Public contracting in latin america

Public Contracting in Latin America: Institutions, practices, and corruption risks

A Study on the Level of Risk in Public Contracting Systems in 9 Latin American Countries

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1. Introduction

States allocate approximately 70%[1] of their national budgets to some form of contracting or procurement. The existence of corruption in such processes results in the public resources needed to promote the economic development of the country, combat poverty and ensure that citizens have access to basic rights such as education and health ending up in the pockets of certain government officials. Citizens are not the only ones to bear the brunt. The private sector also is greatly affected by it since the companies that participate in competitive bidding processes walk into a culture of unhealthy competition, which can undermine market processes.

In addition to the national laws and regulations that govern procurement and public contracting procedures, countries are subject to the international framework that they have voluntarily undertaken such as the Inter-American Convention against Corruption (IACAC) and the United Nations Convention Against Corruption (UNCAC). These conventions require the countries to comply with certain requirements intended to ensure that the countries use transparent, equitable, effective and efficient public contracting systems.

All Latin American countries have acceded to the IACAC and some to the UNCAC. Citing the provisions on public contracting and procurement in the conventions as a point of reference, the Transparency International Americas Department and the Public Contracting Global Programme at TI decided to conduct a study that would provide a general overview of the status of public contracting in Latin America. The purpose of the study was to answer the following questions:

- To what extent has each Latin American country upheld its commitment in terms of public contracting?
- How transparent are the public contracting systems in each Latin American country?
- To what corruption risks are they exposed? What measures must be put into practice to prevent these risks?

The answers to these questions can be used as a guide in determining the measures that must be implemented to prevent these risks.

[1] [1] UNPAN Statistical Databases Central Government Expenditures by Type and Function, as a percentage of all central government expenditure as of 1997. Source: IMF Government Finance Statistics. Calculations by TI-S. These results were obtained excluding wages and interest payments from the equation.

2. General Overview of the Methodology

The study was based on a project coordinated by TI's national chapters in 9 countries[2] in Latin America. Renowned experts in the area from each country answered a questionnaire during the second half of 2005 and their responses were validated by a focus group comprising national experts and then reviewed by an independent referee.

The questionnaire was developed by TI and seeks to measure whether risk exists, and if so, to what extent in a given public contracting system. The responses are based on 138 indicators that fall into one of four categories. Each seeks to analyse a different aspect of transparency in a given public contracting system:

- **Institutional Indicators**: What provisions does the law contain?
- **System or Context Integrity Indicators:** In what context is the law applied?, Are the conditions necessary for its application actually in place?
- **Perception Indicators:** In the opinion of the experts, is the law actually being applied, and how?
- **Performance Indicators:** According to the statistical data, is the law actually being applied, and how?

The indicators compare the response given to an ideal contracting system as determined by Transparency International's Minimum Standards for Public Contracting, the IACAC and the UNCAC, as well as international practices. The risk is then the difference between the actual and ideal systems.

The results obtained with the use of this tool give us important information about:

1) **Where major risks of corruption lie** in the contracting processes used in each country and

2) **Where to focus efforts for improvement** in the countries, not only in order to fulfil the commitments undertaken in anti-corruption conventions, but also to ensure that the countries are providing their citizens with contracting processes that are transparent and geared towards protecting the public interest and the proper use of government resources.

The purpose of the study is NOT to detect cases of corruption or compare one country to another but rather to present in a **regional report** the risks that lie in the public contracting systems used in Latin America. **National reports** that underscore where risk lies in national-level contracting systems are also included. The study seeks to measure how transparent the systems are, not how efficient. In such a way aspects of transparency that are being measured do not necessarily reflect inefficiencies

[2] Chile, Colombia, Costa Rica, Ecuador, Guatemala, Panama, Paraguay, Peru, and Venezuela

3. Findings and conclusions at the regional level[3]

This section will include the results obtained from applying the methodology in Latin America. The data does not attempt to establish any ranking by country but rather provides information about the level of existing risk in the public contracting systems used in the countries of the Americas.

How can the indicators be read?

As previously mentioned, there are four types of indicators and for each group, we will present the disaggregated results: institutional indicators, perception indicators, system integrity indicators, and performance indicators. A consolidated analysis will follow. It is important to note that **every indicator is expressed as a "risk percentage"** (100% being high risk, 0% no risk). The level of risk is determined according to the gap between the actual public contracting system in a given country and an "ideal" system.

3.1 Findings by Type of Indicator[4]

a. **Institutional Indicators**

The laws and institutions do not yield high levels of corruption risk in the area of contracting. **Higher levels of risk are seen appear in actual practice.**

- The average corruption risk in the area of contracting associated with institutions (laws and organisations) amounts to 35%.
- The average corruption risk associated with practices (their application and effectiveness) amounts to 64%.

Although this positive finding cannot be interpreted as an indication of the laws and institutions being perfect, it does reveal that, overall, this area faces lower levels of risk, especially when compared to practices or the application of the laws. The cases of **Costa Rica**, **Ecuador** and **Guatemala** were exceptions however, showing relatively higher levels of risk than the institutional indicator average.

Other findings:

- **Access to Information** appears to be the most vulnerable institutional aspect in all countries, demonstrating an average risk level of 46% across the region. (See Figure 1).

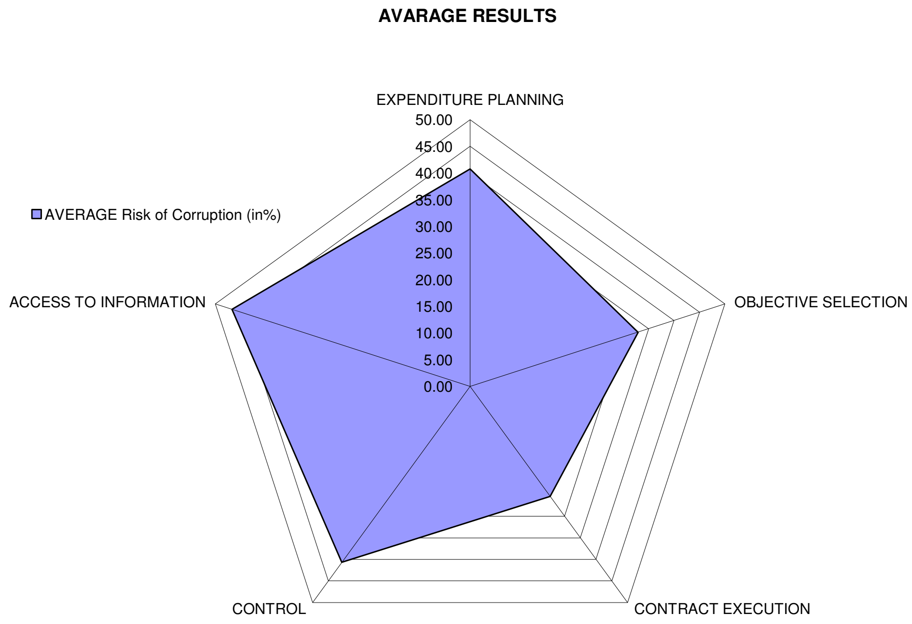
- Areas related to **auditing or planning of spending**, in terms of elements likely to increase propensity to risk of corruption, appear as the second most vulnerable.

- Areas related to the **objective selection of bidders** and **contract implementation and compliance** do not yield high levels of risk at the institutional level, except in the cases of **Costa Rica**, **Ecuador** and **Guatemala.** Nevertheless, we must consider the influence of other facets,

[3] For details and analysis by country, see country reports annexed.
[4] When data was gathered in Panama the country did not have the public contracting legislation in force today: *Ley de Contrataciones públicas*, Law 22/June 27 2006.

which may be indirectly related to more formal aspects of selection processes or of evaluating proposals, but which might also affect the objectivity of the award decision. These might include: norms relating to the access of information, conflicts of interest and budgetary planning.

Figure 1. Integrity System Indicators (Institutional)



b. Perception Indicators

Table 1 shows the aggregated results for perception indicators for each country analysed by topic or question. The main findings regarding this type of indicator are briefly described in the following paragraphs.

b.1 **Contracting Methods**:

- **Direct contracting** and less competitive contracting methods in general face higher levels of corruption risk because they lack the direct control prompted by competition and lead to situations of conflicts of interest. on top of the fact that it is easy to exploit this type of contracting as a mechanism for returning favours.

- Exceptions to contracting through **competitive bidding** are generally problematic. It appeared that, although the laws of almost all countries are transparent and the circumstances when such exceptions can be made are clearly stipulated, this type of contracting is abused in the majority of cases.

- In half of the countries, problems due to **multiple standards** (a number of applicable contracting laws) were encountered, making them difficult to apply.

b.2 **Professional Expertise** and **Conflicts of Interest** on behalf of the individuals involved in the contracting processes:

- There are risks associated with conflicts of interest, especially in relation to the individuals involved in drafting the terms of reference and evaluating the proposals. Eight of the countries stipulated that the staff who draft the terms of reference do not differ from those who evaluate the proposals and this could result in conflicts of interest at both stages of the process.

- The risk posed by the possibility of any individual involved in the drafting of the terms of reference later participating as a bidder is less prevalent. 5 out of 9 countries noted that this was not possible.

- Most of the countries also emphasised that one of the shortcomings in the administrative contracting processes from where corruption risk seems to stem primarily is the lack of professional expertise and scant technical training among the individuals in charge of drafting the terms of reference and evaluating and rating the proposals submitted.

b.3 **Contract Implementation:**

- The responses to the perceptions questions related to this topic focus on monitoring efforts carried out to ensure contract implementation and compliance and also on the potential abuse of early termination clause included in such. In consonance with the institutional indicators, the responses suggested that the early termination clause is not abused but there are indeed shortcomings in the monitoring efforts conducted to ensure contract implementation and compliance.

b.4 **Monitoring:**

- 8 out of the 9 countries evaluated noted there were problems in the effectiveness of the control institutions in identifying cases of corruption. This is compounded by the fact that most of the countries (8 in total) indicated that the audits on contracts are not performed adequately or are not legally instituted. (See Table 1).

- In terms of protecting the interests of those involved in contracting processes, more countries cited administrative control and review institutions as being more efficient than legal institutions. This could also be due to the fact that in most countries' legal systems, jurisdictional control is supplementary, that is, it is only used once administrative control (through governmental channels) has been performed.

b.5 **Participation of Civil Society:**

- 7 out of a total 9 countries indicated that the mechanisms for the participation of civil society in contracting processes are not used properly (or do not exist).

b.6 **Access to Information:**

- In none of the countries evaluated was it reported that the information regarding direct (or special) contracting is of high quality or available (See Figure 2). This becomes an especially problematic issue when evaluated alongside the responses on contracting methods and the risks associated with direct contracting. It is possible that the lack of transparency contributes to the abuses related to access to information indicated in previous questions.

- The indicators measuring the availability of information concerning the terms of reference and contract awards seems to function relatively well in 5 out of 9 countries. This, in contrast with the shortcomings noted with the indicators related to access to information, included under institutional indicators, and the differences noted (see ensuing paragraphs) on performance indicators, seems to suggest that although basic information on contracting is available to the bidders, it is not necessarily available to the public in general, or is not available in such a way that it can be used widely, which can lead to monitoring problems. It may also indicate that how access to information is handled does not entirely depend on a legal statute that provides for this. In general, the institutional indicators (see Figure 1) yield more negative results than those suggested by the perception indicators regarding practices. Countries such as **Colombia** and **Chile** reported relatively good practices in terms of access to information, and **Costa Rica** and **Peru** noted that although some serious problems have arisen and that there are still significant weaknesses in this area, progress has been made in the past few years.

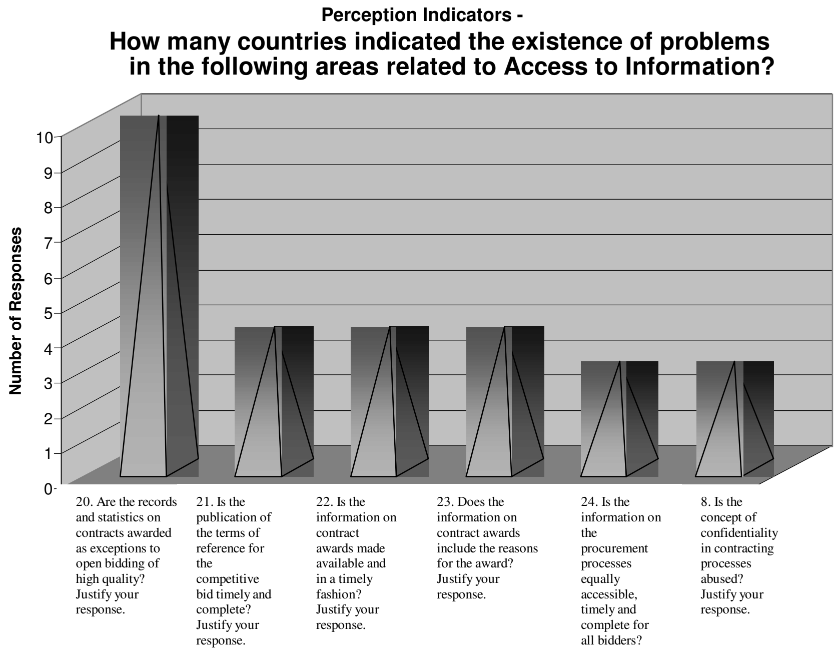
Table 1. Out of a total of 9 countries, how many indicated the presence of the following problems?

INDICATOR	RESPONSES[5]	Type of Question/Indicates risk	AREA
1. Can the criteria be manipulated in order not to apply the procurement law? Justify your answer	**7**	YES	Procurement Methods – Exceptions to Competitive Bidding
2. If there is more than one procurement law, are there contradictions between them or is there the possibility of arbitrary use? Justify your answer.	**5**	YES	
3. Are the existing exceptions to open bidding reasonable? Justify your answer.	**5**	NO	
4. Are the exceptions to open bidding or tendering requirements abused? Justify your answer.	**8**	YES	
5. Are the contracting methods different from open bidding, used adequately? Justify your answer.	**5**	NO	
6. Are the reasons for choosing one method or another for public contracting (competitive tendering or direct contracting) transparent? Justify your answer.	**3**	NO	
7. Does the staff in charge of evaluating and qualifying the bids in a public contracting process possess expertise in the field of contracting? Justify your answer.	**7**	NO	Expertise of Staff
10. Are the conflict of interest situations in elaborating terms of reference for public contracting clearly established and complied with? Justify your answer.	**8**	NO	Conflicts of Interest
11. Are there precise restrictions on the participation in public contracting for individuals that have participated in the studies on and the elaboration of terms of reference of a contracting process? Are these restrictions complied with? Justify your answer.	**5**	NO	
12. Is the staff qualifying the bids different from the staff elaborating the terms of reference? Justify your answer.	**8**	NO	
13. Are there cases of conflicts of interest in the evaluation and qualification of offers? Justify your answer.	**7**	YES	

[5] Indicates the number of times the risk indicator received a response

15. Is there an adequate monitoring or follow-up contract implementation and compliance? Justify your answer.	8	NO	Contract Execution and Cmpliance
9. Is the option of anticipated contract termination abused to facilitate corrupt deals? Justify your answer.	1	YES	
14. Is the supervision of the contracts of high quality? Justify your answer.	8	NO	Control
16. Has the performance of control organs enabled the adequate and correct identification of cases of corruption in public contracting?	8	NO	
17. Do the administrative review institutions established to resolve conflicts or problems arising during the contracting process function properly? Justify your answer.	6	NO	
18. Do the judicial institutions established to resolve conflicts or problems arising during the contracting process function properly? Justify your answer.	7	NO	
19. Are the legal mechanisms providing for the involvement of civil society in contracting processes applied adequately? Justify your answer.	2	YES	Involvement of Civil Society
20. Are the registers and statistics on contracts awarded as exceptions to open bidding of high quality? Justify your response.	9	NO	Access to Information
21. Is the publication of the terms of reference for public contracting adequate and complete? Justify your answer.	4	NO	
22. Is adequate (and timely) information available on the adjustments of the contracts? Justify your answer.	4	NO	
23. Does the information on adjustment of contracts include the underlying reasons for the adjustments? Justify your answer.	4	NO	
24. Is adequate and complete information on the contracting processes accessible for all bidders evenly?	3	NO	
25. Is the concept of confidentiality in contracting processes abused? Justify your answer.	3	YES	

Figure 2. Access to Information – Perception Indicators



c. Performance Indicators[6]

It was not possible to collect **statistical data** in all countries. Some information was obtained from **Chile, Colombia, Paraguay**, and **Venezuela** (See Table 2). The information continues to be based on different measures used in each country and therefore no comparison across countries is possible. Nevertheless, the fact that there is statistical information (or raw data) available regarding several aspects of the public contracting processes in terms of access to information bodes well for these countries and bears mention. At the same time, not having information available was interpreted negatively as a risk factor.

This information is vitally important for the monitoring efforts carried out both by public entities and independent stakeholders since it allows aspects of current practices to be directly observed in each of the contracting systems as opposed to provisions contained in the law. An example that illustrates this is the percentage of contracts that are processed through open bidding procedures. Even though the contracting statutes in every country include provisions that the prevailing contracting method is open bidding; in actuality, only a low percentage of contracts (except in **Chile**) are awarded by way of this contracting method. This is consistent across all the countries and justifies the concern over direct contracting and its impact on potential corruption risks.

[6] Based on statistical data available

Table 2. Performance Indicators

Indicator/Country	Colombia(1)	Chile (2)	Paraguay(3)	Venezuela (4)
% of contracts awarded through competitive tendering	31.95%	69%	10.77%	5%
% of modified contracts	8.39%		0.11%	
% of suspended contracts	2.10%			
% of institutions that publicise their contracts on the internet	49%	100%		
% of contracts publicised on the internet		100%	100%	
% of procurement processes subject to public hearings		69%		
% of contracts implemented according to procurement law		100%		62.60%
% of contracts publicised via mass media			100%	
% of contracts with legal proceedings			0.05%	
For detailed information by country, see the country reports annexed.				

(1)*Each government agency conducts its own contracting, and to date, no aggregated, unified information regarding this activity in the country exists.* This information has been compiled using the following sources (i) Single Contracting Portal and (ii) the State Contracting Information System – SICE. This information does not include all procurements nationwide as their publication on the single portal is not mandatory. In the case of SICE, although state agencies are required to record all information relating to the requirement, the system itself does not allow the information requested to be obtained. (iii) National Public Entities Integrity Index 2003 – 2004.

(2) The Directorate of Government Procurement and Contracting, *chilecompras*, showed its remarkable willingness to provide the information needed, however, given the structure of this service, in terms of indicators no. 5, 6, 7 and 8: no data is available and it is only possible to search for specific cases, whether performing a service-to-service search or by reviewing printed documentation at the Office of the Auditor General of the Republic. Indicators no. 9, 10 and 11: this data is available at the State Courts for civil matters and at the new Procurement and Contracting Court, although neither institution has information available online. Moreover, the Procurement Court will officially open its doors in October 2005. Lastly, as regards indicator Nº 14, since there is no legal requirement to publicise contracts via mass media, and doing so is voluntary, there are no official figures available.

(3) It refers only to those contracts attributed through open processes, or with the participation of. The data provided by the General Directorate of Public Contracting through Transparencia Paraguay, and that by statute, all contracts verified by the Directorate must be publicised on the electronic portal on the internet, as is the case for all contracts forwarded to the Directorate. Nevertheless, the General Directorate of Public Contracting has not responded with the percentage of institutions that publicise their contracts online, despite the fact that the law makes no exception regarding the publication requirement that is applicable to all institutions governed by said provision.

(4) Information obtained from the National Contracting Service for 2004 and the first quarter of 2005. In addition, it is important to note that several government agencies (approximately 10%) publicise their calls for tender and bidding conditions on their websites, but not information on signed contracts, a part of the public administration which is not disclosed.

d. System or Context Integrity Indicators

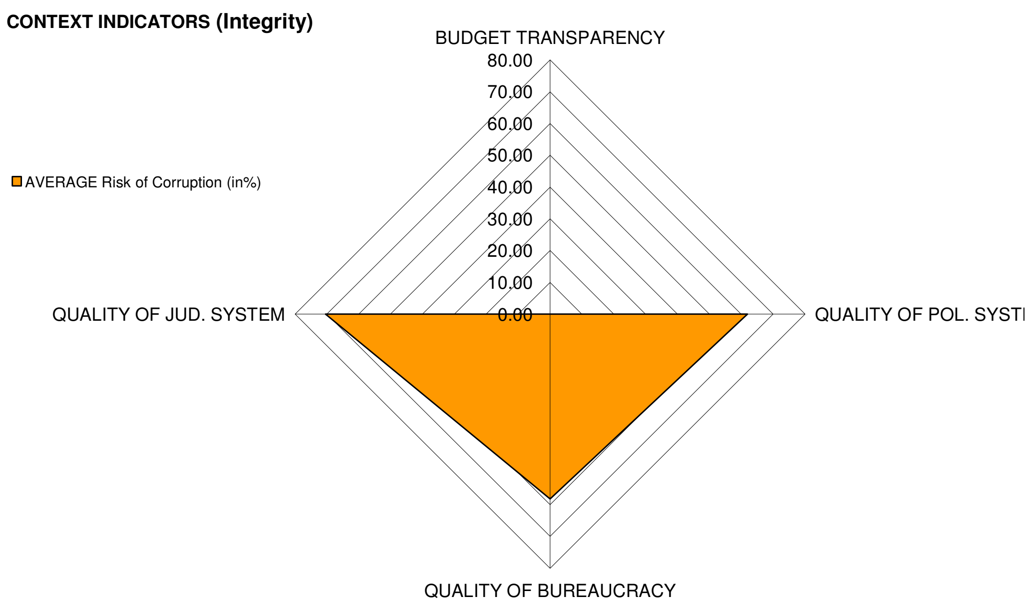
These indicators were included bearing in mind that contracting activities do not occur in an isolated fashion but rather in the context of institutional and governance arrangements that influence, whether positively or negatively, how they are conducted. Such context indicators are taken from existing surveys or indicators created from sources other than Transparency International[7].

One aspect that these indicators consistently highlight across all countries (except **Chile**) is the differing level of quality of the **legal system** (See Figure 3). This component contributes significantly to the potential level of risk faced in the area of contracting. This situation is also consistent with the results of the other groups of indicators that underline the deficiencies in control and jurisdictional activity.

In second place by order of importance is the issue surrounding the quality of the **political system** as a high risk factor.

Although it remains problematic, the quality of bureaucracy is less prevalent, except in the case of **Chile** where its role is equally as significant as the quality of the political system and in the case of **Costa Rica** where the level of risk within bureaucracy (85%) is even higher than in the judicial system.

Figure 3. Integrity System or Context Integrity Indicators:



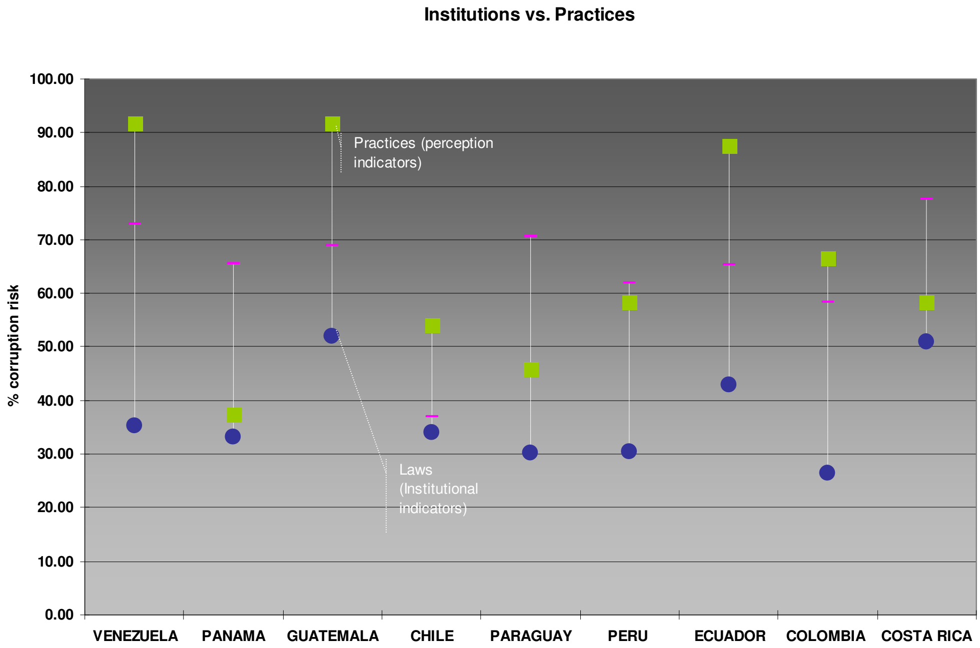
[7] See the sources used by reviewing the relevant information contained in the technical data section.

3.2 Consolidated Analysis

The following aspects were derived from the results by indicator we just presented as characteristics at the regional level:

- The institutions (the law of contracting and institutional designs) show relatively low levels of corruption risk.
- The corruption risks seem to be found more in practices (the way in which the law is applied or not applied). (See Figure 4).
- Many countries do not compile statistical data.

Figure 4. Laws vs. Practices



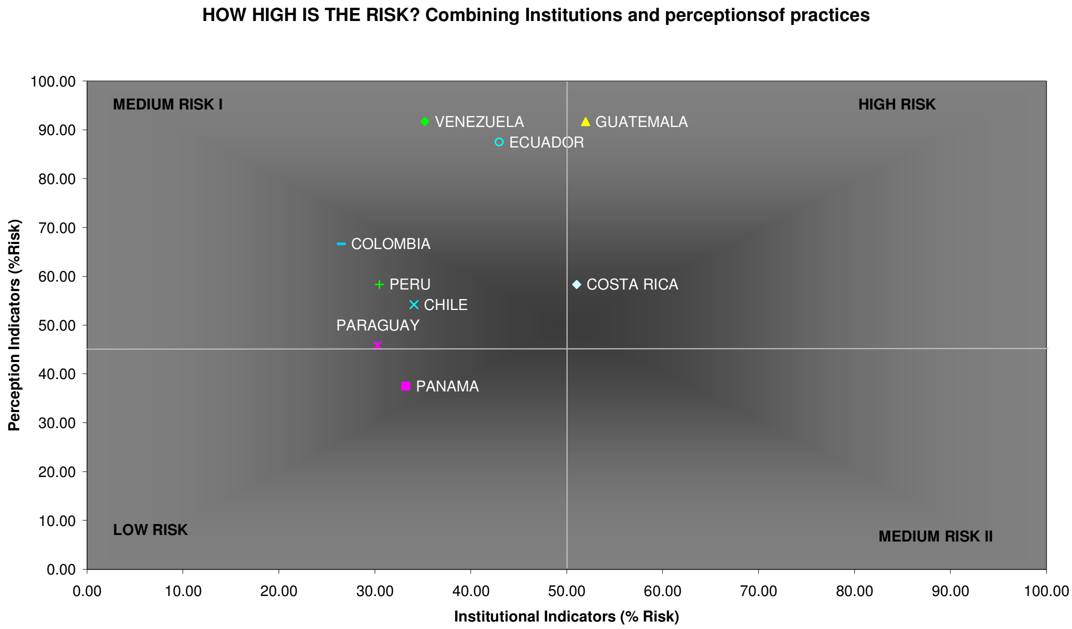
Looking at the institutional and perception indicators as a whole (see Figure 5), we can see that most of the countries face a **medium level of risk**. Looking at the laws only, the level of risk would be relatively low for most of the countries (except for **Guatemala** and **Costa Rica**, and **Ecuador** as well if looking closely, which would each face a medium level of risk).

Several especially problematic areas (**risk factors**) include – broadly speaking:

- **Access to information:** The findings indicate that on average, 46% of corruption risk in contracting is associated with topics relating to the access to information, particularly from an institutional point of view.
- **Control activities** face considerable risk (both at an institutional level and in terms of practices and context).
- The risk associated with **direct contracting** is particularly high for most of the countries as a result of the institutional shortcomings associated with this contracting method, due to a lack of transparency and abuse of exception rules, which on paper are straightforward and transparent.

- Budget planning and decision-making processes are also weak.
- The participation of civil society in monitoring, participatory, and control activities in the area of contracting is weak in many countries.

Figure 5. Levels of Corruption Risk in Public Contracting



4. Regional Recommendations

Among the recommendations offered based on the analysis of the results at the regional level, we would like to place special emphasis on the following:

- In addition to promoting new institutional reforms (and especially legal reform), it is advisable for the countries to focus on properly implementing existing norms.

- A new balance between prevention and control must also be struck. Without neglecting necessary preventive measures, it is important to emphasize the development of best practices in the area of control, both at the administrative level (contract supervision, review of administrative processes, etc.) and the judicial level. Significant shortcomings in these areas can render preventive measures less effective.

- Enhanced transparency (access to information) must also facilitate the participation of civil society in these processes. Attention must be directed towards the relationship between weaknesses in the area of access to information and weaknesses in the participation of civil society in such processes since both reinforce one another and together, they create possibilities for independent monitoring efforts and give rise to accountability. Moreover, civil society's involvement is necessary and must not substitute law enforcement, an essential responsibility of each government.

- The controls used in direct contracting must be improved, as well as the level of access to information in this type of contracting increased in order to thus facilitate monitoring, control and accountability processes[8].

[8] Arguments have surfaced on occasion that direct contracting is indispensable in various areas at the state level (especially in the case of joint venture commercial companies); nevertheless, this does not prevent direct contracting processes from becoming more transparent.

5. Technical Data

a. Background

The Public Contracting Monitoring System (PCMS) is a tool developed by TI's Public Contracting Regional Programme for Latin America and the Caribbean (TILAC) The project was divided into two phases. During the initial phase, the tool was designed and pilot tested in several countries in the region[9]. This phase concluded in April 2005. In the second phase, the tool was used to give structure to the indicators derived from this exercise to develop a study that would enable the public contracting measures cited in the provisions undertaken by the countries by signing/acceding to the Inter-American Convention against Corruption (IACAC) and the United Nations Convention against Corruption (UNCAC) to be evaluated from a regional perspective. It was applied in 9 countries.

b. Structure

This tool has been designed to enable TI national chapters and contacts and other stakeholders interested in observing and monitoring (measuring) public contracting systems and any changes they may undergo towards a convergence with or divergence from an "ideal" public contracting system in relation to transparency, corruption prevention, and control. Any gap that exists between the ideal system and the current situation is defined as "corruption risk." The **PCMS**, as such, is a tool that measures and identifies corruption risks, with no intention of creating a "ranking" or "index."

This "ideal system," referred to as (IS), has been defined on the basis of Transparency International's "Minimum Standards for Public Contracting"[10]; applicable provisions set forth in the UNCAC and IACAC; as well as existing international guidelines and internationally accepted practices. The indicators explain the idea that if the legislation, institutions, and practices of a given country coincide with the best practices of the ideal system, the corruption risk of the country will be lower than in countries where such elements are absent or underdeveloped. The IS indicators pivot on the following areas: planning, regulations, transparency, accountability, civic involvement, and control.

c. Components

The PCMS consists of 138[11] indicators. Some indicators measure the existence of legal mandates or institutional designs (institutional indicators), while others measure existing practices (performance indicators/perception indicators) or areas related to the integrity system (system integrity indicators).

Every indicator is expressed as a "risk percentage" (100% being high risk, 0% no risk). The level of risk is determined according to the gap between the existing public contracting system in a given country and an "ideal" system (IS).

The indicators are grouped into the following four separate categories:

Institutional Indicators. There are 86 yes/no questions that seek to determine if the country's public contracting legislation or relevant institutions have provisions established that in the "ideal system" are considered vital to reducing corruption risk. For example: Are competitive bidding exceptions regulated by statute? Are authorities required by law to publicise the decision to award a contract?

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[9] Argentina, Brazil, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Panama, Paraguay, and Peru

[10] The content of the document can be consulted in TI's 2005 Global Corruption Report and also figures below.

[11] For the complete list of indicators visit http://www.transparency.org/global_priorities/public_contracting/projects_public_contracting/pcms

The application of Institutional Indicators is carried out through the consultation of the current regulations of the respective country that are applicable to the public contracting process, as regards all significant variables, whether or not such regulations appear in a single contracting code.

There are 86 Institutional Indicators, grouped by component below:

Components	# of indicators
Public Expenditures Planning	6
Objective selection	23
Implementation and compliance	6
Control	31
Information	20

The indicators are formulated as close-ended questions (yes or no). The questions have been formulated so that, except in some instances, a response in the negative indicates corruption risk. A response in the negative, except in some instances, is assigned a value of 1, while a response in the affirmative, except in some instances, is assigned a value of 0.

Moreover, each indicator is weighted. The weight given to each is determined as a function of the relative importance that is assigned to the specific indicator in relation to the corruption risk of the respective component. The weight given is coded in terms of A, B, C:

A = 3, high risk,
B = 2, medium risk, and
C = 1, low risk.

As such, each indicator will be assigned a value, which will be determined by the type of response (in the affirmative or negative) and the weight it was given.

Accordingly, an indicator that has an A "degree of risk," and is responded to in the negative, will be assigned a value of 3, and so on and so forth for all other cases.

System (or Context) Integrity Indicators. These include 14 numeric indicators built on the basis of existing surveys conducted in the country, and that seek to assess the quality of the political system, the judicial branch, and the government. Although they do not directly or exclusively refer to public contracting, they assume the fact that the activity of public contracting does not transpire in a vacuum but rather within the context of a system of government and a society with individual characteristics. For example: the questions on formalities in the Global Competitiveness Report, or the questions on legal quality in the Heritage Foundation or Fraser Institute reports.

Performance indicators. These include 14 "hard-fact" indicators that gather important information relating to the practices used in contracting systems. Performance indicators are expressed in terms of percentages. For example: % of competitive bids compared to total number of contracts, % of entities that publish their contracts online compared to total number of government entities.

Perception Indicators. These include 24 open-ended questions that indicate how well such systems operate in practice. For example: in your opinion, are the exceptions to the use of competitive bidding processes as a contracting method abused?

Special attention is given to the issue of **access to information** in this questionnaire and among the indicators. Several questions focus on this issue within the institutional indicators and perception indicators; moreover, the performance indicators have also been designed in such a way that if the question cannot be answered because such information does not exist or is not available, this would constitute a risk associated with a lack of access to information.

All responses were provided by nationally renown experts and validated by an referee and a focus group.

d. Limitations

The following list includes the primary limitations that must be taken into account when interpreting the results obtained through the PCMS tool or using the data it has yielded:

- The PCMS tool has not been devised to provide any ranking between countries primarily because although the results are qualitatively comparable between countries, quantitatively they are not. This makes it difficult at this point in the development and use of the tool to generate lists where the countries are ranked according to the data.
- The numerical data is relevant to each country and applicable within each country, but of no use for making comparisons between countries. That is, if a given indicator in one country yields a figure of 50% but for another country, the same indicator yields 55%, we cannot say with certainty that the figure for the second country was any worse than that calculated for the first. Nevertheless, if within the first country, the given indicator yields a figure of 50% and another indicator yields a figure of 55%, it IS in fact possible to affirm that the second indicator for that country poses a greater threat than the first indicator.
- For the same reasons as those listed above, at this point in the development of the tool and its use, it is not possible or feasible to use the data to perform econometric regressions.
- It is important to keep in mind that this tool cannot be used (nor seeks to do so) to identify cases or acts of corruption. As such, it does not allow for any statements based on such.
- It is also important to keep in mind that the tool does not measure the efficiency of the contracting systems. Nevertheless, the ideal system on which it is based assume transparency measures that do not compromise the efficiency of the contracting processes.

e. Referents in the OAS Convention (IACAC) and the UN Convention (UNCAC)

For the purposes of monitoring the issue of public contracting, the referent in the **Inter-American Convention against Corruption** (IACAC) is found most notably in the following excerpt taken from the document:

Article III (Preventive Measures)

"*For the purposes set forth in Article II of this Convention, the States Parties agree to consider the applicability of measures within their own institutional systems to create, maintain and strengthen:"*

Section 5: "Systems for government hiring and procurement of goods and services that assure the openness, equity and efficiency of such systems."

The questionnaire focuses therefore on regulations, institutions and practices related to public contracting, as well as on aspects of the institutional context that help encourage it. Nevertheless, the IACAC must be interpreted precisely. In this connection, the components of the public contracting questionnaire, while specific to contracting, have a bearing on other areas addressed in the convention such as the existence of standards of conduct and the prevention of conflicts of interest (Article III, Section 1), the existence of high-level control bodies (Article III, Section 9) and the existence of mechanisms to encourage participation by civil society in efforts to prevent corruption (Article III, Section 11), *inter alia*.

In turn, the referent in the **UN Convention Against Corruption** (UNCAC) is found most notably in the following excerpts taken from the document:

Article 9, Public Procurement and Management of Public Finances

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

public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

establishment, in advance of conditions for participation, including selection and award criteria and tendering rules, and their publication;

the use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;

Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements."

As in the case of the IACAC, the latter must be interpreted precisely, in such a way that implicit mention is made also to elements such as those outlined under Article 10 in relation to public information, under Article 12 in relation to the private sector, and under Article 13 in relation to civil society participation, for example.

We have used Transparency International's Minimum Standards for Public Contracting (see Box 1) to put the provisions of both conventions into action. Although both conventions refer to efficient, transparent contracting systems, they provide differing degrees of detail, being the IACC more general and open to interpretation, and the UNCAC somewhat more detailed and precise. As such, what is understood by efficient and transparent must be defined. Moreover, the UNCAC does not list elements that are essential to the transparency of the system. As such, the Minimum Standards help fully flesh out the plan for transparency referred to in the general principles of both conventions.

The indicator questionnaire focuses on the issue of transparency of each system without intending to assess their efficiency. Nevertheless, the working hypothesis is that whichever transparency mechanisms are used do not abound in inefficient systems and as such, the two are, in this case, compatible concepts.

Box 1. Transparency International's Minimum Standards for Public Contracting

Transparency International's Minimum Standards for Public Contracting provide a framework for preventing and reducing corruption based on clear rules, transparency and effective control and auditing procedures throughout the contracting process.
The standards focus on the public sector and cover the entire project cycle, including needs assessment, design, preparation and budgeting activities prior to the contracting process, the contracting process itself and contract implementation. The standards extend to all types of government contracts, including:

- Procurement of goods and services
- Supply, construction and service contracts (including engineering, financial, economic, legal and other consultancies)
- Privatisations, concessions and licensing
- Subcontracting processes and the involvement of agents and joint-venture partners.

Public procurement authorities should:

1. Implement a code of conduct that commits the contracting authority and its employees to a strict anti-corruption policy. The policy should take into account possible conflicts of interest; provide mechanisms for reporting corruption and protecting whistleblowers.
2. Allow a company to tender only if it has implemented a code of conduct that commits the company and its employees to a strict anti-corruption policy.[12]
3. Maintain a blacklist of companies for which there is sufficient evidence of their involvement in corruption activities; alternatively, adopt a blacklist prepared by an appropriate international institution. Debar blacklisted companies from tendering for the authority's projects for a specified period of time.
4. Ensure that all contracts between the authority and its contractors, suppliers and service providers require the parties to comply with strict anti-corruption policies. This may best be achieved by requiring the use of a project integrity pact during both tender and project execution, committing the authority and bidding companies to refrain from bribery.
5. Ensure that public contracts above a low threshold are subject to open competitive bidding. Exceptions must be limited and clear justification given.
6. Provide all bidders, and preferably also the general public, with easy access to information about:
   - Activities carried out prior to initiating the contracting process
   - Tender opportunities
   - Selection criteria
   - The evaluation process
   - The award decision and its justification
   - The terms and conditions of the contract and any amendments
   - The implementation of the contract
   - The role of intermediaries and agents
   - Dispute-settlement mechanisms and procedures.
   - Confidentiality should be limited to legally protected information.
   - Equivalent information on direct contracting or limited bidding processes should also be made available to the public.
7. Ensure that no bidder is given access to privileged information at any stage of the contracting process, especially information relating to the selection process.
8. Allow bidders sufficient time for bid preparation and for pre-qualification requirements when these apply. Allow a reasonable amount of time between publication of the contract award decision and the signing of the contract, in order to give an aggrieved competitor the opportunity to challenge the award decision.
9. Ensure that contract "change" orders that alter the price or description of work beyond a cumulative threshold (for example, 15 per cent of contract value) are monitored at a high level, preferably by the decision-making body that awarded the contract.
10. Ensure that internal and external control and auditing bodies are independent and functioning effectively, and that their reports are accessible to the public. Any unreasonable delays in project execution should trigger additional control activities.
11. Separate key functions to ensure that responsibility for demand assessment, preparation, selection, contracting, supervision and control of a project is assigned to separate bodies.

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[12] The Business Principles for Countering Bribery, developed by Transparency International and Social Accountability International, provide a framework for the development an effective anti-corruption policy (see www.transparency.org/building_coalitions/private_sector/business_principles.html)

12. Apply standard office safeguards, such as the use of committees at decision-making points and rotation of staff in sensitive positions. Staff responsible for procurement processes should be well trained and adequately remunerated.
13. Promote the participation of civil society organisations as independent monitors of both the tender and execution of projects.

6. Organisations coordinating the Study and Experts implementing the methodology

Countries	Coordinating organisation	Expert
Chile	Chile Transparente	Carmen Valenzuela
Colombia	Transparencia por Colombia	Transparencia por Colombia
Costa Rica	Transparencia Costa Rica	Juan José Sobrado
Ecuador	Corporación Latinoamericana para el Desarrollo	Andrés Tobar
Guatemala	Acción Ciudadana	Marvin Flores
Panama	Fundación para la Libertad Ciudadana	Patricio Mosquera
Paraguay	Transparencia Paraguay	Javier Parquett
Peru	Proética	Juan Carlos Morón
Venezuela	Transparencia Venezuela	Silvia Salvatto

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