supplier

Tender proceeding status

Tender type

Procuring category

CPV codes

* CPV * CPV (ENG)

Date
registration date

Estimated value of procurement (from/up to)

SEARCH Reset

Last 5 changes of tender statuses

SPA160007374	Contract awarded 17.03.2016 22:15
Procuring entities: Grigol Tsulukidze Mining Institute Category: 38400000	
SPA160008991	Tender announced 17.03.2016 22:10
Procuring entities: The Union of Kindergartens of the Kobuleti Municipality Category: 30100000	
SPA160008355	Selection/Evaluation 17.03.2016 22:07
Procuring entities: Centre on the Information and Education on Environment Protection Category: 30100000	
SPA160006673	Contract awarded 17.03.2016 21:19
Procuring entities: LEPL "Justice High School" Category: 39100000	
SPA160004920	Selection/Evaluation 17.03.2016 20:58
Procuring entities: The Ministry of Defence of Georgia Category: 44100000	


Sample Georgian Auction


Back

SPA160008991
Tender documentation
Offers
Result

Tender type Simplified Electronic Tender

Tender Registration Number SPA160008991

Tender proceeding status  Tender announced

Procuring entities  The Union of Kindergartens of the Kobuleti Municipality

Tender announcement date 17.03.2016 22:10

Bids accepted from 22.03.2016 00:00

Deadline for bid submission 24.03.2016 14:00

Estimated value of procurement 8'290.00 GEL

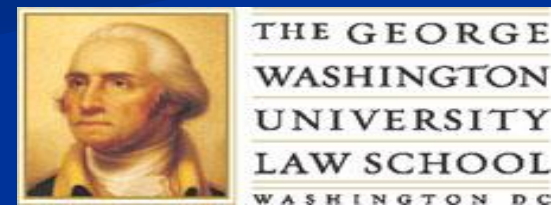
Bid should be submitted Including VAT

Procuring category 30100000-Office machinery, equipment and supplies except computers, printers and furniture

CPV codes

- 30141200 - Desktop calculators
- 30190000 - Various office equipment and supplies
- 30192100 - Erasers
- 30192121 - Ballpoint pens
- 30192130 - Pencils
- 30192133 - Pencil sharpeners
- 30192930 - Correction pens
- 30197110 - Staples
- 30197120 - Tacks
- 30197210 - Ring binders
- 30197320 - Staplers

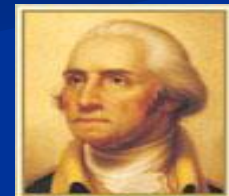
The Established U.S. Rule on Reverse Auctions



Which types of auction can be used?

- Type 1 – allowed; is the most common in UK
 - winning tender is chosen based solely on the auction phase (usually price only)
 - winner (usually lowest price) is apparent to participants during the auction process

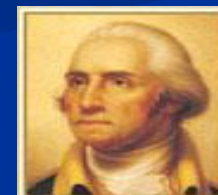
European Perspective
- Sue Arrowsmith



Which types of auction can be used?

- Type 2 – allowed
 - award is based on aspects of tenders assessed before the auction (e.g. quality) *and* on the auction (where usually only price only is subject to change)
 - winner is apparent during the auction process

European Perspective
- Sue Arrowsmith



Which types of auction can be used?

- Type 3 – not allowed under directives at all; was rare before new directives *except* for utilities
 - As in type 2, award is based on aspects of tenders not changed in the auction (e.g. quality) *and* on the auction
 - winner is *not* apparent during the auction process (e.g. quality is judged *after* the auction and then an overall judgment made on price/quality)

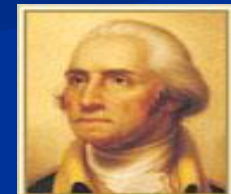
European Perspective
- Sue Arrowsmith



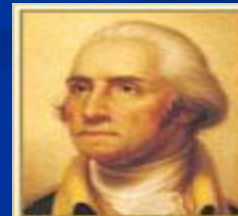
European Union Directive – Cont'd

The electronic auction shall be based:

- either solely on prices when the contract is awarded to the lowest price,
- or on prices and/or on the new values of the features of the tenders indicated in the specification when the contract is awarded to the most economically advantageous tender.



Any Recourse in GPA?

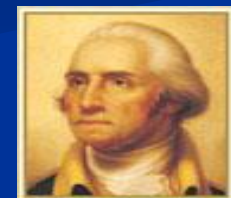


THE GEORGE
WASHINGTON
UNIVERSITY
LAW SCHOOL
WASHINGTON, D.C.

Revised GPA Defines Electronic Reverse Auction

Article I:

- (e) **electronic auction** means an iterative process that involves the use of electronic means for the **presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both**, resulting in a ranking or re-ranking of tenders;

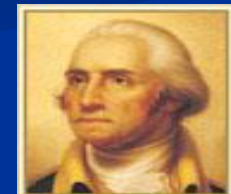


And GPA Regulates . . .

Article XIV Electronic Auctions

Where a procuring entity intends to conduct a covered procurement using an electronic auction, **the entity shall provide each participant, before commencing the electronic auction**, with:

- (a) the **automatic evaluation method**, including the mathematical formula, that is based on the evaluation criteria set out in the tender documentation and that will be used in the automatic ranking or re-ranking during the auction;
- (b) **the results of any initial evaluation of the elements** of its tender where the contract is to be awarded on the basis of the most advantageous tender; and
- (c) **any other relevant information** relating to the conduct of the auction.



Pending FAR Case on Electronic Reverse Auctions

Federal Acquisition Regulation: Reverse Auction Guidance

A Proposed Rule by the [Defense Department](#), the [General Services Administration](#), and the [National Aeronautics and Space Administration](#) on 12/07/2020



[Proposed FAR Rule](#) on Reverse Auctions

Published December 7, 2020; **comments submitted in February 2021.**

No previous federal rule -- though reverse auctions common since mid-1990s



Open FAR Cases
as of 10/12/2021



2015-038

12, 13, 17.8,
2.101, 52.217,
8.4

Reverse Auction Guidance

Implements OFPP memorandum, "Effective Use of Reverse Auctions." The memorandum provides guidance on the usage of reverse auctions, and was issued in response to recommendations within GAO report (Reverse Auctions: Guidance is Needed to Maximize Competition and Achieve Cost Savings, GAO-14-108).

03/02/2021 DARC Director tasked Acquisition Strategy Team to review public comments, draft final FAR rule. Report due 04/28/2021. Report due date extended to 11/10/2021.

Issues with Proposed Rule

- Proposed rule (FAR 17.804) requires contracting officers to **conduct market research** and **evaluate fee structures** of different auction service providers, and to **determine “that the use of a reverse auction service provider is cost effective”** – but **not to consider whether the selected reverse auction service provider delivers best value**
- Proposed rule does not explicitly **allow value-based auctions**
 - Value-based auctions **need careful structure**: as prices go down, non-price (quality) factors dominate
 - Congress and [GAO](#) have criticized **Lowest Price Technically Acceptable (LPTA)** awards, which make awards to lowest-priced acceptable offerors – and do not weigh technical strengths against price
- Proposed rule is not explicit on whether providers can use **standard commercial terms**

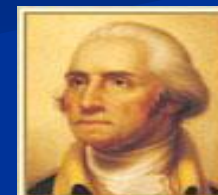
Comments on Proposed Rule

ANISA SPOTSWOOD - STUDENT



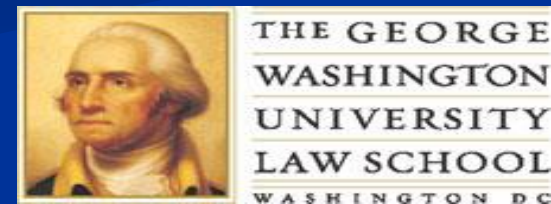
Mock Auction Rules

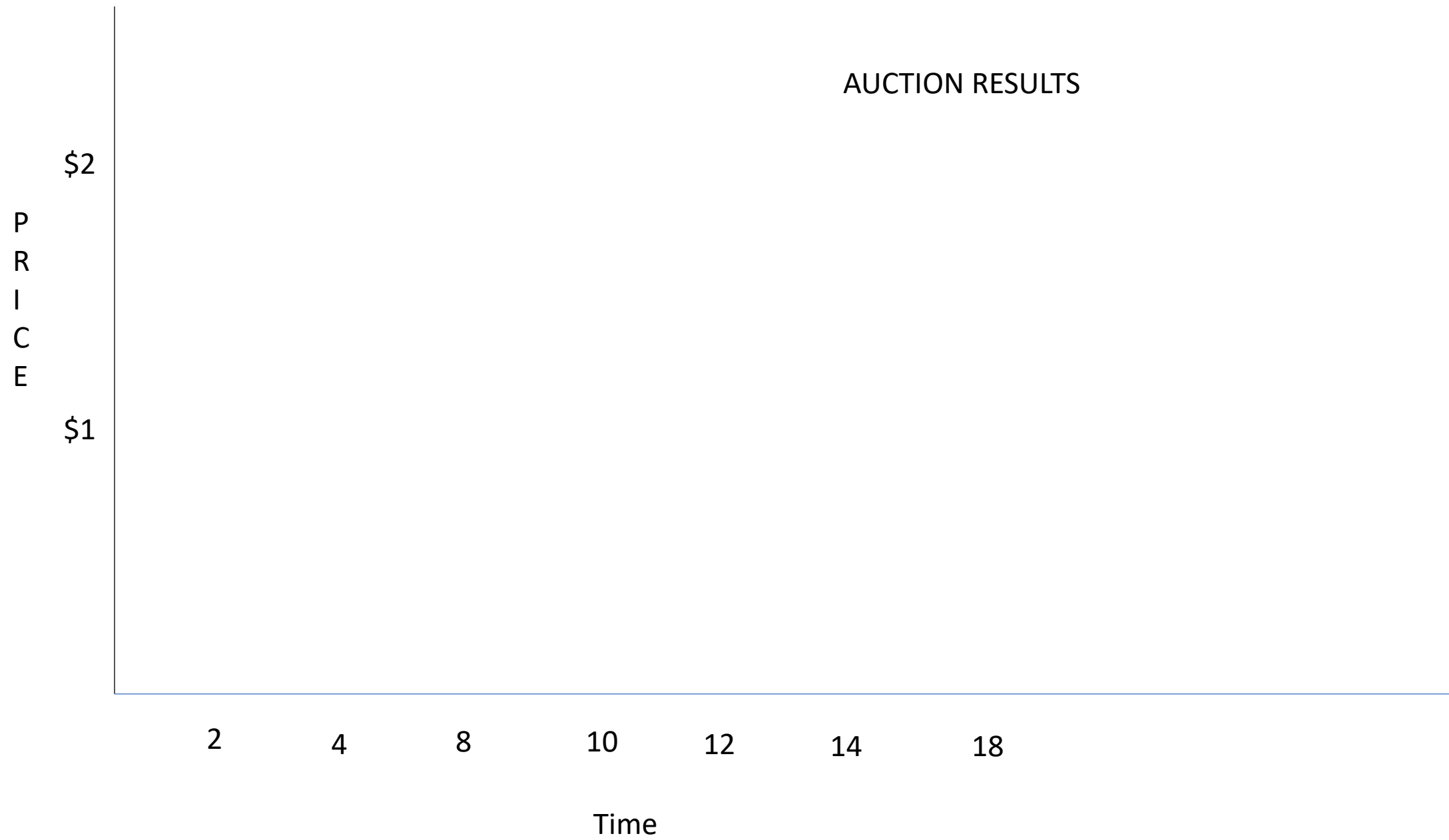
- Group descriptions drive bidding strategy
- Auction per mock solicitation
- U.S. rules regarding reverse auctions apply
- U.S. bid protest rules apply
- Bids to be submitted; low bid posted
- Professor is both auctioneer and arbiter



Mock Auction

- General Facts: Solicitation
- Team-Specific Facts (to be distributed)





Conclusion
