Global Forum on Competition

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Executive Summary --

18-19 February 2010

The attached Executive Summary and the GFC proceedings on Collusion and Corruption in Public Procurement are distributed as a free publication under the code DAF/COMP/GF(2010)6.
EXECUTIVE SUMMARY

By the Secretariat

1. A roundtable discussion on Collusion and Corruption in Public Procurement was held at the Ninth Global Forum on Competition. In light of this discussion, the Secretariat’s background paper, the country submissions and several individual contributions, a number of key points regarding the topic emerge.

(I) **Collusion and corruption are distinct problems within public procurement, yet they may frequently occur in tandem, and have mutually reinforcing effect. They are best viewed, therefore, as concomitant threats to the integrity of public procurement.**

2. Public procurement comprises government purchasing of goods and services required for State activities, the basic purpose of which is to secure best value for public money. In both developed and developing economies, however, the efficient functioning of public procurement may be distorted by the problems of collusion or corruption or both.

3. Collusion involves a horizontal relationship between bidders in a public procurement, who conspire to remove the element of competition from the process. Bid rigging is the typical mechanism of collusion in public contracts: the bidders determine between themselves who should “win” the tender, and then arrange their bids – for example, by bid rotation, complementary bidding or cover pricing – in such a way as to ensure that the designated bidder is selected by the purportedly competitive process. In most legal systems, bid rigging is a hard core cartel offence, and is accordingly prohibited by the competition law. In many countries bid rigging is also a criminal offence.

4. Corruption occurs where public officials use public powers for personal gain, for example, by accepting a bribe in exchange for granting a tender. While usually occurring during the procurement process, instances of post-award corruption also arise. Corruption constitutes a vertical relationship between the public official concerned, acting as buyer in the transaction, and one or more bidders, acting as sellers in this instance. Corruption is generally prohibited by the national criminal justice rules, legislation on ethics in public office or by the specific public procurement regulations.

5. Ultimately, however, these discrete offences have the same effect: a public contract is awarded on a basis other than fair competition and the merit of the successful contractor, so that maximum value for public money is not achieved. The country contributions (including those of Colombia, France, Latvia and the United States) provided some empirical evidence that corruption and collusion can occur in tandem, and certainly, these offences have a mutually reinforcing effect. Where corruption occurs in a public contract, collusion between bidders – for example, in the form of compensatory payments or the granting of subcontracts – may be necessary to ensure that losing bidders do not expose the illegal conduct to the public authorities. Equally, economic rents derived from collusion may foster corruption, while collusion is also facilitated by having an “insider” in the public agency that provides the bidders with information necessary to rig bids in a plausible manner and may even operate as a cartel enforcement mechanism.
The distinctiveness of public procurement and its context makes the process particularly vulnerable to collusion and corruption, while also increasing the magnitude of harm that these offences cause.

6. Collusion and corruption can arise in any procurement procedure, whether occurring in the public or private sectors. Yet, the distinctiveness of public procurement renders it particularly vulnerable to anticompetitive and corrupt practices, and magnifies the resultant harm. It is for this reason that the problems of collusion and corruption within the field of public procurement specifically merit individual attention.

7. Public procurement is vitally important to the economic system of a State: the country contributions indicated that it typically accounts for between 15-20% of Gross Domestic Product. Effective public procurement determines the quality of public infrastructure and services and it impacts on the range and depth of infrastructure and services that a State can provide to its citizens, as money wasted because of collusion and/or corruption ultimately results in fewer public funds. In this way, public procurement is an issue of key importance for a State’s economic development.

8. Aspects of the public procurement process nevertheless render it particularly vulnerable to anticompetitive and corrupt practices. Public procurement frequently involves large, high value projects, which present attractive opportunities for collusion and corruption. Regulatory requirements dictating particular procurement procedures can render the process excessively predictable, creating opportunity for collusion. Certain sectors frequently subject to public procurement, including construction and medical goods and services, may be particularly prone to anticompetitive or corrupt practices. Finally, the sheer quantity of goods and services that are contracted by the State creates monitoring difficulties and increases the likelihood that the public procurement process may fall prey to collusion or corruption.

9. The effects of collusion and corruption in public procurement are arguably more problematic than in private procurement. Moneys lost because of subversion of the public procurement process represent wastage of public funds. The resulting loss to public infrastructure and services, whether in quality or range, typically has the heaviest detrimental impact on the most disadvantaged in society, who rely on public provision to the greatest extent. Distortion of the public procurement process is detrimental for democracy and for a sound public governance, and it inhibits investment and economic development. Thus, deficiencies in public procurement impact on the wider economy in a way that does not occur with private procurement.

Tackling collusion and corruption are not mutually exclusive goals, so there is a need to accommodate both in order to better protect the public procurement process. Tensions between the sometimes competing approaches to the prevention of collusion and corruption within public procurement may necessitate trade-offs to achieve both effectively. For example, while transparency is indispensible for corruption prevention, excessive or unnecessary transparency should be avoided.

10. Both collusion and corruption prevention are necessary aspects of any overall strategy aimed at protecting the integrity of the public procurement process: that is, ensuring that no party to a public procurement transaction acts in a manner contrary to the objective of securing best value for public money. Collusion and corruption are typically pursued under separate but largely compatible legal frameworks. Moreover, as these problems are mutually reinforcing, reducing the likelihood of one offence will also decrease the risk of the other.

11. At an operational level, however, best practice approaches to avoidance of collusion and corruption can differ. In terms of designing the procurement process, for example, while a pattern of
regular small tenders is seen to facilitate collusion, large lumpy tenders can foster corruption. A significant
difference is the role and importance of transparency in the procurement process. The principle of
transparency – which relates to the availability of information on contract opportunities, the rules of the
process, decision-making and verification and enforcement – is of critical importance in preventing
corruption. In certain instances, however, transparency is inconsistent with the need to ensure maximum
competition within the procurement process. Transparency requirements can result in unnecessary
dissemination of commercially sensitive information, allowing firms to align their bidding strategies and
thereby facilitating the formation and monitoring of bid rigging cartels. Transparency may also make a
procurement procedure predictable, which can further assist collusion.

12. This may lead to tensions between the sometimes competing approaches to prevention of
collusion and corruption within public procurement and require trade-offs in terms of how to achieve these
objectives. While transparency of the process is indispensable to limit corruption, excessive or unnecessary
transparency should be avoided in order not to foster collusion. There is some uncertainty, however, as to
what information can facilitate collusion, and so further research on this is desirable. Nevertheless, sound
procedural design can go a long way towards achieving effective procurement and mitigating this trade-off.
For example, procurement rules might require only information on winning bids to be released and not
require bidder identities to be disclosed. Bidding procedures should not provide participants with sensitive
information regarding the actions of others tenders, but, conversely, should allow for review of decisions
of public officials by independent public agencies.

(4) Co-operation between the various national enforcement agencies with jurisdiction over
collusion and corruption in public procurement is paramount, in order to achieve a coherent
overall strategy and ensure its full implementation, and additionally, to facilitate efficient
prosecution of these offences.

13. Incidents of collusion and corruption are typically investigated and sanctioned by separate
national agencies: collusion generally comes within the remit of the competition authority, whereas
corruption is pursued by public prosecutors or specialised anti-corruption agencies. However, due to the
mutually reinforcing nature of collusion and corruption plus the likelihood that such offences occur in
tandem, the most effective approach to protecting the integrity of the public procurement process requires
co-operation between the various enforcement agencies, whether by means of a formal memorandum of
understanding, notification requirements or other mechanisms.

14. The benefits to a co-ordinated approach are considerable. Evidence of collusion may come to
light during a corruption investigation, and vice versa; having in place a knowledge-sharing policy ensures
that this information is brought to the attention of the appropriate enforcement body. Evidence-sharing,
where compatible with national evidentiary rules, also assists those enforcement agencies (typically,
competition authorities) that have more limited evidence-gathering powers than the public prosecutor or
other criminal justice agencies. The introduction of a formal co-operation policy can improve knowledge
of misconduct in public procurement amongst enforcement agencies more generally. Co-operation
between enforcers can therefore go some way towards addressing the deleterious effects of cumulative
attacks on public procurement through collusion and corruption. In certain jurisdictions, a single agency
may have both a collusion and corruption remit, thus internalising this co-operation. While a combined
approach is not a necessary requirement of an effective strategy for the protection of public procurement,
whatever the structure of the co-operation mechanism utilised, it should, as basic principle, ensure: (i)
comprehensive coverage of all forms of malfeasance in public procurement; and (ii) efficient prosecution
of any such offences that arise in practice.

15. Enforcement agencies should also seek to establish a collaborative relationship with front line
public procurement officials. The purpose of such co-operation is two-fold. There is an educative effect,
alerting officials to the possibility and warning signs of collusion, as well as warning of the consequences for officials who themselves engage in corrupt practices. Additionally, co-operation establishes channels of communication between procurement officials and enforcers, thus further facilitating efficient prosecution of suspected instances of collusion and/or corruption.

(5) In addition to the existing framework of competition law, criminal justice legislation and public procurement regulations, a variety of more specialised mechanisms have been developed to protect and improve the integrity of the public procurement process. Nevertheless, such techniques must balance the sometimes competing requirements of collusion and corruption prevention, and the need to achieve a mutual accommodation of these objectives.

16. In addition to enforcement of the general competition law, criminal justice provisions and any public procurement rules, there exist a variety of methods by which integrity of the public procurement process, specifically, might be protected or improved. Such mechanisms include:

- **Opening national markets to international competition**, thus increasing the number of bidders in any tendering process.

- **Redesign of the procurement process**, maximising transparency without allowing sharing of commercially-sensitive information. Generally, sealed bid tenders are less prone to collusion than dynamic or open tender mechanisms; whereas individual negotiation has greater potential for corruption or favouritism than competitive bidding, although in certain circumstances it may be the most efficient procurement tool.

- **E-procurement**, that is, the organisation of tenders by electronic means via an internet portal. Care must be taken to ensure that the e-procurement procedure itself does not facilitate collusion, especially as this method eliminates the paper trail that might otherwise have provided evidence of bid rigging in the process.

- **Certificates of Independent Bid Determination (CIBD)**, which require bidders to certify that they have arrived at their tender price absolutely independent of other bidders. CIBDs operate as both a reminder of the relevant legislation and as a commitment by the bidder that these rules have been complied with, and are of particular value in situations where tender participants may be less aware of national legislation prohibiting corruption and collusion. Prosecution of CIBD violations can also be a possibility where absence of proof of an agreement makes it impossible to charge an antitrust violation.

- **Education** of public officials, business and civil society. This is perceived to be especially relevant in economies where rules against collusion and/or corruption in public tendering are relatively new or under-enforced.

- **Data analysis tools**, such as comparison of public databases to identify indicators of anti-competitive or corrupt activity.

- **Specialised review mechanisms for public contract awards**, whereby unsuccessful bidders who suspect flaws in the procurement procedure can challenge the award before a specialised tribunal. While such procedures can identify individual instances of corruption or collusion, they are generally unsuitable for detecting patterns of corruption and/or collusion across a number of contracts.

- **Auditing** of public procurement procedures, whether conducted internally by a separate wing of the relevant public agency, or externally by an independent State body with specific powers of audit.
Sanctions for collusion and/or corruption in public procurement range from fines and imprisonment to more specialised penalties like debarment from participation in future public procurement procedures. A key factor to achieving deterrence is to ensure a credible prospect of detection and prosecution, coupled with a sufficiently severe penalty. However, generating a “culture of compliance” should be a key objective for enforcement agencies.

In fighting collusion and corruption in public procurement, there must be a credible threat of discovery and prosecution, coupled with strong sanctions upon conviction. The typical penalties imposed for corruption in the contributing country submissions are fines and imprisonment, and dismissal within the employment context. Bid rigging is generally subject to the same penalties as other hard core cartels, meaning fines and, depending on the jurisdiction, imprisonment. Many countries have competition leniency programmes in place which grant immunity or reduced fines to firms that reveal the existence of cartels and participate in their subsequent investigation.

A number of sanctions, specific to the public procurement context, can be identified. In many jurisdictions, a conviction for participation in collusion and/or corruption in public procurement leads to debarment from future procurement procedures for a certain period of time. Particularly in smaller economies, however, this penalty may have the paradoxical effect of reducing the number of qualified bidders to an uncompetitive level. In those jurisdictions that utilise Certificates of Independent Bid Determination (CIBD) in public procurement, prosecution for false statements in certification can provide a straightforward means of penalising collusion in tendering. While the possibility of civil suits against corrupt officials and/or firms that participated in collusion was mentioned in the contributions, quasi private action of this nature is utilised to a lesser extent in the public context.

For some businesses, fines imposed for anticompetitive or corrupt behaviour are considered simply a cost of doing business. The United Kingdom’s contribution suggests that the adverse publicity and the possibility of disqualification from holding certain company offices may represent a greater harm, and function as a greater deterrent, for firms. More generally, while eliminating collusion and corruption entirely is a very challenging goal for any legal system, the development of a “culture of compliance” is an important step towards reducing such behaviours. As competing firms are often best placed to identify irregularities in public procurement, getting business on board in the fight against collusion and corruption can reap benefits in terms of both deterrence and detection.

The optimal strategy to tackle both collusion and corruption in public procurement appears to require a three-pronged approach: development of best practice rules for public procurement; extensive advocacy efforts; and vigorous enforcement action taken against any instances of corruption and/or collusion that are uncovered.

The optimal strategy to protect the integrity of public procurement that emerges from the contributions is a three-pronged approach, combining development of best practice rules with wide-ranging advocacy efforts and vigorous law enforcement.

Co-ordinated efforts to develop best practices rules for public procurement can utilise the benefits of hands-on experience to shape balanced and effective regulations for this complex area. Knowledge-sharing can occur on at least three levels: as part of a co-operation strategy between enforcement agencies at the national level; through transnational networks of national enforcement agencies; and through the work of international organisations, including the OECD.

With regard to advocacy efforts, a broad range of useful target areas can be identified: education of public officials; of business; of the media; and of the wider community. Effective advocacy can promote a change of culture in State practices and generate public support for enforcement efforts. More generally,
enforcement agencies should identify and advocate for the removal of any public procurement rules or procedures that facilitate or foster collusion or corruption. Business also has a role in this process, in terms of the education of its personnel and the development of internal compliance mechanisms.

23. As regards enforcement, the principles already outlined – including credible likelihood of discovery and prosecution, strong sanctions, use of specialised detection mechanisms and inter-agency co-operation – should govern such procedures. Moreover, enforcement should extend to the frontline of public procurement – namely, procurement officials themselves – so as to develop a synergy between all State agencies charged with the protection of the public procurement process.