

Backwards in Blacklisting: Gaps in Sri Lanka's Procurement Framework Enable Corruption

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Research Brief



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SUMMARY FINDINGS

Corruption in public procurement undermines competition and pushes up the price of contracts, leading to waste of scarce public resources. Blacklisting, or debarment, is a tool available to deter fraud and corruption in procurement by preventing companies found guilty of such misconduct from participating in government procurement for a specified period.¹ The aim is to deter and stop companies from engaging in wrongdoing.

This research brief finds that the existing public procurement regulatory framework has failed to protect public funds from being misused and stolen by failing to blacklist firms engaging in fraudulent and corrupt practices. To rectify this situation, there are two critical gaps that need to be addressed without delay.

The first is a **gap in the law** – the procurement guidelines do not provide for blacklisting of contractors/suppliers for engaging in fraud and corruption. The guidelines however provide for blacklisting of contractors who default/fail to meet their contractual obligations.

The second is a **gap in compliance**, i.e., the failure to even blacklist defaulting contractors that default on their contractual obligations. This second gap shows that bridging the first gap – the gap in the law – is not sufficient. It shows that in addition to including fraud and corruption as valid reasons for blacklisting, it is also necessary to have in place provisions to ensure compliance; for example by having provisions to penalise non-compliance.

The research also finds Sri Lanka to be extremely backward, even compared to other South Asian countries, with respect to these practices. The regulatory frameworks of other countries in the South Asian region identify engaging in corrupt practices as a valid reason for blacklisting. Unlike Sri Lanka, these countries also have functional online databases of blacklisted firms.

1. IMPORTANCE OF BLACKLISTING TO DETER CORRUPTION

Public procurement is the process of purchasing goods and services by the public sector, ranging from purchasing of off-the-shelf everyday items like stationery and cleaning supplies to constructing airports and power plants. It is an activity that is highly prone to corruption because of the large sums of money involved. Estimates indicate that expenditure on public procurement accounts for about 15–30% of the Gross Domestic Product (GDP) of many countries.² In Sri Lanka, a low estimate is that government procurement accounts for at least 25% of total government expenditure – which is around 5% of GDP.³ Corruption in public procurement undermines competition and can push up the price of contracts, leading to a waste of scarce public resources. Research indicates that the amount lost on public contracts due to corruption can amount to 10–25% of a public contract's value on average.⁴

Assuming a 20% cost escalation on the 5% of GDP which is Sri Lanka's procurement expenditure, it would suggest that Sri Lanka is losing around 1% of GDP each year due to corruption in public procurement. Based on

1 Blacklisting in public procurement, <https://knowledgehub.transparency.org/helpdesk/blacklisting-in-public-procurement>, accessed February 28, 2023

2 United Nations Office on Drugs and Crime, Guidebook on anti-corruption in public procurement and the management of public finances, 2013

3 Verite Research, E government procurement, January 2017

4 United Nations Office on Drugs and Crime, Guidebook on anti-corruption in public procurement and the management of public finances, 2013

the expenditure estimates for 2023, this would amount to around LKR 300 billion, which is more than double the estimated expenditure of the country in 2023 on its social safety net, which is around LKR 150 billion and almost equal to what is spent on the public health care system.⁵

Given that Sri Lanka is in a debt crisis, another way of looking at the consequence is to recognise that Sri Lanka is adding at least 1% of debt to GDP each year (including the cost of paying interest on that debt) due to corruption in procurement – that is 10% increase in debt to GDP over ten years. Therefore, curtailing the corruption in procurement could have made the difference between running into a debt sustainability crisis as Sri Lanka did and avoiding it.

Debarment or blacklisting of contractors is a tool used to deter corruption as well as non-compliance (i.e., failure to meet contractual obligations) in procurement. Blacklisting systems are designed to exclude contractors “that pose unacceptable performance or reputational risks because of bad acts or broken internal controls.”⁶ The presence of such wayward suppliers in the procurement system pose a risk to public funds. Therefore, taking legal remedies such as blacklisting/debarment to prevent government agencies from doing business with such suppliers for a period is important to combat fraud, abuse, and waste in public procurement.⁷ Implementing measures such as blacklisting is identified as an important step the governments can take to encourage compliance with the anti-corruption requirements of the United Nations Convention against Corruption (UNCAC).⁸

Denying private companies, the opportunity to do business with the government is likely to be one of the strongest deterrents for future wrongdoers. The resulting reputational damage and economic losses would act as a disincentive for companies to engage in corrupt behaviour.⁹ As a result, blacklisting acts both as a deterrent to future wrongdoers and punishment for the current wrongdoers. Further, it provides confidence to those companies that do not engage in such acts of fraud and have better internal controls that the government does business in a fair and competitive manner.¹⁰

2. BLACKLISTING IN SRI LANKA: THE KEY PROBLEMS¹¹

Sri Lanka’s public procurement process is governed at present by the Procurement Guidelines 2006 (PG 2006) and the Procurement Manual 2006 (PM 2006) with the approval of the Cabinet of Ministers. The apex courts of Sri Lanka have recognised these guidelines/tender procedures as law that the government agencies must abide by when engaging in procurement.¹² This research brief identifies two critical gaps in Sri Lanka that

5 Ministry of Finance, ‘Budget Estimates 2023’, available at. <https://www.treasury.gov.lk/api/file/817341f9-142b-44cc-a649-0e2400e49b0>

6 United Nations Office on Drugs and Crime, Guidebook on anti-corruption in public procurement and the management of public finances, 2013

7 The World Bank, A Global View of Debarment: Understanding Exclusion Systems Around the World, April 2019

8 United Nations Office on Drugs and Crime, Guidebook on anti-corruption in public procurement and the management of public finances, 2013

9 Transparency International, Public Procurement Law and Corruption, 2015

10 Hlengwa. M. Blacklisting of companies: National Treasury & SIU briefing with Deputy Minister, Parliamentary Monitoring Group, Zambia, available at. <https://pmg.org.za/committee-meeting/34528/>

11 It is important to note that the public procurement of pharmaceuticals is governed by a separate guideline and this research has not taken the provisions in that guideline into consideration. Its’ scope is limited to blacklisting for public procurement applicable to all other sectors, which is primarily governed by PG 2006. *(The latest 2022 guidelines for procurement of pharmaceuticals, and medical devices of a consumable nature provides for blacklisting of firms engaged in corrupt practices. The list of blacklisted suppliers is made public for example by the State Pharmaceutical Corporation black-listed-suppliers.pdf (spc.lk) as per the guidelines)*

12 Tiranthai Public Co. Ltd. and others v. CEB and others [2016] SC/FR 108/2016 https://www.supremecourt.lk/images/documents/sc_fr_108_2016j.pdf; Noble Resources International Pte Limited v. Ranjith Siyambalapatiya and others [2015] SC FR No. 394/2015 https://www.supremecourt.lk/images/documents/sc_fr_394_2015.pdf

prevent the country from using blacklisting as a tool to deter corruption. The first is a gap in law and the second is a gap in compliance with laws.

2.1. Engaging in fraud and corruption is not a valid reason to blacklist firms under the 2006 guidelines

Despite blacklisting being a useful tool to deter corrupt practices by contractors, PG 2006 does not identify engaging in fraudulent and corrupt practices as a valid reason for blacklisting.

Firms can be blacklisted only for default

The PG 2006 provides for blacklisting of contractors for default or failure to meet contractual duties. For example, during the bidding stage a contractor or a supplier can be blacklisted or suspended from participating in government procurement up to three years for (a) withdrawal of the bid during the specified bid validity period, (b) refusal to accept correction of errors in accordance with the instructions to the bidders and (c) once notified of the acceptance of the bid, failure or refusal to execute the contract form if required to furnish the performance security.¹³ During the contract implementation stage, a successful contractor or a supplier can be blacklisted for failure (i) to carry out the contract after contract award or (ii) to submit the performance security or (iii) to carry out his contract in a satisfactory manner or (iv) abandon the works or (v) is guilty of improper conduct.¹⁴

There is some ambiguity with regard to the last criterion relating to improper conduct. In the absence of a definition as to what types of conduct are considered “improper conduct”, it is not clear whether engaging in fraudulent and corrupt practices can be considered as acts of “improper conduct” that warrant a contractor or a supplier to be blacklisted.

Firms can be disqualified from a bid for offering gifts or inducement but cannot be blacklisted

According to Section 1.4.4 of the guidelines, suppliers and contractors found to be guilty of “*offering any gift or inducement*” during the bidding stage are only “*liable to be disqualified from the bidding process.*” Engaging in such corrupt practices however is not identified explicitly as a valid reason for blacklisting.

2.2. Blacklisting for fraud and corruption is left to the discretion of the authorities under the 2019 draft guidelines

The National Procurement Commission (NPC) drafted new guidelines on procurement in 2019. These were gazetted but not approved by parliament, hence not enforced at present.¹⁵ The 2019 guidelines make a faint-hearted attempt to provide for blacklisting of contractors or suppliers found to be engaging in fraudulent and corrupt practices.¹⁶ According to the proposed guidelines, if a contractor is confirmed of engaging in corrupt practices following a formal inquiry, that contractor can either be barred from that procurement or

¹³ Procurement Guidelines Reference. 5.3.12. Format of Bid Security Declaration. Procurement Manual 2006

¹⁴ 8.11.4 (a) Procurement Guidelines 2006

¹⁵ The NPC was established by the 19th Amendment to the Constitution of Sri Lanka passed in May 2015, and it was abolished by the 20th Amendment to the Constitution introduced in October 2020. The NPC has been reinstated with the passing of the 21st Amendment to the Constitution in October 2022.

¹⁶ Procurement Guidelines 2019, National Procurement Commission of the Democratic Socialist Republic of Sri Lanka, Extraordinary Gazette No. 2144/68, October 12, 2019

from being eligible to participate in future procurement.¹⁷ Debarring a contractor from engaging in a single procurement is not as effective as being debarred from engaging in future procurement. The provision in the guidelines leaves the decision to debar from participating in a single contract or from future contracts to the discretion of the government agencies without providing objective criteria to guide that decision. By doing so, the drafters of the guidelines have diluted the effectiveness of the provision to blacklist firms engaging in fraudulent and corrupt practices.

2.3. The current provisions to blacklist defaulting contractors not implemented

As mentioned in Section 2.1, although PG 2006 does not provide for blacklisting of firms for fraud and corruption, it provides for blacklisting of defaulting contractors. The guidelines require the government agency carrying out the procurement (Procurement Entity – PE) to promptly notify of defaulting contractors originally to the National Procurement Authority (NPA), and with the closure of the NPA in 2008, to the Department of Public Finance (DPF).¹⁸ The DPF at its sole discretion can suspend/blacklist the defaulted bidder for a specified period.¹⁹ The process that the PE should follow in instances of default by contractors or suppliers for contracts above Rs. 5 million is outlined in the guidelines. Refer Box 1 for details.

BOX 1 – PROCESS THAT PES SHOULD FOLLOW WHEN BLACKLISTING A DEFAULTING CONTRACTOR.

The PE should issue written notice to the contractor, providing a period of two weeks, to indicate reasons for not including their name in the list of defaulting contractors/suppliers. If the PE is not satisfied with the answer, it submits a report to the secretary of the line ministry informing of the default. Upon receiving this report, the line ministry must allege default or improper conduct and appoint a committee to inquire into the alleged default or improper conduct of the contractor or supplier. If the committee appointed decides to treat the contractor as a defaulting contractor, the secretary of the line ministry submits a report to the DPF stating all facts pertaining to such default. If the DPF is satisfied with the findings of the committee, the contractor's or supplier's name is included as a defaulting supplier/contractor in the database and published in the DPF website, if the value of the contract is above Rs. 5 million.²⁰ The name is kept in the database for the period that the contractor is barred from participating in government procurement. As per the guidelines, the PEs²¹ should not award any contracts to the bidders whose names are in this database.²²

17 Section 1.4.3, Procurement Guidelines 2019

18 The NPA was closed in 2008. As per the Public Finance Circular No. PF/429 dated March 17, 2008, all the functions of the NPA were transferred to the Department of Public Finance (DPF).

19 5.3.12(b) and (c) Procurement Guidelines 2006

20 8.11.4 and 8.11.5 Procurement Guidelines

21 Procurement Entity (PE) means a government ministry, provincial council, government department, statutory authority, government corporation, government owned company, local authority or any subdivision thereof or any other body wholly or partly owned by the Government of Sri Lanka or where the Government of Sri Lanka has effective control of such body that engages in procurement (procurement guidelines definitions)

22 8.11.1(c) Procurement Guidelines 2006

As per PG 2006, for contracts below Rs. 5 million, PEs can maintain a database of defaulting contractors/suppliers at the department level and provide such information to other departments only on inquiry.²³

Only two suppliers listed in the online database for defaulting contractors since 2006

This research finds that the respective government agencies have not complied with the existing blacklisting provisions of the PG 2006. Despite the guidelines requiring the names of defaulted contractors to be published online, discussions with a senior official of the Ministry of Finance revealed that the list was initiated only in 2020. Only two companies have been included in the online database to date. The date of commencement of the default period for these two companies was 10th December 2020 and the end was 12th December 2022. According to the DPF, these two names were included in the database in response to a notification received from a PE. At present, there are no companies in the online database of defaulted suppliers/contractors.²⁴

Further, the responses received for Right to Information (RTI) requests filed by Verité Research with 10 government agencies revealed that the agencies do not maintain a database of blacklisted firms at organisational level (refer Annexure 1 for details).

The PEs have failed to notify of defaulting contractors to the DPF

As outlined in Box 1, for the DPF to include the names of the contractors in the list of defaulting contractors, it must receive from the PEs notifications of default. According to a response received from the DPF to a right to information (RTI) application filed by Verité Research requesting the latest available reports/notifications from the PEs to this effect, the DPF responded on 3rd October 2022 that it has not received such notifications from the PEs. This was further confirmed by a senior official attached to the DPF during an interview. In his view this is the main reason for not having names of contractors on the online database of defaulted contractors/suppliers.

2.4. Sri Lanka is a backward outlier

Research reveals Sri Lanka to be a backward outlier in terms of not having provisions to blacklist contractors that engage in fraudulent and corrupt practices. It is also backward in terms of implementing existing provisions and publishing online the list of defaulting contractors.

Fraud and corruption are common reasons for blacklisting in other countries

In contrast to Sri Lanka, in 11 jurisdictions surveyed by the World Bank, fraud, corruption and collusion (bid rigging) were some of the most common grounds for debarment.²⁵ The survey was conducted among a mix of private practitioners, government officials and academics with knowledge of debarments in these 11 jurisdictions.²⁶

A review of the legal and regulatory frameworks governing public procurement in South Asia reveals Sri Lanka

23 8.11.6 Procurement Guidelines 2006

24 Ministry of Finance, Economic Stabilisation and National Policies, Defaulting Suppliers/Contractors, available at <https://www.treasury.gov.lk/web/defaulting-suppliers-contractors>; accessed on December 23, 2022

25 The World Bank, A Global View of Debarment: Understanding Exclusion Systems Around the World, April 2019

26 Australia, Brazil, Chile, Germany, Italy, Spain, Tunisia, the United Kingdom (UK), the United States (US), the European Commission (EC) and the World Bank

to be backward in this respect in the region as well. Other South Asian countries—Bangladesh,²⁷ Bhutan,²⁸ India,²⁹ Maldives,³⁰ Nepal,³¹ and Pakistan³²—recognise engaging in fraudulent and corrupt practices as a valid reason for blacklisting of contractors or suppliers.

The primary legal foundation for government-wide debarment or blacklisting for fraud and corruption varies from country to country; some follow criminal law and others follow administrative law (refer Annexure 2 for details of practices followed by countries referred to in this section).

Other South Asian countries have functional online databases of blacklisted firms

Sri Lanka is backward in the region in terms of implementation as well. As shown in Table 1 below, Nepal, Bangladesh, Pakistan, Maldives, Bhutan and India have published the list of blacklisted/debarred contractors online at a central location. Not all these countries have an independent procurement authority. However, absence of such an authority has not prevented these countries from blacklisting or from publishing the information online. For example, Pakistan and Nepal have an independent procurement authority that publishes the list of debarred firms. Although Bangladesh does not have an independent procurement authority, the list is published by the Central Procurement Technical Unit that is under the Monitoring and Evaluation Division of the Ministry of Planning in Bangladesh.³³

Further, the lists published online are comprehensive and up to date. For example, the list of debarred firms published by the Public Procurement and Monitoring Office of Nepal had 629 entries as of July 2023, and the duration as well as the reason for blacklisting are published on the website. The e-government procurement portal of Bangladesh has a comprehensive list of companies debarred that went through the e-government tender process.³⁴ As of July 2023, the list had 510 entries, and the debarment period as well as the reason for debarment are clearly stated on the website.

27 Ministry of Planning, Central Procurement Technical Unit, Government of Bangladesh, Public Procurement Rules 2008, Section 127(2), available at [Microsoft Word - Fineurop_escb version_april08_rule2904_final020409.doc](#) [last accessed October 2, 2023]

28 Royal Government of Bhutan, Procurement Rules and Regulations 2019, 1.1.4.1(a) and (c), available at <http://paro.gov.bt/downloads/revise-prr-and-sbd-2019> [last accessed October 2, 2023]

29 Department of Expenditure, Government of India, General Financial Rules 2017, Rule 151(i), available at www.doe.gov.in [last accessed October 2, 2023]

30 Debarred List, Maldives, available at <https://www.finance.gov.mv/debarred-list>

31 Nepal Law Commission, Government of Nepal, Public Procurement Act 2007, Section 62(2)(c) and 63(a), available at <https://lawcommission.gov.np/en/?p=19503> [last accessed October 2, 2023]

32 The Pakistan Code, Ministry of Law and Justice, Government of Pakistan, Public Procurement Rules 2004, Section 19, available at <https://www.pakistan-code.gov.pk/pdf/files/administrator9a7c7e1f25ac4af1fe8b1f411b81cf5d.pdf#:~:text=Procuring%20agencies%2C%20while%20engaging%20in%20procurements%2C%20shall%20ensure,and%20the%20procurement%20process%20is%20efficient%20and%20economical> [last accessed October 2, 2023]

33 Database of Debarred Firms, Bangladesh, available at <https://cptu.gov.bd/debarment/debarment-list.html>

34 Database maintained by Bangladesh of debarred firms that had participated in e-GP tenders, available at <https://www.eprocure.gov.bd/resources/common/DebarmentRpt.jsp>

Exhibit 01 – Publication of blacklisted contractors online by South Asian countries

Country	Blacklist published online by
Nepal	Public Procurement and Monitoring Office ³⁵
Bangladesh	Central Procurement Technical Unit ³⁶
Pakistan	Public Procurement Regulatory Authority ³⁷
Maldives	Ministry of Finance ³⁸
Bhutan	Procurement Management and Development Division ³⁹
India	The Central Public Procurement Portal ⁴⁰

CONCLUSION

A sound, adequate legal framework that is effectively implemented is vital to ensure that the procurement process is efficient and effective and is free of corruption. In instituting such a legal framework, it is important to have in place “sanctions that are effective, proportionate and dissuasive in the procurement process to curb corruption.”⁴¹ Blacklisting contractors/suppliers that engage in wrongdoing is an important sanction/penalty that helps deter corruption.

Therefore, it is important for Sri Lanka to close the two gaps with regard to blacklisting, that have been identified in this study: the legal gap and the compliance gap. To do that Sri Lanka must ensure that it has robust provisions in its legislation in relation to blacklisting. That means, the provisions must be designed in a manner to deter fraudulent and corrupt practices. But the solution does not end there. These provisions must also be implemented effectively. To do that the government should maintain online a functional, regularly updated and publicly accessible comprehensive list of blacklisted companies with all relevant information. This can be a high priority tasks to be carried out by the National Procurement Commission of Sri Lanka that was re-established with the passing of the 21st Amendment to the Constitutions on 31st October 2022.

35 Blacklisted Organisations Database, Nepal, available at https://ppmo.gov.np/index.php?route=information/black_lists

36 Database maintained by Bangladesh of debarred firms that had participated in e-GP tenders, available at <https://www.eprocure.gov.bd/resources/common/DebarmentRpt.jsp>

37 Blacklisted/Debarred Firms, Pakistan, available at <https://www.ppra.org.pk/blacklist.asp>

38 Debarred List, Maldives, available at <https://www.finance.gov.mv/debarred-list>

39 Debarment List, Bhutan, available at https://www.egp.gov.bt/resources/common/DebarmentListing.jsp?lang=en_US&langForMenu=en_US

40 Debarment List, India available at [Debarment List Search | Tenders Portal of Government of India | Government eTenders \(eprocure.gov.in\)](https://www.eprocure.gov.in)

41 Transparency International, Public Procurement Law and Corruption, 2015

ANNEXURE 1

List of organisations that responded to Right to Information (RTI) request stating that they do not maintain a blacklist	
1.	Ministry of Transport and Highways
2.	Ministry of Education
3.	Ministry of Power and Energy
4.	Road Development Authority
5.	Ceylon Electricity Board
6.	National Water Supply and Drainage Board
7.	Urban Development Authority
8.	Board of Investment
9.	Information and Communication Technology Agency
10.	National Fertiliser Secretariat

ANNEXURE 2

Primary legal foundation for blacklisting

A survey carried out by the World Bank among 10 jurisdictions with government-wide debarment systems found that the debarment or blacklisting mechanisms of nine are governed by administrative law and one governed solely by criminal law.⁴² The survey also found that the entity or person that makes the decision varies across countries as well. In some jurisdictions decisions are made by a centralised decision maker, while some others provide for the decision to be made by a decision maker at the agency level.⁴³ Analysis of mechanisms used by South Asian countries for this study also revealed similar variations as indicated in the table below.

Jurisdiction	Foundational legal basis	Decision maker(s)
Brazil	Administrative	Centralised, agency level, Individual contracting officer, judicial authority
Chile	Administrative, Criminal	Agency level, judicial authority, other
Germany	Administrative	Agency level
Italy	Criminal	Judicial authority
Spain	Administrative	Agency level, Individual contracting officer, judicial authority
Tunisia	Administrative	Centralised
United Kingdom	Administrative	Individual contracting officer
United States	Administrative	Agency level, judicial authority
European Commission	Administrative	Centralised, Individual contracting officer
World Bank	Administrative	Centralised
Australia	N/A	N/A
Pakistan	Administrative, Criminal	Agency level
Nepal	Administrative, Criminal	Centralised
India	Administrative, Criminal	Centralised, agency level
Bangladesh	Administrative, Criminal	Centralised, agency level
Maldives	Administrative	Centralised
Bhutan	Administrative, Criminal	Centralised, agency level

⁴² World Bank. Global View of Debarment: Understanding Exclusion Systems Around the World. Summary of Pilot Survey Results. April 2019

⁴³ *Ibid.*

