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

**LATIN AMERICAN COMPETITION FORUM**

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

**Contribution from Colombia**

**18-19 September 2012, Santo Domingo, Dominican Republic**

*The attached document from Colombia 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.*

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## LATIN AMERICAN COMPETITION FORUM

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

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

#### CONTRIBUTION FROM COLOMBIA

#### I. Size and policy objectives

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

1. According to estimates, public procurement accounts for around 25% of Colombia's GDP. Its importance greatly increased following the passing of Law 80/1993 on public procurement in a wide variety of sectors, including infrastructure and the procurement of goods and services.

2. The principle policy objectives of public procurement in Colombia are transparency, objectivity, responsibility and integrity, as laid down in the provisions of the Constitution, in particular Law 80/1993 and Law 1150/2007.

**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 Colombia (e.g. employment generation, economic development and education programs) that were or are aimed at reducing poverty and utilised the savings generated from more effective and competitive public procurement?***

3. There is no information available on possible cost-savings from more effective public procurement for any other government-funded objectives.

## II. Corruption

### 1. *What is the cost of corruption?*

4. Corruption results in costs for both the State and the population in general. It implies additional costs for the State in that resources originally intended for projects either do not arrive at their destination or are insufficient. This hinders the State from providing the population with the goods and services that they need, and the objectives of public policy become unachievable. These costs are closely connected, with the result of tax burdens on the one hand and gaps in social development on the other.

### 2. *What factors facilitate corruption? Do some factors appear to be more important than others?*

5. One of the factors facilitating corruption is the existence of incentives for both procurement officials and private agents to engage in this type of practice. As long as penalties are low for this type of offence, the higher the possibilities that they will occur.

6. Pursuant to the adoption of Law 1474 in 2011, the Colombian government increased the fines, prison terms and other penalties for corrupt practices, which, together with other measures such as enhanced transparency on all levels in public sector management, has reduced the incentives to engage in these practices.

### 3. *How do transparency programmes help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in Colombia?*

7. Transparency programmes help fight corruption by making each stage visible in processes that are affected by this phenomenon. Increased supervision and regulation by procurement officials leads to better detection. In Colombia, these programmes are combined with stringent penalties.

8. Another measure used to combat corruption is the setting up of independent agencies with qualified staff for the monitoring and early detection of corrupt practices. This approach is overseen in Colombia by an anti-corruption and transparency watchdog (see below).

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

9. There is no obligation for firms that participate in public procurement in Colombia to certify that they have not offered bribes to officials. Sanctions for individuals include debarment from public procurement, fines and imprisonment (Article 16 and 31-32, Law 1474/2011).

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

10. The authorities competent to prosecute corruption cases in Colombia are as follows:

- The *Procuraduría General de la Nación* (Office of the Procurator-General) is in charge of the administrative and disciplinary responsibility of public officials who break the law.
- The *Contraloría General de la República* (General Comptroller's Office) is responsible for overseeing the use of fiscal resources and tax revenues by public entities. This covers all ex-ante and ex-post public procurement activities. It also carries out investigations into public officials engaging in corrupt practices and can impose fines.

- The *Fiscalía General de la Nación* (Office of the State Attorney) investigates practices connected with criminal activities including corruption and bid rigging in public procurement by officials and agents in both the private and public sectors. Its investigations can lead to imprisonment.
- The anti-corruption watchdog (*Zar Anticorrupción*) can request the prosecution of public officials and private agents for alleged corruption, although it has no authority to give judgment on cases or to impose administrative sanctions and is mostly involved in campaigns and producing and publicising information on corruption.
- The *Superintendencia de Industria y Comercio* (SIC, hereinafter the Competition Authority) is the sole competition authority in Colombia.

### III. Collusion

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

11. According to the “Practical guide to combating bid rigging in public procurement”, produced by the Competition Authority, the factors that facilitate collusion in public procurement are:

- Market concentration: A low number of potential bidders facilitates collusive agreements in that it reduces the costs of business relations, control over agreements and even penalties in prison set for failing to comply with the law.
- Entry barriers: By establishing barriers to newcomers, firms in the market are protected from the competitive demands of different competitors.
- Repetitive or frequent bidding: This occurs when framework contracts, which are recognised by bidders with experience, are used for the procurement process.
- Stability of market conditions: The regularity of supply and demand in the market may lead to a constant, predictable flow of demand from the public sector, which may increase the risk of collusion
- Homogeneous products with few, if any, close substitutes: when goods and services for procurement have no close substitutes, suppliers try to use alternatives that have been reduced and raise the prices.
- Consortiums and temporary partnerships: although these forms of business association are legal, they can facilitate the transfer of information between the members.

#### *What industries seem especially vulnerable to bid rigging?*

12. The industries in Colombia that are most susceptible to collusive agreements are construction, repair and maintenance, and supplies in general (foodstuffs, office supplies).

**2. *What sectors in Colombia have been affected by bid rigging conspiracies in public procurement?***

13. From the cases dealt with by the Competition Authority, the sectors most susceptible to collusive agreements are construction, repair and maintenance; foodstuffs, drinks and tobacco; services for national defence, public order, security and surveillance; and office equipment, accessories and supplies.

***What experience has your agency had in helping design procurement systems in order to minimize the risks of bid rigging?***

14. The Competition Authority has helped to improve the design of procurement systems through regular close contact with the public entities that use them. This has included frequent training sessions and dissemination of the “Practical guide to combating bid rigging in public procurement”.

**3. *Are certificates of independent bid determination employed in Colombia?***

15. These certificates are not employed in Colombia.<sup>1</sup>

***When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?***

16. Pursuant to Article 27 of Law 1474 (Anti-corruption Statute), 2011, collusion in public procurement, public tenders, short-listing and tender contracts shall be sentenced to imprisonment, an economic fine and debarment from participation in public procurement procedures for eight years. Under the leniency programme, debarment is reduced to five years.

17. In cases of corruption in which natural persons have been declared legally responsible for crimes against the public administration and public property and for those who have been condemned for links with illegal groups, crimes against humanity and international bribery, in accordance with Article 1 of Law 1474, the sanction is debarment from participation in public procurement procedures for twenty years.<sup>2</sup> In August 2012, the Constitutional Court declared this article to be unconstitutional and forewarned that sanction in these cases would subsequently incur lifetime debarment.<sup>3</sup>

**IV. *Fighting collusion and corruption***

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

18. There have been various cases involving both collusion and corruption. One of the more recent ones, amongst others, dealt with by the Competition Authority is the “NULE” case<sup>4</sup>, in which various firms had formed a cartel that involved public officials in state and local government entities and was influencing public procurement.

<sup>1</sup> <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00599.html>

<sup>2</sup> [http://www.secretariasenado.gov.co/senado/basedoc/ley/2011/ley\\_1474\\_2011.html](http://www.secretariasenado.gov.co/senado/basedoc/ley/2011/ley_1474_2011.html)

<sup>3</sup> <http://www.rcnradio.com/noticias/condenados-por-corrupcion-no-podran-contratar-con-el-estado-de-por-vida-corte-15874>

<sup>4</sup> [www.elspectador.com/impreso/temadeldia/articulo-353284-grupo-nule-y-los-casos-nacionales](http://www.elspectador.com/impreso/temadeldia/articulo-353284-grupo-nule-y-los-casos-nacionales)

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

19. From the cases that have come before the authorities in Colombia, no one level of government stands out as being affected by collusion and corruption. Certain levels may appear to be more affected by these phenomena, although it is difficult to determine their relative position due to data and information problems.

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

20. The penalties laid down in Law 1474/2011 for those convicted of corrupt practices have been increased and as such both hinder and are a discouragement to collusive practices. Debarment from public procurement, sanctions and prison sentences, together with more stringent regulatory requirements, make it increasingly difficult to set up and participate in anti-competitive agreements.

21. Nevertheless, as the “Transparencia por Colombia” organisation has pointed out, laws are necessary but they are not sufficient.<sup>5</sup> Developments by this organisation have shown that various additional elements, in addition to the fight against corruption, could contribute greatly in reducing the risk of collusion. These include objective rules of the game for procurement processes, ongoing training of procurement officials, improvements in planning, incentives for integrity, the strengthening of controls over recruitment, and promotion of the culture of loyalty.

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

22. In general, this is not the case. As far as competition is concerned, only collusion is classified as a criminal offence. Leniency in such cases, in accordance with Article 27 of Law 1474, leads to a one third reduction in the prison sentence, a reduction of 40% in the fine and debarment from public procurement for five years. This article was incorporated into the Colombian Criminal Code under Article 410 A.

**V. *Advocacy and institutional arrangements***

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

23. Certain institutional and regulatory conditions can facilitate bid rigging and corruption. Entry barriers and tender frequency and homogeneity are examples of this. In addition, weak penalties can be an encouragement for officials procurement to engage in these practices.

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

24. The Competition Authority (SIC) can improve the efficiency of public procurement in Colombia in various ways. One is by supervising and monitoring the markets in which public procurement takes place in order to prevent anti-competitive tender practices. In addition, increased penalties for violations of free competition may discourage these practices. A third way is through advisory assistance and continuous training in competition for procurement officials. All together, these measures may help to improve efficiency in public procurement.

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<sup>5</sup> [www.transparenciacolombia.org.co/Portals/0/Publicaciones/Art%C3%ADculo%20Econom%C3%ADa%20Colombiana%20PDF.pdf](http://www.transparenciacolombia.org.co/Portals/0/Publicaciones/Art%C3%ADculo%20Econom%C3%ADa%20Colombiana%20PDF.pdf)

3. ***What steps have been taken to improve the efficiency of the public procurement process in Colombia? 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 Colombia and what have been the results?***

25. Various measures have been taken on different fronts to improve efficiency in public procurement. One is Law 1474/2011 (the Anti-corruption Statute), which strengthens and regulates the system of sanctions and leniency for cases of corruption and collusion. It also fosters transparency programmes on all levels of government.

26. With regard to the Competition Authority in particular, an inter-disciplinary group specialising in collusive practices was set up in April 2012 to improve the monitoring of public procurement as a result of a notable increase over the last three years of public procurement-related cases dealt with by the authority. Approximately 30 cases a year have been dealt with during this time.

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?***

27. The Competition Authority believes that the best balance can be achieved through maintaining and enhancing transparency, on the one hand, and reducing the risk of collusion, on the other.

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

28. The Competition Authority has undertaken different advocacy actions as a way of approaching and contacting entities involved in public procurement in Colombia. It has also produced handbooks on advocacy and collusion and organised various congress events on the subject.

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

29. Once the Competition Authority has imposed a sanction or penalty, no other immediate remedy is taken into consideration other than to issue warnings to other actors in the market in order to prevent any repeat of these practices.

7. ***What institutional arrangements are in place in your country 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, co-operation agreements, inter-agency taskforce)? Is there a duty on competition officials to report alleged instances of corruption which were found during the investigation of bid rigging cases? If yes, has this ever occurred?***

30. There have so far been no cooperation agreements, memoranda of understanding or inter-agency taskforces with other entities of the state in the fight against corruption. Reports of cases of this type that come to the attention of the Competition Authority are made known to either the Office of the Procurator-General, the General Comptroller's Office or the Office of the State Attorney.

31. Public officials have the duty to report cases involving corruption to the competent authority. In general, they do receive prior knowledge of cases of this type, and they also inform the Competition Authority of cases of corruption involving collusion.

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