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## **Global Forum on Competition**

### **COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT**

#### **Contribution from Ireland**

-- Session V --

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## COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Ireland --

### 1. Public Procurement Objectives and Policy

1. Anticompetitive conduct in public procurement is a particularly insidious violation of the competition rules. Price fixing, bid-rigging, market and customer allocation on public contracts limit supply and raise prices on the tender which is the subject of the collusion. The inflated price may become an artificial benchmark or competitive floor on which similar contracts are evaluated in the future by public authorities. As such, the effect of collusion on a particular contract or group of public contracts may reach beyond the specifics of a single instance of collusion.

2. In Ireland, offences under Section 4 of the Competition Act 2002 and Article 101 TFEU (ex. Article 81) are made criminal by Section 6 of the Competition Act 2002. Undertakings and individuals convicted on indictment are subject to fines not exceeding either €4 million or 10 percent of turnover in the year preceding sentencing and to a term of imprisonment of up to five years.<sup>1</sup>

### 2. Organisation of Public Procurement in Ireland

3. The value of public contracts in Ireland represents a substantial expenditure of revenue from taxpayers. In 2007 it was estimated by Eurostat<sup>2</sup> that the Irish public procurement market accounted for approximately €26 billion per annum, or 13.67 percent of Irish GNP.<sup>3</sup>

4. In Ireland public procurement is highly decentralised. Individual departments and agencies function independently but within the framework of EU and national laws and guidelines. The Department of Finance in Ireland is the Government Department responsible for public procurement. In 2002 the National Public Policy Procurement Unit (NPPPU) was established in the Department of Finance to “develop public service procurement, policy and practice through a process of procurement management reform”.<sup>4</sup> This reform process involves training and education of staff involved in public procurement and aggregation of procurements.

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<sup>1</sup> Section 8, Competition Act 2002.

<sup>2</sup> This data is available from Eurostat’s website: <http://nui.epp.eurostat.ec.europa.eu/nui/setupModifyTableLayout.do>.

<sup>3</sup> At page 3 of its report, Ensuring Value through Public Procurement, November 2008, IBEC noted that €16 billion or 10% of Ireland’s GDP was spent on public procurement in 2008. <[http://www.ibec.ie/IBEC/DFB.nsf/vPages/Public\\_sector~Resources~public-procurement---ensuring-value-28-11-2008/\\$file/Ensuring\\_Value\\_Through\\_Public%20Procurement.pdf](http://www.ibec.ie/IBEC/DFB.nsf/vPages/Public_sector~Resources~public-procurement---ensuring-value-28-11-2008/$file/Ensuring_Value_Through_Public%20Procurement.pdf)>

<sup>4</sup> National Public Procurement Policy Framework, (NPPPU, Department of Finance), April 2005, at page 1.

5. In conjunction with the Department's Government Contracts Committee (GCC), the NPPPU is responsible for developing best practices for public procurement in Ireland.<sup>5</sup> Procurement regulations, guidelines and other information concerning public tenders are available on the *e-tenders* website.<sup>6</sup>

6. In 2004, the NPPPU published new Public Procurement Guidelines – Competitive Process (Public Procurement Guidelines).<sup>7</sup> The Public Procurement Guidelines make contracting authorities responsible for guarding against corrupt or collusive practices. *“To safeguard against improper or unethical practices contracting authorities must also take measures to separate functions within the procurement cycle, by ensuring that, for example, ordering and receiving of goods and services are distinct from payment for services.”*<sup>8</sup> Additionally, the Guidelines state: *“Contracting authorities should be aware of potential conflicts of interest in the tendering process and should take appropriate action to avoid them.”*<sup>9</sup>

7. The Public Procurement Guidelines also alert contracting authorities to the potential for collusive tendering and what to do about suspected collusion:

*Contracting authorities should watch for anti-competitive practices such as collusive tendering. Any evidence of suspected collusion in tendering should be brought to the attention of the Competition Authority: telephone (01) 8045400.*<sup>10</sup>

8. This clear guidance and unequivocal requirement about reporting suspected collusion affirms the commitment of the Government to uncovering and reporting suspected anticompetitive activities by bidders on public sector contracts.

9. In April 2005, the NPPPU, in consultation with the GCC, issued a National Public Procurement Policy Framework (Framework).<sup>11</sup> The core principles of the public procurement policy as stated within the Framework are: to be accountable, competitive, non-discriminatory; to provide for equality of treatment, fairness and transparency; and, to be conducted with probity and integrity. The Framework underlines the importance of purchasing decisions by public bodies and the need for strategic management of the public procurement process.

10. The Framework applies to central government departments and bodies, commercial and non-commercial state bodies and local and regional authorities and promotes open and transparent competition. It underlines the need to maximise competition in the market for goods and services purchased by the State. Policy and actions are focused on compliance with EU and national legal requirements. The Framework notes that compliance with such requirements is vital to encourage competition.

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<sup>5</sup> Circular 40/02: Public Procurement Guidelines – revision of existing procedures for approval of certain contracts in the Central Government sector dispensed with the need for approval by the Government Contracts Committee (GCC) of contracts exceeding €25,000 in value and provided that such contracts should be reviewed within a Government Department, preferably by the Internal Audit Unit. The new arrangement was designed to allow the GCC to advise the Government on procurement issues of general concern and, in conjunction with the NPPPU, to develop best practices for public procurements within the State.

<sup>6</sup> <http://www.etenders.gov.ie>.

<sup>7</sup> Public Procurement Guidelines [http://www.etenders.gov.ie/guides/Guide\\_Download.aspx?id=2745](http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=2745). The 2009 Guidelines, which were drafted by the NPPPU in conjunction with the Government Contracts Committee, update the so-called “Green Book” procurement regulations promulgated in 1994.

<sup>8</sup> Public Procurement Guidelines at paragraph 3.1.

<sup>9</sup> Public Procurement Guidelines at paragraph 3.6.

<sup>10</sup> Public Procurement Guidelines at paragraph 3.8 (Emphasis supplied).

<sup>11</sup> National Public Procurement Policy Framework, (NPPPU, Department of Finance), April 2005; [http://www.etenders.gov.ie/guides/Guide\\_Download.aspx?id=1103](http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=1103).

11. National legislation in Ireland has implemented the two EU Directives on procurement. The European Communities (Award of Public Authorities' Contracts) Regulations 2006, S.I. No. 329 of 2006, implemented Directive 2004/18/EC.<sup>12</sup> In 2007, S.I. No. 50, The European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 implemented Directive 2004/17/EC.<sup>13</sup>

### 3. Ethics and Standards in Public Office

12. The Irish Competition Authority has no remit with respect to the detection, investigation or prosecution of corruption involving public procurement. Nor does it have any expertise with respect to the application of the legislation on corruption. What follows is simply an outline of the current legislation.

13. The Ethics in Public Office Act 1995, and Standards in Public Office Act 2001, provide for disclosure of interests, including any material factors which could influence a Government Minister or Minister of State, a member of the Houses of the Oireachtas or a public servant in performing their official duties.

14. The Standards in Public Office Act 2001 establishes the wide scope of persons covered by the provisions, including employees, public servants, Members of the Oireachtas, the Attorney General, the Comptroller and Auditor General, the DPP, judges, members of foreign parliaments, foreign office holders, members and officials of EU institutions and members of local authorities. It makes it an offence to seek or receive any benefit, whether for oneself or another person, in return for action or refraining from acting in accordance with one's position, or to give or offer any benefit for a like purpose.

15. A Civil Service Code of Standards and Behaviour<sup>14</sup> was drawn up and promulgated by the Minister for Finance on 9 September 2004 pursuant to Section 10(3) of the Standards in Public Office Act 2001 and published by the Standards in Public Office Commission (revised edition) in September 2008 pursuant to Section 10(11) of the Standards in Public Office Act 2001.

16. The Prevention of Corruption Acts 1889-2001 (Corruption Acts) make the acceptance of bribes by public officials a criminal offence punishable by imprisonment or fine or both. Section 16.3 of the Civil Servant's Code of Conduct<sup>15</sup> references the Prevention of Corruption Acts 1889 to 2001 (as amended by the Ethics in Public Office Act 1995), and notes that the corrupt giving of gifts to or receipt of gifts by civil servants is a criminal offence punishable by imprisonment or fine or both. The Corruption Acts provide that money, gifts or other consideration received by a civil servant from a person holding or seeking to obtain a contract from a Government Department/Office is deemed to have been received corruptly unless the contrary is proved.

17. In June 2005, the NPPPU and GCC issued Ethics in Public Procurement: General guidance to assist public sector buyers to conduct purchasing in a way that satisfied probity and accountability (Ethics Guidance).<sup>16</sup> The Ethics Guidance notes:

*Contracting authorities must be cost effective and efficient in the use of resources while upholding the highest standards of integrity. Procurement practices are subject to audit and*

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<sup>12</sup> [http://www.etenders.gov.ie/guides/Guide\\_Download.aspx?id=1481](http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=1481).

<sup>13</sup> [http://www.etenders.gov.ie/guides/Guide\\_Download.aspx?id=1481](http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=1481).

<sup>14</sup> <http://www.sipo.gov.ie/en/CodesofConduct/CivilServants/File,727,en.pdf>.

<sup>15</sup> <http://www.sipo.gov.ie/en/CodesofConduct/CivilServants/Name,718,en.htm>.

<sup>16</sup> Ethics in Public Procurement; [http://www.etenders.gov.ie/guides/Guide\\_Download.aspx?id=601](http://www.etenders.gov.ie/guides/Guide_Download.aspx?id=601).

*scrutiny under the Comptroller and Auditor General (Amendment) Act 1993 and Accounting Officers are publicly accountable for expenditure incurred.*<sup>17</sup>

18. The Ethics Guidance contains detailed provisions concerning disclosure of conflicts of interest, acceptance of gifts and hospitality by those involved in public procurement.

### **3.1 Conflicts of Interest**

19. The Ethics Guidance requires disclosure of “*any form of personal interest which may impinge, or might reasonably be deemed by others to impinge, on a public official’s impartiality in any matter relevant to his or her duties .....*” (Emphasis supplied). Personal interest includes an interest of a relative or connected person.<sup>18</sup> Disclosure of the personal interest is required to be made in writing to line management. Line management must then decide if the exercise should be dealt with by another member of staff or seek further advice.

### **3.2 Gifts**

20. In respect of the solicitation or acceptance of gifts, the Ethics Guidance states unequivocally:

*Public officials should not accept benefits of any kind from a third party which might reasonably be seen to compromise their personal judgement or integrity. The actions of public officials must be above suspicion and not give rise to any actual or potential conflict of interest and their dealings with commercial and other interests should bear the closest possible scrutiny.*<sup>19</sup>

21. The following activities are specifically prohibited:<sup>20</sup>

- Gifts must never be solicited, directly or indirectly;
- Cash, gift cheques or any vouchers that may be exchanged for cash may not be accepted regardless of amount;
- Public purchasers must never solicit sponsorship for social, sporting, charitable or similar organisations or events from contractors, suppliers or service providers;<sup>21</sup>

<sup>17</sup> Comptroller And Auditor General (Amendment) Act, 1993 (No.8/1993) .

<sup>18</sup> A connected person is defined in (2) ( a ) of the Ethics in Public Office Act, 1995 as follows:

*Any question whether a person is connected with another shall be determined in accordance with the following provisions of this paragraph (any provision that one person is connected with another person being taken to mean also that that other person is connected with the first-mentioned person):*

*(i) a person is connected with an individual if that person is a relative of the individual;*

*(ii) a person, in his or her capacity as a trustee of a trust, is connected with an individual who or any of whose children or as respects whom any body corporate which he or she controls is a beneficiary of the trust;*

*(iii) a person is connected with any person with whom he or she is in partnership;*

*(iv) a company is connected with another person if that person has control of it or if that person and persons connected with that person together have control of it;*

*(v) any two or more persons acting together to secure or exercise control of a company shall be treated in relation to that company as connected with one another and with any person acting on the directions of any of them to secure or exercise control of the company.*

<sup>19</sup> Ethics in Public Procurement at paragraph 3.3.

<sup>20</sup> Ibid.

<sup>21</sup> “Where such sponsorship is offered, it may only be accepted when expressly approved in writing by management.” Ibid.

- Public purchasers must not seek or accept special facilities or discounts on private purchasers from contractors, suppliers or service providers with whom they have official dealings;
- Subject to local rules, an official may accept and retain gifts of low intrinsic value. Any gift of more significant value should be refused. . . Particular care should be taken in relation to offers of gifts from donors who stand to derive a personal or commercial benefit from their relationship with the contracting authority concerned.

### **3.3 Hospitality**

22. While recognising that normal business practices may justify accepting “routine/modest” hospitality from suppliers, the Ethics Guidance notes that particular care should be taken with suppliers who are in the process of tendering and there “should be no acceptance of gifts or hospitality” from those involved in a current tendering process.<sup>22</sup> Additionally, the Civil Service Code of Standards and Behaviour that applies to central government offices and departments, states that offers of hospitality should be reported to management.

### **3.4 Violations of the Ethics Laws, Regulations and Guidance**

23. There have been no cartel investigations or cases in Ireland that have involved allegations or violations of the corruption or ethics requirements of Irish law.

24. Activities that would constitute violations of the Ethics laws, regulations and guidance are subject to investigation by An Garda Síochána (the national police force). Prosecution of ethics offences is within the discretion of the Director of Public Prosecutions. The Competition Authority has no role or involvement in the investigation of corruption in public tendering and would be aware of investigations and prosecutions solely from public information and reports in the press.

## **4. Collusion in Public Procurement**

25. There have been no convictions in Ireland for collusive tendering or other anticompetitive practices involving public tendering and procurement.<sup>23</sup> Charges are presently pending in the Central Criminal Court against two individuals and one company for alleged collusion in connection with a tender for vegetation removal by Iarnród Éireann (Irish Rail).<sup>24</sup>

### **4.1 Designing Procurements to Minimise Collusion**

26. The Competition Authority does not design procurement systems or regularly review them for departments or agencies. However, as part of its functions of the Authority is periodically asked to provide input on the design of specific procurements. Additionally, in speeches and presentations certain practices that may facilitate collusion are highlighted.

27. Practices facilitating collusion in public procurement have been identified at hearings of the OECD and in its publications, to which Ireland has contributed. Among the practices which facilitate collusion are:

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<sup>22</sup> Ethics in Public Procurement at 3.4.

<sup>23</sup> In June 2009, five individuals and three companies were acquitted of charges of customer and market allocation that allegedly occurred in conjunction with a joint tender by them for waste collection services in County Mayo. Following an eight day trial, all individuals and companies were unanimously acquitted of the charges by a jury. *DPP-v-Stanley Bourke and others*.

<sup>24</sup> *DPP-v- John Joe McNicholas trading as John Joe McNicholas Plant Hire, Oliver Dixon & Oliver Dixon (Hedgecutting & Plant Hire) Limited*.

- A long lead-in period between pre qualification to be invited to tender and award of contract;
- Small number of competitors;
- Identical or simple product or service;
- No significant technological changes;
- Active trade association;
- The product has few or no close substitutes.

28. For example, pre-qualification criteria that are not tailored to each competition can result in the stagnation of the list of parties who can qualify for various competitions. Their effect can be to reduce the number of undertakings who can respond to a call to tender and over time allow those parties to identify each other and potentially coordinate their behaviour in relation to subsequent public procurements in that market. The Authority has consulted with procurement agencies concerning the benefits of devising tenders with competition in mind. Tender criteria that allow clients to obtain the benefits from increasing the number of responses to their tender and that contain only restrictive criteria necessary to achieve their purpose are among the pro-competitive results from well-crafted tenders. The Authority endorses the use of procurement practices which allow more potential suppliers to respond to a tender.

29. It is beneficial for public procurement officials to have a clear understanding of the competition law which may be of assistance when designing and undertaking a tender. Activities related to a tender may unwittingly create situations that facilitate rather than discourage collusion on a tender. Bid-rigging training provided by the Competition Authority emphasises the importance of well considered criteria and clear procedures before, during and after competitions.

30. The Competition Authority has also provided assistance to government departments and public bodies in relation to specific proposed procurement activities. Where concerns have arisen regarding potential anti-competitive effects the Competition Authority has made itself available to provide information on the possible or probable detrimental effects the proposed schemes or services could have on markets. The advice offered is non-binding and informal. It does not constitute legal advice and is designed to assist agencies in identifying portions of procurement that might unwittingly or inadvertently give rise to anticompetitive practices. In some instances it may be the long-term effect of practice in divulging information to competitors or allowing them to reverse engineer costs or prices that raise the potential for collusion and raise anticompetitive concerns.

#### **4.2 *Membership on the Government Construction Contracts Committee***

31. As a result of the regular consultations between the NPPPU and the Competition Authority concerning competition and collusion in public tendering, in 2009 the Government Construction Contracts Committee (GCCC) requested the Competition Authority to become a member of the GCCC. The GCCC is a regular forum, chaired by the NPPPU that explores the procurement of government construction contracts and allows all the public bodies and agencies involved in public disbursements an opportunity to trade experience and knowledge. Members of the GCCC regularly make more formal presentations to this group as means of raising awareness within the group membership of EU and national procurements they are involved in and what their experience and learning has been.

32. The Manager of the Cartels Division was selected by the Authority as the representative on the GCCC. The request reflects the commitment of the Government to competitive procurements and the continuing, positive relationship that has developed between the NPPPU and the Competition Authority on matters involving competition in public procurement.

### **4.3 Certificates of Independent Bid Determinations**

33. Since October 2008, representatives of the Competition Authority and the National Public Procurement Policy Unit (NPPPU) of the Department of Finance (the government department which oversees public procurement activities within Ireland), have been engaged in periodic discussions about public procurement and cartel detection.

34. During the course of the discussions with public bodies such as the NPPPU the Competition Authority has raised the prospect of introducing a certificate of independent bid determination (CIBD) into Ireland's tendering process.

35. The Competition Authority is of the view that public procurement bodies could obtain substantial benefits from the introduction of a CIBD. First, a CIBD can serve as a continuous reminder of the obligation in public tenders to comply with both the procurement rules and the applicable competition laws. Second, properly crafted so as to require signature by an officer or director of an undertaking, a CIBD serves as a commitment by the undertaking and its principals about the bona fides of their tender. Third, a CIBD provides an added incentive for undertakings and their principals to ensure that all managers and employees are made aware of competition prohibitions through regular compliance training programmes and understand that their actions and violations may be imputed to the undertaking.

### **5. Fighting Collusion and Corruption**

36. To date there have been no corruption charges or convictions involving both corruption and collusion in public procurement in Ireland. The Competition Authority is unaware of any cases in Ireland involving both collusion and public corruption. Instances of corruption of public officials, that have been through the Irish courts, have to date related to the bribing of publicly elected representatives of both central and local government, public sector employees involved in planning and bribing Gardaí (police).

### **6. Advocacy**

37. Regulatory or institutional conditions can help facilitate bid-rigging. As noted above, the Department of Finance Procurement Guidelines provide clear guidance about contacting the Competition Authority in instances where suspected collusive tendering has taken place. That advice has resulted in procurement agents reporting allegations of suspected bid-rigging and collusive tendering to the Authority.

38. Likewise, the Competition Authority regularly receives complaints from individuals of alleged anticompetitive activities associated with tenders, and in appropriate circumstances would investigate such allegations. Complaints have been received from undertakings who find themselves precluded from competitions due to regulatory requirements or the inclusion of particular qualifying criteria that they feel are not always relevant or necessary for the purposes of a particular competition.

39. In 2009, the Authority published four information booklets for the public on competition enforcement, including a booklet on collusive tendering:

- The Detection and Prevention of Collusive Tendering;
- Competition Benefits Everyone;
- Guide to Competition Law and Policy for Consumers;
- Guide to Competition Law and Policy for Businesses.

40. These booklets are available on the Competition Authority website.<sup>25</sup>

41. Additionally, the Competition Authority has undertaken proactively to offer assistance to procurement bodies in identifying anticompetitive practices and potential collusion involving tendering. To that end, the Competition Authority has offered training opportunities to the Department of Finance NPPPU, other central government departments and bodies, commercial and non commercial state bodies and local and regional authorities.

42. In the past year the Competition Authority has increased its outreach activities to make government agencies and procurement officers aware of the Competition Authority and collusive tendering. The Authority has been asked to present a module on cartels and bid-rigging as part of an eight day public procurement training course sponsored by Public Affairs Ireland, an organisation dedicated to on-going training and education about the public sector in Ireland. The Authority has developed a “Bid-Rigging Road Show”, which is designed to alert contracting officers to bid-rigging schemes and collusive practices. To date, training on identifying and combating cartels and collusion involving tendering has been presented to approximately 90 procurement officials from over 40 departments, agencies and local authorities in Ireland. We intend to increase the number of presentations in 2010.

43. This training has assisted public procurement agencies by increasing staff awareness of the harm caused by collusion, the reasons for and benefits of healthy competition and informed them of the steps they can take to avoid opportunities for collusion arising on public procurement competitions. Given the requirements on procurement staff to ensure the integrity all aspects of the tender process, it is important that they have an awareness of the benefits of competition to their procurements, and knowledge of the role and functions of the Competition Authority. Training builds beneficial relationships between procurement staff and the staff of the Competition Authority. It informs staff of the resources available from the Competition Authority and stresses the opportunity for procurement officials to consult with the Authority before, during and after competitions, if they have concerns about competition aspects of their tender procedures or believe they may have been the victim of collusive behaviour.

44. As a result of our regular meetings with the NPPPU and with individuals involved in various committees of the Department of Finance, the Authority has been consulted on specific issues surrounding competition in public contracts. The Competition Authority obtained and included comments from the NPPPU in responses to the OECD Bid-Rigging Publications in 2008. Similarly, in February 2009, the NPPPU sought input from the Competition Authority in order to respond to a questionnaire from the EU Advisory Committee on Public Contracts, DG Internal Markets, on Public Procurement and Antitrust Law.

45. Government agencies contemplating issues that might arise in respect of public procurements have consulted with staff of the Advocacy and Enforcement Divisions of the Competition Authority in advance of their tenders. Whilst such consultations are undertaken with the clear caveat that the Competition Authority does not provide legal advice or give advisory opinions, the consultations have permitted agencies to explore the types of questions or issues that might arise in respect of competition from certain proposed courses of action.

## **Conclusion**

46. To date, the Competition Authority has not uncovered any instances of corruption in conjunction with its investigations of alleged cartel activities involving procurements. While it is impossible to rule out such behaviour, strong laws, regulations and guidance can serve as clear disincentives to corruption involving public contracts. Programmes that offer regular training, that stress the requirements of integrity on the part of public procurement officials and that create an affirmative duty to report suspected collusion to the Competition Authority all may serve to discourage and minimise illegal and anticompetitive activities.

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<http://www.tca.ie/EN/News--Publications/Information-Booklets.aspx>.