

Unclassified

DAF/COMP/LACF(2012)8

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

13-Sep-2012

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

LATIN AMERICAN COMPETITION FORUM

Session III - Improving Effective Public Procurement: Fighting Collusion and Corruption

Contribution from Ecuador

18-19 September 2012, Santo Domingo, Dominican Republic

The attached document from Ecuador is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III of its forthcoming meeting to be held on 18-19 September 2012 in Santo Domingo, Dominican Republic.

Contact: Ms. Hilary JENNINGS, Head of Global Relations, Competition Division
Tel: +33 (0) 1 45 24 13 60; Fax: +33 (0) 1 45 24 96 95; Email: hilary.jennings@oecd.org

JT03326213

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.



DAF/COMP/LACF(2012)8
Unclassified

English - Or. English



LATIN AMERICAN COMPETITION FORUM

-- 18-19 September 2012, Santo Domingo (Dominican Republic) --

Session III – Improving effective public procurement: fighting collusion and corruption

CONTRIBUTION FROM ECUADOR¹

I. Size and policy objectives

1. *What fraction of the economy of Ecuador does public procurement account for? What are the principle policy objectives of public procurement?*

1. All procurement planning, programming, budget, control, administration and tenders for goods, services and public works by all agencies and institutions carried out with State resources in Ecuador are developed and formulated within a national system for public procurement.

2. In 2011, public procurement accounted for 14.62% of Ecuador's GDP. In comparison to the general state budget (*Presupuesto General del Estado*), the figure is 41.16%.

3. The main objectives of policy in the sector, according to national law on public procurement², are guided primarily by the following principles:

- a. **Quality:** To assure the quality of public spending and procurement in accordance with the national development plan.
- b. **Legality:** To ensure the full implementation of contracts and the effective application of contractual regulations.
- c. **Transparency:** To guarantee transparency and prevent bias in public procurement.

¹ This document was produced by the Competition Authority (*Junta de Regulación de Control de Poder de Mercado*).

² Organic Law on the national public procurement system (LOSNCPE), published in the Official Register (Registro Oficial) 395, 4 August 2008.

- d. **National participation:** To make public procurement a driving force behind national production.
- e. **Opportunity:** To promote the participation in the supply chain of craftsmen, professionals, and micro, small and medium-sized businesses with competitive offers.
- f. **Applicable technologies:** To modernise public procurement so that it enhances efficiency in the economic management of State resources.

2. ***To what extent do procurement policy objectives consider the impact of cost-savings from more effective procurement for other government funded social welfare or infrastructure projects? Are you aware of any initiatives undertaken or being considered by other government agencies in Ecuador (e.g. employment generation, economic development and education programmes) that were or are aimed at reducing poverty as a result of savings from more effective and competitive public procurement?***

4. There are no specified objectives within the national system concerning the channelling of cost-savings from the implementation of more effective public procurement. Furthermore, the *Instituto Nacional de Contratación Pública* (INCOP, hereinafter the National Institute of Public Procurement), as an autonomous body, does not redistribute cost savings from the implementation of an effective system to other government agencies.

5. The objectives of the national system for public procurement do however consider the importance of maintaining and improving efficiency, thereby leading to better economic management of State resources. One example of this is the public system of reverse auctions for pharmaceutical procurement, in which bids will typically decrease as the sellers undercut each other. Through the use of this procedure, the State has procured drugs for the treatment of common, rare, orphan and catastrophic diseases at prices lower than those offered in the private sector³.

II. Corruption

1. *What is the cost of corruption?*

6. Corruption has many costs that mostly affect procurement, the judiciary and finance, amongst other systems. Corruption also increases transaction costs and uncertainty in the economy; it discourages long-term investment; and it weakens the legitimacy of the State and its capacity to obtain revenues.

7. No formal estimates have been made of the economic cost of corruption in Ecuador; nevertheless, within the context of the comparative listing of corruption worldwide as measured by Transparency International, there is clearly a considerably high level of corruption in the country, which potentially implies a high economic cost.

2. *What factors facilitate corruption? Are some factors more important than others?*

8. Factors that facilitate corruption in both Ecuador and other countries in Latin America include: 1) Economic incentives that stem from corrupt practices by the public at large (citizens) and public officials;

³ One example is the case of the antibiotic Ciprofloxacin in 500 mg. tablet form. This pharmaceutical was being sold on the private market at prices varying from USD 0.15 to USD 7.77. Following the public reverse auction, the contract price went down to USD 0.06, which represents a 90% reduction in the selling price on the private market for the successful laboratory.

and 2) Ineffective legal enforcement, which enables stakeholders and other actors to exercise political pressure and prevent investigations in certain sectors from being carried out.

9. According to an evaluation report on the national system for public procurement in May 2011, which was based on a methodology proposed by the OECD, the main factors in the legal and regulatory framework of public procurement that potentially facilitate corruption in Ecuador are:

- a. No clear guidelines are given for tender documents to include wording that deals with the issues of fraud and corruption.
- b. No details are given of individual responsibilities or the consequences of engaging in corruption and fraud as these matters are left to general legislation.
- c. There have been very few cases of the enforcement of anti-corruption laws, which discourages enforcement.
- d. The lack of coordination between anti-corruption activities prevents an effective integrated anti-corruption system from being developed.
- e. Too few private institutions, individuals in civil society or beneficiaries in general are involved in the fight against corruption due to the fact that the system has not been opened up sufficiently to contributions from the public (citizens) to promote improvement.
- f. In spite of the fact that a mechanism to report corrupt conduct does exist, there is no guarantee of the security and confidentiality of information.

3. ***In what ways do transparency programmes help in the fight against corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in Ecuador?***

10. Transparency programmes help combat corruption by developing a culture of quality and transparency in public services, improving work systems, methods and processes and disseminating appropriate information on relationships occurring within and outside of institutions. Transparency programmes in Ecuador are complemented by the *Ley Orgánica de Transparencia y Acceso a la Información Pública* (Transparency and Freedom to Information Act), which has been in effect since May 2004.

11. Another practice that helps combat corruption is the setting up of independent institutions with skilled technical personnel to detect corrupt practices. The autonomy and expertise of these institutions increase the probability of this type of practice being detected.

12. Another key aspect in the fight against corruption is the signing of cooperation agreements and strategic alliances with other institutions. For example, Ecuador has endorsed the Inter-American Programme of Cooperation to Fight Corruption, which among other things comprises: 1) the strategy to achieve prompt ratification of the Inter-American Convention against Corruption; 2) the drafting of codes of conduct for public officials; and 3) the study of the problem of the laundering of assets or proceeds derived from corruption.

13. With regard to the effective implementation of the Transparency Act, it is only partially enforced and barriers to full enforcement continue to exist, including:

- a. A control and auditing system that is inefficient due to excessively complex controls, which are time consuming and inadequately defined for performance auditing purposes.
- b. Limited access to information, which is published in media that are in general difficult for the public to use and understand.

4. *Are firms required to certify during the procurement process that they have not bribed officials? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in Ecuador?*

14. In Ecuador, firms that participate in tenders are not obliged to certify that they have not offered bribes to officials.

15. The purpose of penalties is to preserve and maintain the probity, skills, loyalty, honesty and morality of public officials. Penalties applied to public officials that engage in corrupt practices are stipulated in the Organic Law of Public Service (Sp. acronym: LOSEP) and the Criminal Code of Ecuador (CPE). The penalties for public officials laid down in the LOSEP include removal from their post and disqualification from public office. Penalties under the Criminal Code are not applied exclusively to public officials but to citizens in general and include imprisonment from between six months to eight years and fines from between USD 8 and USD 156, plus between two to three times the amounts in restitution.

5. *What are the competent authorities in Ecuador for prosecuting corruption cases? Does the competition authority have any power in this area?*

16. Pursuant to Part 4, Chapter 5 (Function of Transparency and Social Control) of the Constitution of Ecuador, the following authorities are empowered to investigate and prosecute cases of corruption:

- a. The ***Consejo de Participación Ciudadana y Control Social*** (Council for Citizen Participation and Social Control) investigates, amongst other things, reports of actions and omissions that constitute corruption and which affect citizen participation. It is also responsible for assisting persons reporting corrupt practices and for establishing accountability procedures for bodies in the public sector.
- b. The ***Fiscalía General del Estado*** (Office of the State Attorney) conducts preliminary and criminal investigation and brings actions in accordance with due process and respect for human rights.
- c. The ***Procuraduría General del Estado*** (Office of the Procurator-General) exercises control over the legality of practices and contracts in the public sector for the benefit of national objectives.
- d. The ***Contraloría General del Estado*** (General Comptroller's Office) is the technical body responsible for overseeing the use of state resources and realising the objectives of state institutions and other legal persons governed by private law who receive public resources.
- e. The ***Superintendencias*** (Superintendencies) are technical bodies with different roles including the inspection, auditing, intervention and control of economic, social and environmental activities and services provided by public and private entities, in order to ensure that these activities and services are subject to the law and in the general interest.

17. The competition authority in Ecuador (the *Superintendencia de Control de Poder de Mercado*, hereinafter, the Competition Authority) is responsible for assuring market transparency and efficiency and for promoting competition. Its scope of action however does not focus on the investigation or prosecution

of cases of corruption, but more on imposing penalties on economic operators who engage in anti-competitive practices and abuse their power in the market. Sanctions imposed in such cases, in accordance with the law, are from 8% to 12% of total turnover and in certain cases the payment of 500 times the basic minimum salary rate⁴.

III. Collusion

1. *What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?*

18. The following factors, among others, facilitate collusion in public procurement processes in Ecuador: markets with few participants; entry barriers that limit the potential number of bidders; cross-ownership and other links between competitors; the regularity of tenders for the provision of a certain good or service; markets with a predictable demand; product homogeneity; symmetrical markets (in terms of market quotas, product variety, costs, technology, and capacity); market distribution, etc.

19. As far as industries that seem especially vulnerable is concerned, bid rigging can take place in any industry given that the abovementioned factors are non-specific to the characteristics of any particular sector.

2. *What sectors in Ecuador have been affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimize the risks of bid rigging?*

20. Many sectors in Ecuador have been affected by bid rigging, in particular the building and construction of public infrastructure, such as highways and state facilities, and other services provided to the public sector.

21. Examples of attempts to minimise the risk of bid rigging include, from 2008, the implementation in Ecuador of a system of public procurement to maximise savings in the public sector and minimise the possibilities of corruption through the absence of direct contact between tenderers and bidders. An evaluation of this system, using an OECD methodology, showed that, in comparison to 2002, the risk of corruption and bid rigging between 2008-2010 was reduced by more than 100% (Transparency International). The public procurement system is currently under constant evaluation and being improved, given the willingness of the National Institute of Public Procurement and the General Comptroller's Office to recognise shortcomings and work together, and to dialogue with different actors in society about possible complementary reforms.

22. In addition, the National Institute of Public Procurement has made major efforts in training on all levels and in all types of entity for best use to be made of processing and the systems. It is also important to point out the increasing willingness of private, international and other actors to support the improvements being made in the national system of public procurement.

3. *Are certificates of independent bid determination employed in Ecuador? When firms have engaged in collusion, are they prohibited from bidding in public procurement auctions for a period of time?*

23. In compliance with the existing legal framework, the use of certificates of independent bid determination in public procurement tenders is not required in Ecuador. The *Ley de Control de Poder de*

⁴ In 2012, the basic minimum salary rate (remuneración básica unificada) in Ecuador is USD 292 a month.

Mercado (Market Regulation Act) does however give the definition for restrictive practices in competition, i.e. all types of conduct by suppliers and tenderers that restrict competition through bid rigging in either public or private procurement processes, which are subject to punitive damages (fines).

24. With regard to these restrictive practices punishable by law, the interim Ecuadorian competition authority referred two resolution proposals to the public procurement agency, including a "statutory declaration and undertaking to uphold effective competition" form, in order for entities to become involved in public procurement procedures. The purpose of the form is for tenderers to make a sworn statement regarding the non-violation (in the procurement process concerned) of principles or laws connected with fair competition, including the fact that prices in the bid process concerned have been determined independently.

IV. Fighting collusion and corruption

1. *What cases have there been in Ecuador involving both corruption and collusion in public procurement?*

25. There have been various cases of corruption in Ecuador. One of the more recent, which is still being dealt with by the General Comptroller's Office, concerns possible corrupt practices involving kickbacks, surcharges and the diversion of public funds in public procurement for public hospitals: between 2007-2010, products, foodstuffs and equipment were purchased to the value of USD 2.7 million, of which approximately USD 500,000 was in surcharges.

26. With regard to collusion (and corruption), there have so far been no cases of trials or sanctions as the legal framework for collusion in public procurement to be punished was only set in place in October 2011.

2. *Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?*

27. There have been no reported cases of collusion. Cases of corruption have however been detected and prosecuted in different levels of government by the General Comptroller's Office. Nevertheless, these are difficult for the general public to understand.

3. *What methods and techniques for fighting corruption would aid the fight against collusion?*

28. Corrupt practices in Ecuador are investigated and sanctioned by the authorities referred to in paragraphs 16 and 17 above. Collusive practices are prosecuted by the Competition Authority. Bearing in mind that, from the competition point of view, the majority of collusive practices are investigated, it is important for methods and techniques to be set in place to combat both collusion and corruption. These methods include:

- a. The coordination of actions by the anti-corruption authorities with those of the Competition Authority, in particular, the investigation of collusive practices;
- b. The setting up of a study unit within the organisational structure of the Competition Authority that specialises in collusion in public procurement; and
- c. To reinforce an economic and legal incentive programme whereby members of a cartel who report the cartel's existence or who collaborate with information relevant to investigations can benefit from leniency.

4. *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in Ecuador?*

29. In accordance with the criminal code and different laws, there is no leniency for proven corrupt practices or bribery by public officials or citizens in general. There are circumstances for which penalties are reduced however.

V. *Advocacy and institutional arrangements*

1. *How do regulatory or institutional conditions help to facilitate bid rigging and corruption?*

30. With regard to the legal and regulatory framework, the following factors facilitate corruption:

- a. As far as the regulations are concerned, the procedures used for public procurement have not been brought up to date or standardised.
- b. Legislation on budgeting and financial procedures does not provide support for procurement, the performance of contracts, payment in a timely and accurate manner or the obligation of public entities to submit the certification of budgetary implementation.
- c. There is no definition in the legal system for the responsibilities, accountability or penalties for individuals and firms that have engaged in fraudulent or corrupt practices.

31. In terms of institutional conditions, the following factors are considered to facilitate corruption and bid rigging:

- a. The ineffectiveness of control and auditing systems, as well as inefficient procedures for appeal.
- b. Regulation and control processes are inefficient due to the lack of inter-institutional coordination between the National Institute of Public Procurement and the anti-corruption authorities.

2. *In what ways can the competition authorities work to improve the efficiency of public procurement?*

32. In order for efficiency to improve in public procurement, two aspects need to be addressed in particular: 1) The setting up of inter-institutional cooperation agreements between the National Institute of Public Procurement and the Competition Authority; 2) As discussed above, in order to reduce the risks of collusion, together with the implied economic inefficiencies, the Competition Authority needs to have a section or study unit that specialises in collusion in public procurement.

3. *What steps have been taken to improve the efficiency of the public procurement process in Ecuador? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in Ecuador and what have been the results?*

33. Measures adopted to increase efficiency in public procurement include the implementation of a system with a consolidated legal framework that provides greater transparency and open supervision by contracting entities. The supervisory body is modern and has credibility and a good reputation in the eyes of the public and civil society. Public procurement is also becoming more efficient with provisions to delegate authority to others with the capacity to assume responsibilities, as well as a delegation process that

is supported by regulations and policies, together with the political will from outside that tends towards decentralisation and deconcentration as ways to speed up process.

34. As far as other approaches to reduce the risks associated with collusion and corruption are concerned, no specific measures have been adopted although it is envisaged that the implementation of the methods and techniques discussed in paragraph 28 above will considerably reduce these risks.

4. *When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?*

35. Although no specific measures have been taken to reduce collusion and bid rigging, as mentioned above, both the Competition Authority and the transparency authorities in Ecuador are aware of the impact that such measures would have on corruption.

5. *Has your competition agency undertaken competition advocacy in this area?*

36. The recently appointed Competition Authority is at present coming into effective operation, and the promotion of the current regulations concerning competition is currently under way in Ecuador.

6. *If your agency has prosecuted any cases of procurement corruption or collusion, what types of remedies have you considered?*

37. The Competition Authority is in the process of starting up its activities and forming its organisational structure, and so far there have been no recorded cases of cases of corruption or collusion.

7. *What institutional arrangements are in place in Ecuador to deal with the interface between anti-corruption and anti-collusion policies? Do you have established and institutionalised relationships with those empowered to prosecute corruption cases (for example, Memoranda of Understanding, cooperation agreements, inter-agency taskforce)? Are competition officials obliged to report on alleged instances of corruption that are discovered during the investigation of bid rigging cases? If yes, has this ever occurred?*

38. Following on from the previous paragraph, cooperation agreements between the Competition Authority and the transparency authorities in Ecuador have yet to be signed. As mentioned above, however, the Ecuadorian authorities are aware of the need for these cooperation agreements to be signed.