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The Duality of Public Procurement: How Can Cities Engage in Ethical and Legal Procurement Procedures?

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Abstract

Despite its crucial role, public procurement often suffers from neglect and disregard until a city or public officer commits the misuse or misappropriation of public funds. As stewards of taxpayers' dollars, public officers are tasked with traversing the often forked paths of ethicality and legality. These paths manifest in every instance and aspect of life, from acts of impulsiveness to the careful consideration of outcomes. Ultimately, a path must be taken, which will carry a consequence subject to criticism and proportionate to its outcome. Yet, despite this notion, unethical and illegal practices are invariably committed. There are few greater opportunities for corruption than those offered by the public sector, notably in the field of public procurement.

This article delves into the many aspects of procurement in the public sector and sheds light on commonly recorded incidents. Once these occurrences are identified, this article will outline what can be done to mitigate the accompanying consequences. This article focuses on emphasizing what public procurement entails, where the legal and ethical lines are crossed, why those lines are so frequently breached, and what procedures can be utilized to combat policy violations.

Introduction – A Preamble for Procurement

Public procurement is ubiquitous, as everything utilized by government is acquired through procurement measures. Procurement entails everything from ten-ton commercial air conditioning units and half a million-dollar garbage trucks to small-dollar commodities like printer paper and hands-free soap dispensers. Substantial purchases, such as a multimillion-dollar infrastructure project or an insignificant single spool of electrical wire, are classified as procurement. In the 2023 fiscal year, the City of Nacogdoches processed procurement transactions totaling nearly \$30 million with over 14,000 invoices processed. Examples of these products and services include components for heavy equipment, chemicals for water treatment, ammunition for police, and large-scale infrastructure projects. This does not include acquisitions made via personnel purchasing card use. This value serves as quantifiable evidence of the magnitude of procurement. Considering that Nacogdoches is only one of nearly 1,200 cities in Texas, one can speculate on the sheer scale of procurement statewide.

The importance of public procurement is further substantiated by its legal precedent and regulation in Texas. State and local procurement are regulated and enforced by the Texas Constitution and Statutes Title 8: Acquisition, Sale, or Lease of Property, Subtitles A, B, and C. These statutes lay a concise framework for procured products and services using value-based thresholds, strict procedures, laws tailored to protected classes, and impartially designed competitive-based practices to ensure fairness and equity when seeking bids. The State Constitution also includes sections regarding contracts and written legal agreements, exemptions

that supersede competitive bidding requirements, and laws regarding local preference as it pertains to economic development. Each of these facets is designed to mitigate infractions and enforce the utmost ethical and legal procedures. This begs the question: Are violations of public procurement procedures a common occurrence? By the end of this article, the answer to this question will be made abundantly clear, as well as what can be done to ensure it remains a question and not an abject reality.

Procurement in Nacogdoches – A City in Disarray

Municipal transparency is a fundamental priority, and the City of Nacogdoches has only recently (October 2021) centralized what had been almost a decade of decentralized purchasing. The Finance department hired a purchasing and contract specialist, and their joint efforts allowed the city to swiftly and decisively reclaim city procurement as a centralized process. With a staff of roughly 350 budgeted positions, it would be an understatement to claim that Nacogdoches faced an uphill battle to separate purchasing and contracting entirely from individual departments. The initial three months consisted of revising templates, restoring a mutually beneficial relationship between purchasing and the other departments, and identifying an action plan that led to the total centralization of internal purchasing policy. The next year was spent collecting contracts from departments, as the years of decentralization led to departmental record-keeping in a physical capacity. Many contracts had to be sourced from vendors as departments were unable to locate original copies.

The following year also included the revision and reinstatement of a formerly outdated procurement policy. The new, recently adopted policy (January 2023) consists of 82 pages over 17 chapters of procurement policies and procedures that were jointly designed by the Purchasing and Finance departments to provide a complete procurement guide to city staff. The final nine months of the two-year timeline were spent enforcing the policy and newly determined processes, conducting in-person training sessions, and fine-tuning minute details of the procedures in an attempt to mutually benefit departments. The training sessions mentioned were conducted informally as a workshop-style activity. This was intentionally designed to provide an avenue for employees to comfortably voice their questions and concerns as opposed to being lectured on policy for an extended period. So far, departments have been highly receptive to the new policies, showing markedly decreased errors in the quotation of bids as well as the drafting of requisitioning documents. Departments have also shown increased comfort levels in communicating with the procurement officer, addressing another common problem: a lack of communication when concern or uncertainty arises in the purchasing process.

Great care was taken to provide “dual-threat” processes that met ethical and legal policies but refrained from being an additional encumbrance on the duties of departments. Over these two years, many concepts were learned through trial and error, many violations were caught and found to be unintentional breaches, and all contracted agreements have now been retained and recorded properly. This fairytale ending, however, is not evident in every city. This allows for a segue into the identification of procurement processes and many unethical and illegal opportunities.

The Fork in the Road – The Perils of Procurement

In the realm of local government procurement exists a term that should be championed throughout all areas of professionalism, which is integrity. In the context of this article, integrity

in procurement involves using public funds, assets, available resources, and/or public authority with the best interest of the citizenry in mind.¹ Any deviation from that directive should be considered an ethical and legal violation of local policy and potentially state/federal law. When there is an absence of procurement integrity, it can lead to procurement fraud. The definition of procurement fraud would be an intentional misuse of public funds, assets, authority, or even available resources to avoid proper procedure or to achieve personal gain. For example, government entities are no strangers to what are referred to as “quid pro quo” deals, which are historically infamous agreements between two or more parties that translate from Latin origin loosely as “something for something.” This concept will be expounded upon further in the next section when bribery and kickbacks are mentioned. Table 1 outlines the probability and impact of the most common types of corruption-based risks in public procurement.²

A noteworthy aspect of this table is that five of the thirteen types of corruption risks are related to competitive bidding procedures. Collusive bidding-related corruption tends to taint competitive bidding procedures, inhibiting the ability to obtain the best value for the city and its residents while also ruining the competitive equality of the procedure. Another highly impactful form of corruption in the procurement field is bribery and kickbacks, which embody the “quid pro quo” phrase by offering to do a requested service or make a biased purchase in exchange for a favor or personal gain. The third commonly seen type of corruption risk is a conflict of interest. This occurs when an officer has a vested interest in the success of a certain vendor, thus motivating the officer to steer business to the vendor with whom they share the interest. These three forms of corruption risks have the highest probability of occurring in public procurement (see Table 1) with high or medium impact accompanying the risks. These corrupt practices tend to carry an associated risk to cities, and a vital aspect of financial accountability and responsibility is the assessment of risk. In this context, risk can be defined as the risk levied against the parties influenced by the risk-takers. The risk is carried by the city and its residents.

Table 1. Probability and Impact of Corruption Risks

Type of Risk	Probability	Impact
Bribery and Kickbacks	High	Medium
Conflict of Interest	High	Medium
Collusive Bidding	High	High
Shell Companies	Medium	Medium
Leaking Bid Data	Low	Medium
Unbalanced Bidding	Low	Medium
Bidding Procedure Manipulation	Low	Low
Split Purchases	Medium	Low
Rigged Specifications	Medium	Medium
Excluding Qualified Bidders	Medium	High
Unnecessary Purchases	Low	Medium
Post-Implementation Fraud	High	Medium
Donations to Political Parties	High	High

Delving into Duplicity – Assessing the Motives

Bribery and kickbacks endanger all parties, but the citizenry is the sole victim of the activity. Manipulating an event in the effort to obtain personal gain will skew the outcome of said event, potentially leaving the beneficiary of the deal with a result less favorable when compared to the result that would ensue ethically, legally, and impartially. Suppose a procurement official is expecting to receive bids for playground equipment. During the bidding phase, one bidder, who is in danger of insolvency, expresses in a private conversation with the procurement official that their

firm being chosen would be a cause for celebration. The bidder then invites the procurement official out for a round of golf and a steak dinner. That would be a conditional offer of personal gain at the cost of a skewed decision. That may result in lower quality playground equipment, lower quality installation, or even a worse warranty than the other bids provide.

Bidding-related corruption negatively impacts entities and vendors who, without tampering or collusion, would otherwise be awarded work or jobs that congruently benefit the city and residents. Hypothetically, if bid data were leaked to a competing bidder that the public official preferred, that competing bidder would be able to undercut costs, commit to a shorter project time of completion, or even release secret processes and confidential information. Therefore, the risk is inequitably placed on the bidder with leaked information. To aid in combating these acts, the United States is known to be more stringent in their legislation regarding suspension and debarment of competitive procedure violators when compared to other countries.³ Perhaps the solution to local public procurement bidding corruption would be more severe repercussions for violators.

Conflicts of interest occur on a spectrum of severity, ranging from minor infringements to syndicate-like operations that can manipulate every aspect of an organizational process. For example, a City Engineer with former ties to or stakeholder value in an engineering firm would be able to manipulate the design and engineering awards to their engineering firm in multiple ways. Professional services, land surveying, architecture, and other services (as outlined in the Local Government Code Sec. 252.022) are exempt from bidding based on cost, as these services are heavily dependent on quality as opposed to cost. Due to this, professional services are awarded based on the most qualified firm by way of a statement of qualifications. This document is reviewed by the City Engineer and is at their sole discretion as to who is to be awarded projects. If a City Engineer assumes a personal gain from a certain firm being awarded, that would be a conflict of interest.

Unfortunately, these are common and impactful forms of corruption in public procurement. There still exists a multitude of other corruptive acts in public procurement. With that said, how can cities ensure that mitigatory measures are put in and kept in place?

The Four P's – Put Policies and Procedures in Place

Before exploring the policies and procedures gets too extensive, it is worth mentioning the “why” of implementing a coordinated policy that can be enforced. The why in question is: “Why would a municipality find it beneficial to impose a policy for procurement?” Policies are historically proven necessities in organizations as they provide comprehensive and vital information in an easily accessible location. Policies can be used to teach new hires, referenced in key situations as precedent, and updated if information becomes dated or needs revision. Policies are also approved by governing bodies, ensuring that the information conveyed within is agreed upon and approved as to content.

As an anecdotal example, the City of Nacogdoches regularly experienced violations of state law as well as the city charter. However, this was rarely, if ever, done knowingly and willingly. City departments would unintentionally make purchases in violation of policies, which is an occurrence not exclusive to Nacogdoches. This act is very often due to the failure of interdepartmental coordination of those purchasing procedures, such as a lack of control function or the development of policies. Another evident array of reasons are externalities such as the market, legal, political, organizational, and socioeconomic factors.⁴ Ultimately, the responsibility

and duty of the public officer obligate them to create and enforce policies that keep the taxpayers' interest an absolute priority. Therefore, the first step to establishing an enforceable and trainable policy would be to identify if there is a currently imposed policy. If so, the next step would be to identify faults or contradictions within the rules that are ambiguous or confusing to the reader. Another vital aspect of designing a quality and complete policy is to keep the reader in mind. Legal precedent is one of the most difficult forms of literature to comprehend. Simplifying the language and terminology will allow the entire spectrum of employees to understand and replicate in the field. Ensuring the language is concise and legible while also ensuring no conflicting data or missing information (due to lack of updating or incompleteness) will yield a more approachable and referenceable policy.

Unsurprisingly, employees who are responsible for making purchases on behalf of the city cannot be reasonably expected to be substantially knowledgeable or well-versed in procurement laws. After all, they are tasked with duties entirely separate from procurement. That responsibility falls upon the procurement officer that oversees city purchasing. Even then, much like attorneys, there is far too much content to have memorized. This leads to the next procedure that leads to a complete and effective policy: having an open-door policy and sufficient comprehension of navigating legal precedent. The procurement officer can mitigate a majority of potential infractions by being readily available to all employees to answer questions or lend guidance on processes. Being comfortable with referring to statutes and laws will also aid in answering questions that cannot be immediately answered. There is also a psychological characteristic to having a broad familiarity with the laws and statutes. If the procurement officer can readily cite and quote the law when answering questions, it can be perceived as the procurement officer clearly being a qualified authority in the matter. Using these concepts with the statutory laws will undoubtedly yield better interdepartmental acknowledgment.

Despite the negative reception, training sessions remain one of the undisputed pillars of educating and enforcing policies and procedures. Providing a mandatory training session allows for a direct line of communication between the procurement officer and the employees. Doing so alleviates common conflicts pertaining to various learning styles, apprehension to asking questions over telecommunications (often leading to disjointed or incomplete information), and even complications surrounding individuals who intentionally refrain or actively avoid being taught the material. Training of employees also subjects both parties to a level of accountability. The trainer holds firm to their word that the conveyed information is correct and accurate, and the trainee acknowledges that the information they were given has been received and will be replicated verbatim. Having a solid and comprehensive training procedure also allows for the onboarding of new employees to obtain the information necessary to do their job without the risk of violating policies. Training can be administered quarterly, biannually, or even annually. They can be done as a compliance measure and simultaneously serve to brief employees on maximizing the procurement process for the sake of efficiency. Regardless of the utility, training employees on policy is an absolute necessity in the mission to centralize and bulletproof public procurement.

Contracting Compels Commitment – Signing on the Dotted Line

As stewards of the public and city, the priority is the preservation of quality and complete function of a city, its property, and services. That objective should be achieved with the utmost fiscal responsibility. Unfortunately, many factors play into getting the best value. Entering into contracts with vendors allows for a clearly written agreement between two parties on the two most

important factors: price and time. Contracts also clearly lay out expectations and commitments from both parties that obligate and bind them to their word. Conditions that are too vague will result in underperformance, and too precise conditions will limit the number of proposals received. Contracts can also outline consequences for breaches like fees and damages sought. These consequences can limit the negative outcomes that may be inflicted on the city and budget.

Cities often overspend approved budgets, as the poor forecasting of services or products needed during the fiscal year can lead to a higher cost for “as needed” individual procurements. Forecasting poorly can also lead to a service being needed and no vendor being readily available to render services, resulting in attempts to make procurements that are against policy and law. To combat this, annual service agreements can be executed between the city and vendor for an amount not to be exceeded and a clearly defined inception and termination date. A contract is executed after the proper bidding processes are conducted, and the agreement removes nearly all opportunities for unethically or illegally. Entering into such agreements can also lead to a lower cost and guaranteed service on a routine basis. This, in tandem, limits the opportunity for employees to feel the need to procure products and services through means that may be unethical or illegal.

Cities can also benefit from having escalation/de-escalation clauses that are written to protect both parties in the event of price increases or decreases. If a price were to be locked in and the market value increased, the vendor would suffer. Conversely, if the market price decreased after the execution of the contract, the city would be contractually bound to pay more than a reasonable price for a product or service. Both parties should agree to the clause and have it in writing. This is a unique instance where ethical dualism exists for the city but not legal dualism. If there were not to be an escalation/de-escalation clause, a city holding a vendor to a price that benefits the city would be unethical but not illegal. Conversely, a city holding themselves to a price that benefits a vendor would be unethical to the citizens as it does not benefit them to overpay. Therefore, the escalation/de-escalation clause should be considered in all procurement policies.

When an agreement is being drafted, the two most important facets to employ are price and time. A price must be determined to avoid overspending the budget. A time must be determined to ensure that the service is rendered in a timely manner. Within the agreement must exist a “time is of the essence” clause indicating that the products or services received must be done in the timeliest manner. A duration longer than considered reasonable would be a waste of the city’s time, and one shorter would risk breaching the terms set forth in the agreement. The project manager must determine a duration that is both feasible as well as cognizant of the project scope. That effort is achieved by seeking the most qualified vendor for the project, as their experience may cost more but will yield shorter delivery times. The greater the accumulated capabilities by the winning bidder, the shorter the delivery lead times.⁵ Therefore, the more experienced the vendor, the lower the likelihood that they will breach the term of the contract. This leads to an important aspect of combatting breached contracts: How should a city enforce the violations and breaches?

A difficult aspect of any agreement is the appropriation of consequences in the event of a violation or breach. Seldom does anyone enjoy administering discipline, especially after already dealing with the effects of a breached contract. Failure to enforce penalties will result in the increased likelihood of reoccurrence and occurring with even more vendors. Contracts must clearly and concisely state the penalties for a contractual breach and must be swiftly and decisively enacted. There is no room for wavering when the city and its residents are the victims of a contractual breach. Common reasons for breaches are related to price or time, which are the

foundation of the contract. A change in the agreed-upon fixed cost could disrupt the agreement, or the vendor could fail to meet the determined deadline on the project. The vendor could fail to meet the commitments of a warranty, or the vendor could also knowingly and intentionally cut corners to save money and time.

Just as the agreement was signed for the cost and for the commitment of fulfillment, the agreement was signed for the levying of penalties, either in the form of liquidated damages or named penalties. Liquidated damages are daily fees that are charged to the vendor for each day the project is in default. Named penalties would be any legally acceptable penalty that is clearly outlined, such as the disqualification of proposed bids or the prohibition of a vendor doing further business with a city, either temporarily or indefinitely. Each of these consequences must be carefully but swiftly determined to be appropriate, and all vendors that are found to be in violation of a contract must also be offered the opportunity to appeal against the violation decision.

Oversee to Avoid Oversight – No Blind Eye Turned

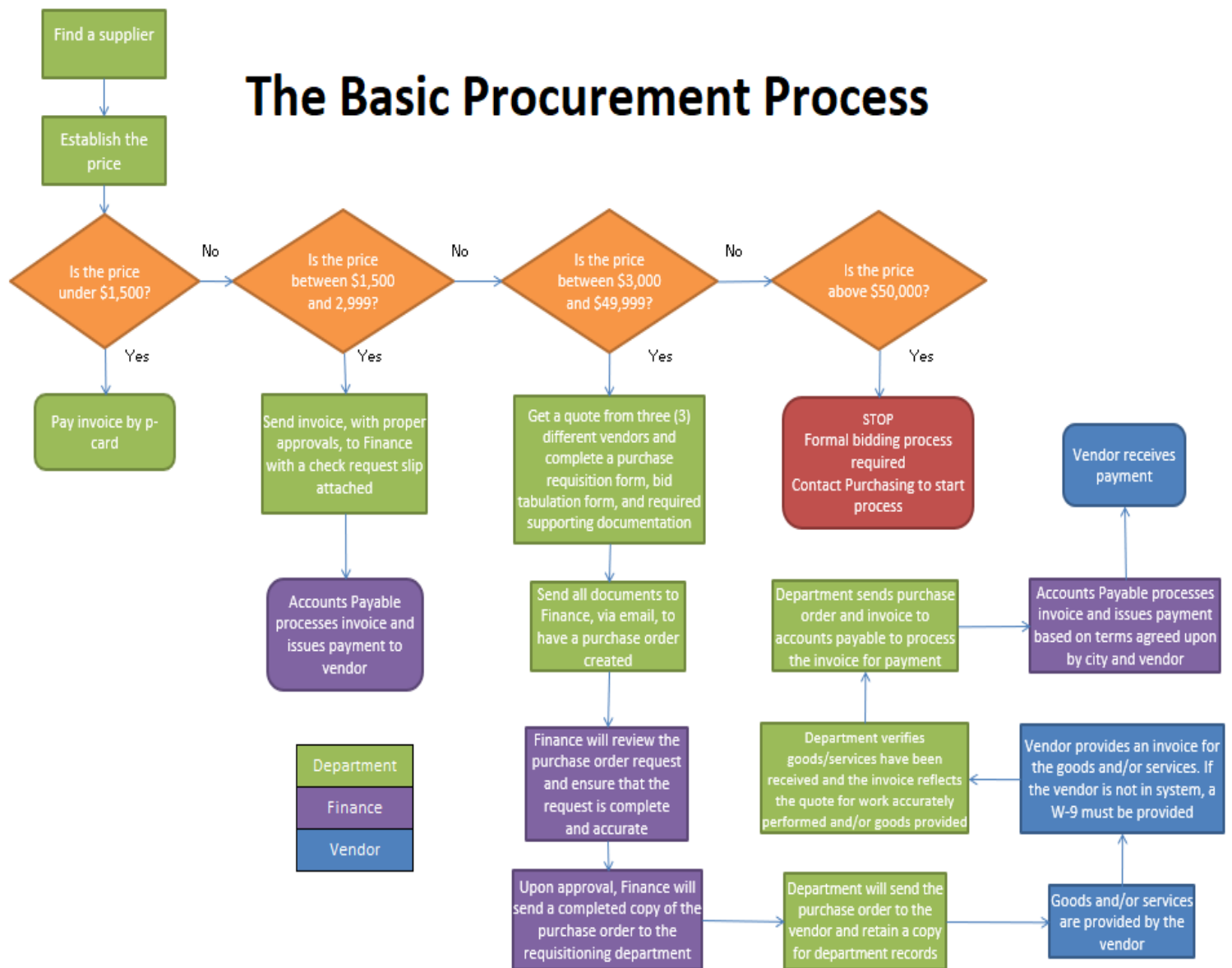
Just as a “no running” sign at a public pool needs a lifeguard to diligently and objectively enforce, so does a city need operating procedures to regulate the activities that are governed by the policies imposed. The existence of an opportunity to deviate pervasively leads to acting on that opportunity. This section will outline certain practices and concepts that can be used to combat and mitigate the deviations that occur in day-to-day procurement procedures. The City of Nacogdoches will be used as an example, and examples will include concepts that have been proven effective and some that were not as effective.

During its decentralized phase, the City of Nacogdoches adopted many questionable and inefficient processes that paved the way for unethical and fraudulent activity. Quotes were sent in beyond their expiration date, vendors were contacted and suggested to provide discounts that guaranteed their award, and information was withheld in attempts to expedite acquisitions. Additionally, duties were seldom segregated, resulting in conflicts of interest. Now, those processes have been modified to appropriate a set of eyes at multiple checkpoints specifically designed to alleviate those errors. The Basic Procurement Process was designed by the Purchasing Department to provide staff direction for all four monetary thresholds as outlined in the City Procurement Policy (see Figure 1).

The flow of this process ensures that there are always multiple sets of eyes on every transaction. With the recent introduction of purchasing training to city departments, employees are given the ability to have a broad understanding of the policies in place but are not expected to know the entirety of the policies that exist. The minute rules are left to Purchasing to be familiar with and enforce. This flow ultimately provides a multistage approach that prevents any sole individual from being able to make purchases and forces review of purchases before any exchange can occur.

This leads to the introduction of segregation of duties and responsibilities, which has been a long-championed concept in society. An increase in the number of checkpoints in a process increases the number of times something that is seen as immoral may be caught. This can be seen as a quality control endeavor or a risk management initiative.

Figure 1. The Basic Procurement Process



To illustrate this concept, consider the following process used by the City of Nacogdoches:

- An employee seeks bids for the purchase of an item.
- The employee's manager takes those bids and inputs them into a bid tabulation sheet for cost analysis and checks their employee's work.
- The manager then sends this tabulation to Purchasing, who will check the bids as well as reference the state and local laws that may be relevant to the purchase.
- Purchasing then creates a purchase order request, which goes through an approval process that ranges from one approver to four individual approvers before reaching final approval status.

This procedure has a minimum of four different sets of eyes, independently driven by their own intrinsic moral faculties, and provides a substantial degree of screening before the purchase is finalized. The varying levels of review are segregated by department authority and even by job role. Every additional layer of review can lead to the reduction of partiality or conflicts of interest.

Lastly, every city must display a strong sense of accountability in all aspects of its function. Failure to hold offenders accountable for their violations will produce no improvement in the future. Therefore, supervisors must be well aware and well-equipped with the knowledge of penalties and the authority to enforce those penalties on their employees. Additionally, disciplinary action should always come from the manager who oversees the violator (aside from circumstances related to financial or human resource violations). If an employee is punished by someone other than their manager, who is their primary supervisor and source of direction, it may be seen by the employee that their manager does not agree with their conviction. At every level, in every department, and with every operation, everyone must be held accountable equally and objectively.

Conclusion – The End That Justifies the Means

City structures are charged with a responsibility that can be compared to the mythological tale of Sisyphus and his eternal struggle. Sisyphus, as punishment by Zeus, was forced to endlessly roll a massive boulder up a steep mountain. Occasionally, Sisyphus would coax the boulder to the top of the mountain, but an enchantment would prevent the boulder from reaching the peak. This would result in the boulder (and Sisyphus) rolling all the way back down the mountain, consigning Sisyphus to an eternity of unending effort.

Though a city's responsibility to the citizenry can be seen as Sisyphean, the effort is not futile. The effort results in the efficient use of city funds. Efficient use of funds invites growth by way of increased financial reach. That potential growth would pave the way to increased revenues, economic development, and a generally happier populace. The Sisyphean task in question is procurement management in general, as corruption and unethicity are omnipresent occurrences that show no historical data or evidence to imply their departure.

State and local laws change constantly because of lobbying and city council political gambits. Department directors reach dangerous levels of control that result in city dependence on their tenure, leading to dogmatic mentalities that reinforce inelasticity in their reasoning. With enough outcry, directors are given their way, and the changes designed to improve ethical engagement are rejected. Policies are waived, and exceptions are made under the pretense that it is being done in the best interest of the city. Once an exception is made, however, it is then made again and again. Career executive staff are of the highest voices in city structures, and corruption on that level creates fractures in the foundation of city integrity, often in the form of "do as I say, not as I do." This is the Sisyphean task of procurement management, but it bears a finality that all too well justifies its obligation.

The aforementioned finality is the duty and oath made to the citizens to spend the levied taxes in the most responsible, beneficial, ethical, legal, and transparent means possible. This duty is non-negotiable as it is a right of the citizen that their taxes are used in service to their well-being. The oath made is one made in perpetuity, with no expiration date and no waiver of responsibility. Irrespective of how arduous or fruitless the outcome, regardless of how tedious or interminable the endeavor, our duty to safeguard the city and its residents is not just a priority; it is the priority. Misuse or misappropriation of taxpayer funds is one of the most egregious violations that can be done by a public officer, and public procurement is no stranger to those acts. Hopefully, this article

provided adequate examples of commonly seen unethical acts as well as steps that can be used to diminish and possibly eliminate violations in their entirety.

Notes

¹ Khairul Saidah Abas Azmi and Alifah Aida Lope Abdul Rahman, “E-Procurement: A Tool to Mitigate Public Procurement Fraud in Malaysia?,” A proceeding in European Conference on Digital Government, Academic Conferences International Limited, (June 2015).

² Ilse Schuster and Serghei Merjan, “Assessment Report of Corruption Risks in Public Procurement in the Republic of Moldova,” Report under Project, “Strengthening the corruption prevention and analysis functions of the National Anti-Corruption Center”, (Norwegian Ministry of Foreign Affairs, 2016). 51

³ Albert Sanchez Graells, “Prevention and Deterrence of Bid Rigging: A Look From the New EU Directive on Public Procurement” in G Racca & C Yukins (eds), Integrity and Efficiency in Sustainable Public Contracts (Brussels, Bruylant, 2014), 19.

⁴ Happiness Anton Huka, Alban Dismas Mchopa, Johnson James Kimambo, “Analysis of Procurement Procedures in Local Government Authorities: Experience after Procurement Reforms and Case Analysis from Selected Councils in Kilimanjaro Tanzania,” *European Journal of Business and Management* Volume 6, No. 18 (2014) 16-22, 16.

⁵ Paulo Ricardo da Costa Reis and Sandro Cabral, “Beyond Contracted Prices: Determinants of Agility in Government Electronic Procurement,” *Revista de Administracao Publica* Volume 52 Issue 1 (2018): 107-125, 112.