



## POLICY ROUNDTABLES

# Collusion and Corruption in Public Procurement 2010

### Introduction

The OECD Global Forum on Competition debated Collusion and Corruption in Public Procurement in February 2010. This document includes an executive summary and the documents from the meeting: an analytical note by the OECD Secretariat, written submissions from Albania, Australia, Bangladesh, Brazil, Canada, Chile, Colombia, Croatia, El Salvador, European Union, France, Gabon, Germany, India, Indonesia, Ireland, Israel, Japan, Korea, Latvia, Mexico, Morocco, Norway, Pakistan, Papua New Guinea, Peru, Poland, Romania, Russian Federation, Singapore, Slovak Republic, South Africa, Sweden, Chinese Taipei, Tunisia, Turkey, United Kingdom, United States and several experts, as well as an aide-memoire of the discussion.

### Overview

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

### Related Topics

- Principles of Integrity in Public Procurement (2009)
- Guidelines for Fighting Bid Rigging in Public Procurement (2009)
- Designing Tenders to reduce Bid Rigging (2009)
- Detecting Bid Rigging in Public Procurement (2009)
- Fighting Cartels in Public Procurement (2008)
- Public Procurement; the Role of Competition Authorities in Promoting Competition (2007)

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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on Collusion and Corruption in Public Procurement, held by the Global Forum on Competition in February 2010.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur collusion et corruption dans les marchés publics qui s'est tenue en février 2010 dans le cadre du Forum mondial sur la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

*By the Secretariat*

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.

- (1) ***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.***

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 economics, however, the efficient functioning of public procurement may be distorted by the problems of collusion or corruption or both.

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.

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.

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.

- (2) ***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.***

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.

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.

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.

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.

- (3) ***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 indispensable for corruption prevention, excessive or unnecessary transparency should be avoided.***

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.

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.

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.***

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.

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.

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.***

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.

(6) ***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.

(7) ***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.

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.

## SYNTHÈSE

*par le Secrétariat*

Une table ronde sur la collusion et la corruption dans la passation des marchés publics s'est tenue dans le cadre du Neuvième Forum mondial sur la concurrence. À la lumière de ces débats, de la note de référence du Secrétariat et des contributions soumises par les pays et par différents intervenants, plusieurs points clés se dégagent.

- 1) ***La collusion et la corruption sont des problèmes distincts qui touchent la passation des marchés publics, mais ils se produisent souvent concomitamment, et leurs effets se renforcent mutuellement. Il convient donc de les envisager conjointement comme une menace pesant sur l'intégrité des marchés publics.***

Les marchés publics portent sur l'achat par l'État de biens et services nécessaires à ses activités, et leur but premier est d'obtenir la meilleure utilisation possible des deniers publics. Dans les économies développées comme en développement, cependant, le bon fonctionnement de cette procédure d'achat peut être altéré par des problèmes de collusion, ou de corruption, ou des deux.

Dans le cadre d'un appel d'offres portant sur un marché public, la collusion désigne une entente entre les soumissionnaires, qui s'organisent pour éliminer l'élément concurrentiel du processus. Le mécanisme des soumissions concertées est typique de la collusion dans ce contexte : les soumissionnaires déterminent entre eux celui qui devrait remporter le marché, et "truquent" leurs offres – par exemple en assurant une rotation des offres, en faisant des offres complémentaires ou en pratiquant des offres de couverture – de telle sorte que le soumissionnaire qu'ils ont désigné soit sélectionné par la procédure soi-disant concurrentielle. Dans la plupart des régimes juridiques, les soumissions concertées sont considérées comme une entente injustifiable et interdites à ce titre par le droit de la concurrence. Dans de nombreux pays, elles constituent aussi une infraction pénale.

On parle de corruption lorsque des fonctionnaires utilisent la puissance publique à des fins d'enrichissement personnel, par exemple en acceptant un « pot de vin » en contrepartie de l'octroi d'un marché. Si ce phénomène survient habituellement pendant le processus de passation des marchés, il se produit aussi des cas de corruption postérieurement à l'attribution des marchés. La corruption est une relation verticale entre le fonctionnaire concerné, qui est l'acheteur dans le cadre de la transaction, et un ou plusieurs soumissionnaires qui sont dans ce contexte les vendeurs. La corruption est généralement interdite par le droit pénal national, par la législation relative à l'éthique dans la fonction publique ou par la réglementation spécifique de la passation des marchés publics.

En fin de compte, ces infractions, quoique distinctes, produisent cependant le même effet : un marché public est attribué en fonction de critères autres que la concurrence équitable et les mérites de l'offre retenue, de sorte qu'il n'est pas fait une utilisation maximale des deniers publics. Les contributions de certains pays (notamment la Colombie, la France, la Lettonie et les États-Unis) présentent des données empiriques montrant que la corruption et la collusion peuvent coexister et que, sans aucun doute, elles se renforcent mutuellement. Lorsqu'un marché public est entaché de corruption, la collusion entre soumissionnaires – par exemple sous la forme d'un dédommagement ou de l'attribution de marchés secondaires – peut être nécessaire pour que les

candidats éliminés ne révèlent pas le comportement illicite aux autorités. De même, les rentes économiques tirées de la collusion peuvent favoriser la corruption, tandis que la collusion est facilitée par la présence d'un « allié » à l'intérieur de l'organisme acheteur, qui fournit aux soumissionnaires les renseignements nécessaires pour truquer les offres d'une manière plausible et peut même surveiller la bonne exécution du mécanisme d'entente.

2) ***Le caractère particulier de la passation des marchés publics et de leur contexte rend ce processus particulièrement vulnérable à la collusion et à la corruption, et accroît d'autant l'ampleur des préjudices causés par ces infractions.***

Toutes les procédures de passation de marchés, que ce soit dans le secteur public ou privé, peuvent être entachées de collusion et de corruption. Pourtant, le caractère particulier de la passation des marchés publics rend celle-ci particulièrement vulnérable aux pratiques anticoncurrentielles et à la corruption, et amplifie les dommages qui en résultent. C'est pour cette raison que les problèmes de collusion et de corruption qui se posent tout particulièrement dans la passation des marchés publics méritent une attention spéciale.

Les marchés publics sont d'une importance vitale pour l'économie d'un pays : comme l'indiquent les contributions reçues, ils représentent généralement 15 à 20 % du produit intérieur brut. L'efficacité de la passation de ces marchés détermine la qualité des infrastructures et services publics, et elle a une incidence sur la gamme et la qualité des infrastructures et des services qu'un État peut offrir à ses citoyens, puisque l'argent gaspillé du fait de la collusion ou de la corruption se traduit, au bout du compte, par un moindre volume de ressources publiques disponibles. C'est la raison pour laquelle la passation des marchés publics est une question de toute première importance pour le développement économique d'un pays.

Certains aspects de ce processus le rendent toutefois particulièrement vulnérable aux pratiques corrompues et anticoncurrentielles. Les marchés publics portent fréquemment sur de grands projets assortis de budgets élevés, qui présentent des occasions lucratives de pratiquer la collusion et la corruption. Les exigences de la réglementation, en dictant des procédures particulières, peuvent rendre le processus extrêmement prévisible, ce qui crée des opportunités de collusion. Certains secteurs faisant souvent l'objet d'appels d'offres, comme le BTP ou la santé, peuvent être particulièrement exposés aux pratiques corrompues ou anticoncurrentielles. Enfin, le simple volume des biens et services achetés par l'État rend en lui-même la surveillance difficile et accroît la probabilité que le processus de passation des marchés soit victime de la collusion et de la corruption.

On peut avancer que les effets de la collusion et de la corruption sont plus problématiques pour les marchés publics que pour les marchés privés. En effet, les ressources perdues du fait de la distorsion du processus de passation des marchés publics représentent un gaspillage des deniers publics. La perte qui en résulte en termes d'infrastructures et de services publics, que ce soit sur le plan de leur qualité ou de leur diversité, exerce ses effets les plus néfastes sur les couches les plus défavorisées de la population, parce que ce sont elles qui font le plus appel à l'offre publique de services et d'infrastructures. L'altération du processus de passation des marchés publics se fait au détriment de la démocratie et d'une bonne gouvernance publique, et elle entrave l'investissement et le développement économique. C'est ainsi que les déficiences du processus de passation des marchés publics produisent sur l'ensemble de l'économie un impact qui n'est pas celui des marchés privés.

3) ***La lutte contre la collusion et la lutte contre la corruption ne sont pas des objectifs qui s'excluent mutuellement : les deux devraient être menés de front pour mieux protéger le***

*processus de passation des marchés publics. La prévention de la collusion et de la corruption faisant parfois appel à des méthodes concurrentes, des arbitrages peuvent être nécessaires pour atteindre efficacement ces deux objectifs. Ainsi, tandis que la transparence est indispensable à la prévention de la corruption, il faut éviter d'imposer une transparence excessive ou superflue.*

La prévention de la collusion et la lutte contre la corruption sont deux aspects nécessaires de toute stratégie d'ensemble visant à protéger l'intégrité du processus de passation des marchés publics : il faut s'assurer qu'aucune partie à une transaction portant sur un marché public n'agit à l'encontre de l'objectif visant à obtenir la meilleure utilisation possible des deniers publics. Ces deux aspects de la prévention sont généralement mis en œuvre au sein de cadres juridiques distincts mais en grande partie compatibles. De plus, comme ces problèmes se renforcent mutuellement, si l'on réduit les risques de voir se produire l'une de ces infractions, on abaisse aussi la probabilité que l'autre survienne.

Au niveau opérationnel, toutefois, les bonnes pratiques appliquées pour éviter la collusion et la corruption peuvent être différentes. Si l'on prend l'exemple du schéma adopté pour les adjudications, de petits appels d'offres réguliers ont tendance à faciliter la collusion, tandis que les grands appels d'offres généraux peuvent favoriser la corruption. Une différence notable à cet égard réside dans le rôle et l'importance de la transparence dans le processus. Le principe de transparence – qui se rapporte à la disponibilité des informations sur les marchés à pourvoir, les règles de procédure, la prise de décision ainsi que la vérification et l'application des règles – est d'une importance critique pour prévenir la corruption. Dans certains cas, cependant, la transparence n'est pas compatible avec la nécessité d'assurer un degré maximal de concurrence dans le processus. L'exigence de transparence peut se traduire par la diffusion inutile d'informations commercialement sensibles, ce qui permet aux entreprises d'aligner leurs stratégies et facilite ainsi la formation et la surveillance de cartels d'entente. La transparence peut aussi rendre prévisible une procédure de passation de marchés, ce qui favorise encore davantage la collusion.

Il peut en résulter des tensions, du fait que la prévention de la collusion et de la corruption dans la passation des marchés publics repose parfois sur des méthodes concurrentes, ce qui peut nécessiter des arbitrages quant à la manière d'atteindre ces deux objectifs. Ainsi, tandis que la transparence est indispensable à la prévention de la corruption, il faut éviter d'imposer une transparence excessive ou superflue pour ne pas favoriser la collusion. Des incertitudes demeurent toutefois sur la nature des informations qui peuvent faciliter la collusion, et il serait souhaitable de mener de plus amples recherches sur cette question. Néanmoins, une bonne conception des procédures peut déjà faire beaucoup pour améliorer l'efficacité de la passation des marchés et atténuer ces inconvénients. Par exemple, les règles des appels d'offres peuvent imposer de ne publier que les informations concernant les offres gagnantes, sans divulgation de l'identité des soumissionnaires. Les procédures ne doivent pas fournir aux participants des informations sensibles sur les actions des autres soumissionnaires mais elles doivent néanmoins permettre à des organismes publics indépendants de contrôler les décisions prises par les fonctionnaires responsables.

- 4) ***La coopération entre les divers organismes chargés de la lutte contre la collusion et la corruption dans la passation des marchés publics est d'une importance capitale pour que la stratégie d'ensemble soit cohérente, pour qu'elle soit pleinement appliquée et pour que, de plus, les infractions fassent l'objet de poursuites efficaces.***

Les cas de collusion et de corruption sont souvent traités et sanctionnés par des organismes nationaux distincts : la collusion relève généralement de l'autorité de la concurrence, tandis que la corruption est du domaine du ministère public ou d'organes spécialisés dans la lutte contre la corruption. Cependant, étant donné que la collusion et la corruption se renforcent mutuellement et que ces comportements sont souvent concomitants, la méthode la plus efficace pour préserver l'intégrité du processus de passation des marchés publics repose sur une coopération entre les différents organes compétents, qu'elle prenne la forme d'un protocole d'accord officiel, d'une obligation de notification ou d'autres mécanismes.

Une approche coordonnée présente des avantages considérables. Ainsi, des indices de collusion peuvent être mis au jour lors d'une enquête sur un cas de corruption, et vice versa. S'il existe une politique d'échange de données, cette information sera alors portée à l'attention de l'organe d'intervention approprié. L'échange de preuves, lorsqu'il est compatible avec les règles nationales en la matière, facilite en outre le travail des organes d'intervention (le plus souvent, l'autorité de la concurrence) qui ont des pouvoirs plus limités que le ministère public ou d'autres services de la justice pénale. La mise en place d'une politique officielle de coopération peut contribuer, de manière plus générale, à ce que l'ensemble des organes d'application des lois aient une meilleure connaissance des pratiques illicites dans la passation des marchés publics. Ce type de coopération peut donc contribuer utilement à contrer les effets néfastes du cumul de la collusion et de la corruption à l'encontre de la passation des marchés publics. Dans certains pays, un seul organe est chargé de la lutte contre la collusion et la corruption, ce qui internalise cette coopération. Une approche combinée n'est pas absolument nécessaire à l'efficacité d'une stratégie de protection des marchés publics mais, quelle que soit la structure du mécanisme de coopération utilisé, elle devrait au minimum assurer i) une large couverture de toutes les formes de malversations dans la passation des marchés publics, et ii) l'efficacité des poursuites contre les infractions effectivement constatées.

Les instances d'intervention devraient également chercher à établir des relations de collaboration avec les fonctionnaires qui traitent eux-mêmes les dossiers de passation des marchés publics. Une telle collaboration présente un double avantage. Elle a d'une part un effet éducatif, en sensibilisant les fonctionnaires aux possibilités et aux indices de collusion, et d'autre part elle alerte les agents des conséquences qu'entraînerait leur participation à des pratiques illicites. Par ailleurs, la coopération ouvre des voies de communication entre les agents chargés des marchés publics et les services de répression, ce qui favorise l'efficacité des poursuites dans les cas présumés de collusion ou de corruption.

- 5) ***Outre le cadre existant que constituent le droit de la concurrence, le droit pénal et la réglementation des marchés publics, divers mécanismes plus spécialisés ont été mis au point pour préserver et améliorer l'intégrité du processus de passation des marchés publics. Ces techniques doivent néanmoins trouver un équilibre entre les exigences parfois contradictoires de la prévention de la collusion et de la corruption, et réussir à tenir compte de ces deux objectifs.***

Outre l'application du droit général de la concurrence, des dispositions de la justice pénale et des règles concernant les marchés publics, diverses méthodes permettent de préserver et d'améliorer

spécifiquement l'intégrité du processus de passation des marchés publics. Ces mécanismes sont notamment les suivants.

- *L'ouverture des marchés nationaux à la concurrence internationale*, qui accroît le nombre de soumissionnaires participant aux appels d'offres.
- *La révision du format des adjudications*, en vue de maximiser la transparence sans pour autant révéler des informations commercialement sensibles. De manière générale, la remise des offres sous pli scellé donne moins prise à la collusion que les appels d'offres ouverts ou les enchères dynamiques. Si les négociations individuelles avec les fournisseurs sont plus susceptibles d'être entachées de corruption ou de favoritisme que l'appel à la concurrence, elles constituent néanmoins dans certaines circonstances l'outil de passation de marchés le plus efficace.
- *La passation de marchés par voie électronique*, c'est-à-dire l'organisation des appels d'offres sous forme électronique par l'intermédiaire d'un portail sur Internet. Il faut veiller à ce que la procédure électronique ne facilite pas en elle-même la collusion, d'autant plus que l'élimination de toute trace du processus sur papier ne permet plus de fournir la preuve d'une entente entre soumissionnaires.
- *L'attestation d'absence de collusion*, qui exige des soumissionnaires qu'ils certifient avoir établi le prix de leur offre en toute indépendance par rapport aux autres candidats. Ces attestations non seulement servent à rappeler aux participants la teneur de la législation existante, mais elles les engagent aussi à certifier qu'ils se sont conformés aux règles ; elles peuvent être particulièrement utiles dans les situations où les soumissionnaires sont peu conscients du fait que la législation nationale interdit la corruption et la collusion. La poursuite en cas de violation de ces attestations peut aussi être envisagée en l'absence de preuve d'un accord qui rende impossible d'estimer la violation antitrust.
- *L'éducation* des agents de la fonction publique, des entreprises et de la société civile, considérée comme particulièrement utile dans les économies où les règles interdisant la collusion ou la corruption dans la passation des marchés publics sont relativement récentes ou peu respectées.
- *Les outils d'analyse de données*, permettant par exemple de comparer des bases de données publiques pour établir des indicateurs de corruption ou d'activité anticoncurrentielle.
- *Les mécanismes spécialisés d'examen de l'attribution des marchés publics*, grâce auxquels les participants éliminés qui soupçonnent des anomalies dans une procédure peuvent faire appel de la décision d'adjudication devant un tribunal spécialisé. Si ces mécanismes contribuent à repérer des cas isolés de corruption ou de collusion, ils ne sont généralement pas adaptés pour détecter des schémas de corruption ou de collusion sur un grand nombre de marchés.
- *L'audit* des procédures de passation des marchés publics, qui peut être mené en interne par un service distinct de l'organisme public concerné, ou à l'extérieur, par une entité publique indépendante ayant des compétences d'audit spécifiques.

- 6) ***Les sanctions punissant la collusion ou la corruption dans les marchés publics comprennent des amendes et des peines de prison, mais aussi des pénalités plus spécialisées comme l'interdiction de participer à de nouveaux appels d'offres publics. Un facteur clé de dissuasion est la perspective crédible de voir de tels actes découverts et poursuivis, associée à des sanctions suffisamment sévères. L'instauration d'une « culture de la conformité » devrait toutefois être un objectif majeur des instances de répression.***

La lutte contre la collusion et la corruption dans la passation des marchés publics doit s'accompagner d'une menace crédible de voir les faits découverts et punis, ainsi que de sanctions sévères lors de la condamnation. Les contributions des pays indiquent que les sanctions généralement imposées pour corruption sont des amendes et des peines de prison, ainsi que le licenciement dans le contexte d'une entreprise. Les soumissions concertées font habituellement l'objet des mêmes sanctions que les autres types d'ententes injustifiables, c'est-à-dire des amendes et, selon les pays, des peines de prison. De nombreux pays ont mis en place des programmes de clémence qui accordent une immunité ou une réduction des amendes aux entreprises qui révèlent l'existence d'ententes et participent aux enquêtes qui s'ensuivent.

Il existe différentes sanctions spécifiques au contexte des marchés publics. Dans de nombreux pays, une condamnation pour participation à des actes de collusion ou de corruption dans le cadre des marchés publics entraîne l'interdiction de participer, pendant un certain temps, à d'autres appels d'offres. Cette sanction peut toutefois, surtout dans les petites économies, avoir l'effet paradoxal de faire tomber le nombre de soumissionnaires qualifiés au-dessous du niveau concurrentiel. Dans les pays qui ont recours aux attestations d'absence de collusion, les poursuites pour fausse déclaration offrent un moyen simple de pénaliser la collusion dans les appels d'offres. Bien que les contributions mentionnent la possibilité de procès civils contre des fonctionnaires corrompus ou des entreprises accusées de collusion, des actions quasiment privées de ce type sont moins utilisées dans le contexte public.

Certaines entreprises considèrent les amendes pour corruption ou comportement anticoncurrentiel comme un simple coût opérationnel. La contribution du Royaume-Uni laisse penser que la mauvaise publicité faite à l'entreprise et l'éventualité de l'interdiction d'exercer certaines fonctions en entreprise font plus de tort et sont plus dissuasives. De manière plus générale, si l'élimination totale de la collusion et de la corruption est un objectif très difficile à atteindre quel que soit le système juridique, le développement d'une « culture de la conformité » est un pas important vers la limitation de tels comportements. Comme les entreprises soumissionnaires sont souvent les mieux placées pour constater des irrégularités dans la passation des marchés publics, leur participation à la lutte contre la collusion et la corruption peut porter ses fruits, tant sur le plan de la dissuasion que de la détection.

- 7) ***La stratégie optimale pour lutter à la fois contre la collusion et contre la corruption dans les marchés publics paraît nécessiter une triple approche : élaboration de règles de bonnes pratiques pour la passation des marchés publics ; vigoureux efforts de sensibilisation ; et stricte application de la législation à l'encontre de tous les cas de corruption et de collusion.***

Au vu des contributions, la stratégie optimale pour préserver l'intégrité dans les marchés publics est une triple approche, associant l'élaboration de règles de bonnes pratiques, de vigoureux efforts de sensibilisation, et une stricte application de la législation.

Une action coordonnée en vue d'élaborer des règles de bonnes pratiques aux fins de la passation des marchés publics peut tirer parti de l'expérience directe des acteurs concernés pour formuler des règles équilibrées et efficaces qui soient applicables à ce domaine complexe. Le partage

d'expérience peut se dérouler à trois niveaux au moins : dans le cadre d'une stratégie de coopération entre les entités chargées de faire respecter la réglementation au niveau national ; par le biais des réseaux transnationaux des instances nationales chargées de l'application des lois ; et au travers des travaux d'organisations internationales telles que l'OCDE.

En ce qui concerne les actions de sensibilisation, une large gamme de destinataires potentiels peut être visée par des campagnes d'éducation : les agents de la fonction publique ; les entreprises ; les médias ; et la collectivité dans son ensemble. Si de telles campagnes sont efficaces, elles peuvent susciter un changement de culture ayant des effets sur les pratiques de l'État et amener l'opinion publique à soutenir les actions de répression. Plus généralement, les entités chargées de faire respecter les dispositions en vigueur devraient repérer les règles et les procédures qui facilitent ou encouragent la collusion ou la corruption dans les marchés publics et plaider en faveur de leur suppression. Le monde des affaires a également un rôle à jouer dans ce processus, en sensibilisant le personnel des entreprises et en mettant sur pied des mécanismes internes visant à assurer le respect de la réglementation.

Pour ce qui est de veiller au respect des règles, ces procédures devraient obéir aux principes déjà décrits – la perspective crédible de voir les comportements illicites découverts et condamnés, des sanctions sévères, des mécanismes de détection spécialisés et la coopération entre les organismes concernés. De plus, les mesures de répression devraient s'appliquer également aux fonctionnaires ayant la responsabilité directe des marchés publics, de manière à créer une synergie entre tous les organes de l'État chargés de la protection du processus de passation des marchés publics.



## **BACKGROUND NOTE**

*by the Secretariat*

### **Introduction**

In many countries large public procurement contracts raise serious issues of collusion, corruption and favouritism. Given the large sums involved, the incentives of bidders to collude and the temptation facing public officials can be substantial.

This paper will briefly discuss some of the complementarities and trade-offs that the fight against collusion and corruption presents to policy makers. In particular, this paper will briefly look at the following issues:

- The importance of public procurement in national economies and the relationship between collusion and corruption in public procurement;
- How the degree of transparency of the tender process may affect the likelihood of corruption and collusion;
- How the choice of bidding procedure can influence the likelihood that collusion or corruption could occur during the procurement process;
- The benefits that could be achieved by fighting collusion and corruption in public procurement in a co-ordinated way;
- Institutional frameworks that can facilitate the detection, investigation and prosecution of bid rigging and bribery in public procurement.

Annex I to the Issues Paper lists a suggested bibliography related to the issues discussed in the paper.

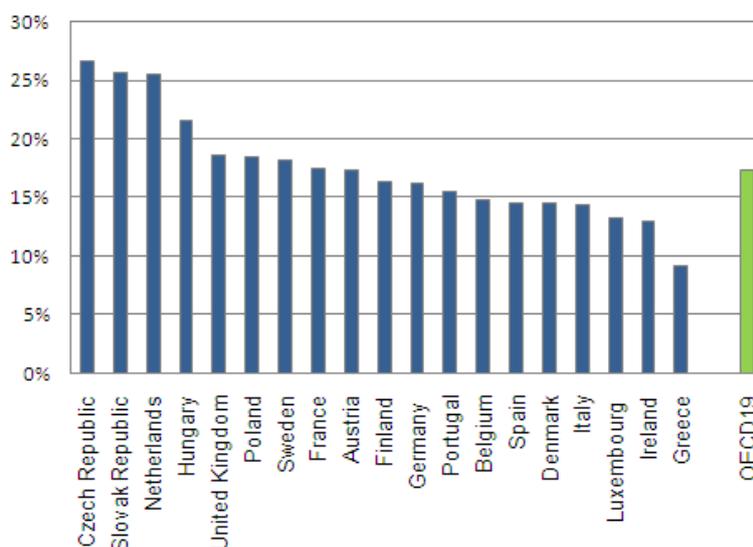
Annex II to the Issues Paper includes the issues and questions listed in the letter calling for country contributions of 1 December 2009 [DAF/COMP/GF(2009)14].

### **1. Collusion, Corruption and Public Procurement**

The performance of public procurement markets has significant implications for the effectiveness of governance in both developed and developing countries. As the statistics below indicate, public procurement accounts for more than 15% of Gross Domestic Product (GDP) in OECD countries. The share of GDP is even higher in non-OECD countries.<sup>1</sup> Moreover, procurement often involves goods and services with substantial economic and social significance, including transportation infrastructures, hospitals and health services, and education supplies.

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<sup>1</sup> OECD (2005), *Public Procurement in OECD, Fighting Corruption and Promoting Integrity in Public Procurement*, Paris.

**Figure 1. Public Procurement as a percentage of GDP (2006)**

Source: OECD, 2006

The fundamental purpose of public procurement is to obtain goods and services at the lowest possible price or, more generally, achieve the best value for money. Ensuring that public procurement markets function effectively requires policy makers to address two distinct but inter-related challenges: (i) promoting effective competition among suppliers and (ii) ensuring integrity in administrative processes. Unfortunately, the potential for both collusion and corruption in public procurement exists in all countries and in all sectors. Moreover, collusion and corruption are often associated with other crimes, such as money laundering, accounting fraud, tax evasion and extortion.

The size of public tenders can generate strong competition but firms may seek to escape competitive pressures through collusion and bribery:

- *Collusion* is a relationship between bidders which restricts competition and harms the public purchaser. Through bid-rigging, the price paid by the public administration for goods or services is artificially raised. These practices have a direct and immediate impact on public expenditures and, therefore, on taxpayers;
- *Corruption* involves a vertical relationship between one or more bidders and the procurement official. It is first and foremost a principal-agent problem where the agent (the procurement official) enriches himself at the expense of his principal, the government purchaser (or the public more generally). Corruption arises in procurement when the agent of the procurer in charge of the procurement is influenced to design the procurement process or alter the outcome of the process in order to favour a particular firm in exchange for bribes or for other rewards. As public procurement accounts for a large share of national economies, the potential of corruption to damage a national economy is significant.

Collusion and corruption affect the efficient allocation of public contracts. By definition, they involve an allocation of contracts which would have been obtained through the competitive process. Collusion implies that public contracts are allocated to the firm chosen by the cartel. Corruption leads to the allocation of the contract to the firm who has offered the bribe. In this sense, corruption implies a distortion of competition. Thus, while fighting collusion and fighting corruption are separate policy challenges, they are often highly complementary. This is the case, for example, when the procurement official is paid to organise and monitor a bid rigging conspiracy.

### **Box 1. Examples of Cases Involving Collusion and Corruption**

Hungary – In recent years, the Hungarian road construction market has witnessed a series of bid rigging cases. So far, the biggest antitrust fine (approximately EUR 27.7 million) was imposed in a bid rigging case involving highway construction. The contract was valued at EUR 630 million. The Hungarian competition authority found that the bidders had previously agreed among them on who was going to win the tender and also on the competing bidder to which the general contractor would offer a subcontract in the construction works. The press has repeatedly reported that road construction projects may have provided an ideal environment for corruption, and suspected that the illegal gains from bid rigging were a major source for financing political campaigns.

Japan - In 2005, the Japanese Fair Trade Commission (JFTC) ordered 45 Japanese steel bridge builders to stop rigging bids for government contracts. More than 70% of the steel projects for steel bridges given out between 1999 and 2004 by the Japan Highway Public Corporation were won by 47 companies which belonged to two bid-rigging associations. Their bids were almost exactly the same as the public corporation estimates. In one of the largest bid rigging cases in Japanese history, the JFTC also ordered the Japan Highway Public Corporation to improve its bridge contract procurement practices, alleging that some 20 former public officials had been involved in bid-rigging practices to secure future jobs with the 45 companies. According to one tally nearly 60% of former bureaucrats involved in road work got jobs after they retired with one of the top 10 corporate bodies that do road work.

France – Another example is the case of three major French construction companies, Bouygues, Suez-Lyonnaise and Vivendi which were the subject of a major investigation for a scandal which was described as “an agreed system for misappropriation of public funds” (Le Monde, 10 Dec 1998). The three companies participated in a corrupt cartel over building work for schools in the Ile-de-France (the region around Paris) between 1989 and 1996. Contracts worth over four billion Euros were shared out by the three major French building companies. The system also involved political corruption: a levy of 2% on all contracts was paid to finance the major political parties in the region.

## **2. The Role of Transparency in Public Procurement**

Transparency is crucial for sound procurement. Transparency is understood as the availability of information on the procurement decision-making process. It refers not only to the external publicity of the procurement event but also to the information that is disclosed to the bidders during the tender or after.

The effect of transparency on the procurement process is two-fold:

- An opaque and complex procurement system provides an ideal environment for corruption to thrive. Transparency is therefore among the most effective deterrents to corruption. Transparent procedures allow a wide variety of stakeholders to scrutinise public officials’ and contractors’ decisions and performance. This scrutiny helps keeping officials and contractors accountable;
- Transparency alone, however, does not guarantee an efficient procurement process. Care must be taken to ensure that the enhancement of transparency of the procurement process for purposes of fighting corruption does not increase the scope for anti-competitive practices. A procurement system based on enhanced transparency can increase the scope for collusion between bidders, if bidders are given the opportunity to know the competitors’ bidding strategy and to align to it to the detriment of competition.

### **2.1 Relationship between Transparency and Corruption**

Transparency requirements help to root-out and deter corruption by requiring information on the public procurement tender to be made publicly available. Procurement rules may increase the degree of transparency of the procurement system by requiring the basic facts and figures; award criteria and weights; the identities of the winning bidder and other bidders; and the terms offered by individual bidders, to be made publicly available. Introducing transparency into the procurement process deters corruption in various ways:

- Publicised and transparent procedures allow scrutiny of public officials' decisions and, thereby, keep public officials accountable. A high degree of transparency reduces the information asymmetries and facilitates monitoring, supervision and control of the procurement process. It also favours public control when information is publicly available;
- Transparency makes bidders accountable and facilitates detection and punishment of malfeasance. Transparency also increases the likelihood that other bidders denounce corrupt activities, which sends positive signals about trust in the process;
- Transparency helps bidders to avoid the prisoner's dilemma in cases where it is not known if other bidders are bribing or not. Where the procedure is not transparent, the prevailing strategy would be to bribe or to leave the tender, both of which would result in a non-efficient procurement outcome;
- Finally, transparency also makes it easier for government auditors to uncover illegal conduct.

## **2.2 *Relationship between Transparency and Collusion***

The issue of whether increasing transparency in public procurement markets helps achieve an effective and efficient procurement system deserves more attention. Improving transparency reduces the procurement official's discretion and allows the controlling bodies to monitor the process more easily. Thus increased transparency is likely to diminish corruption. However, care must be taken that increasing transparency in order to decrease corrupt practices does not increase the scope for anti-competitive practices.

Transparency is one of the factors required for a sustainable collusion. In order to reach terms of coordination, to monitor compliance with such terms and to effectively punish deviations, companies need detailed knowledge of competitors' pricing and/or output strategies. The artificial removal of the uncertainty about competitors' actions, which is the essence of competition, can in itself eliminate normal competitive rivalry. This is particularly the case in highly concentrated markets (which is the case with most public procurement markets), where increased transparency enables companies to better predict or anticipate the conduct of their competitors and thus to align to it, expressly or tacitly.

In the context of public procurement tenders, which are normally attended by a limited number of suppliers, the effects of information exchanges due to a transparent procurement process raises significant competition concerns. Information on the procurement outcome revealed by the auctioneer can facilitate collusion. If the auctioneer, for example, reveals the identity of the bidders and the prices offered, that allows the cartel to work more efficiently, as that information increases the ability of cartels to detect possible deviations from the bid rigging agreement. In other words, transparency makes policing of the agreement more easy. In general, the less information provided on the tender outcome, the more difficult it is to rig bids successfully.

## **2.3 *Policy Considerations***

In designing transparency rules and procedures, serious consideration should be given to establishing clear and precise disclosure requirements for various types of information. Rules also need to address when and to whom the information is made available. A number of other methods could be used to make collusion harder, while safeguarding the need to reduce the risk of corruption:

- Only information on the winning bid should be released, while information on the losing bids could be made available only to issuers of tenders and controllers, and not to competitors generally;
- Because of the potentially destabilising effect of non-identifiable bidders on bid rigging, the procurement official might consider keeping undisclosed the identities of the bidders, perhaps referring only to bidder numbers, and the number of bidders remaining in the bidding process;

- The procurement official might allow bids to be telephoned or mailed in, rather than requiring that bidders turn in their bids in person at a designated time and place where all can observe;
- The procurement official might allow a bidder to submit more than one bid under different bidder numbers, or under different identities;
- The timing of the disclosure of sensitive information (such as the losing bidders' identity and their bids) could be delayed to ease the effects of such disclosure on collusion.

### **3. Bidding Procedures and the Related Risks of Collusion and Corruption**

The issues of the appropriate degree of transparency in the procurement process are closely related to the choice of bidding procedure. This is an important and delicate exercise, as various bidding procedures have different degrees of transparency which may expose them to risks of either collusion or corruption. The choice of the "right" bidding model (or, better, the most suitable bidding model given the circumstances of the procurement) is therefore the starting point of any attempt to achieve efficiency in public procurement.

#### **3.1 *Dynamic or Open Tenders and Sealed-Bid Tenders***

At a *dynamic (or open) tender*, bidders gather at the same time and in the same place to submit multiple bids. The contract is awarded by the procurement entity to the best bidder. In dynamic auctions, bidders can observe their competitors' bidding behaviour at the tender, which facilitates co-ordination at the tender and the monitoring of the agreed contract allocation. The longer a dynamic tender, the easier the co-ordination among bidders since they have a higher number of opportunities of agreeing on allocating contracts. Moreover, a bidding system where bids are publicly disclosed with full identification of each bidder's price and specifications is the ideal instrument for the detection of price-cutters. It therefore provides the opportunity for colluders to punish firms which deviate from a collusive agreement.

If the risk of anti-competitive conduct is significant, the procurement official should preferably use a *sealed-bid tender* model which minimises the bidders' ability and incentives to collude. In sealed-bid tenders each bidder submits one single "best and final" offer, typically in writing, and the bid is kept secret from the other bidders. In a sealed-bid tender, a collusive outcome is possible but it is more difficult: effective prior communication between the conspirators prior to the tender is required and incentives to cheat on a collusive understanding are significantly higher because the ability to punish deviations is reduced, if not eliminated.

From an anti-corruption perspective, however, competitive bidding systems (such as dynamic tenders) are perceived as offering fewer opportunities for procurement officials seeking to favour a specific firm. Usually competitive processes are subject to various levels of supervision with external bodies evaluating bids for quality, specificity and value for money. Furthermore, firms that are not awarded a contract theoretically have the opportunity to call public and judicial attention to their concern about potential irregularities.

#### **3.2 *Direct Negotiations and Framework Contracts***

From a competition perspective, there may be situations where it is not necessary to adopt some form of competitive bidding process to achieve the most efficient procurement outcome. These are situations where *individual negotiations* with a limited number of suppliers may yield the best value for money. This could occur, for example, in the following circumstances:

- If the costs of organising and holding a tender are high and outweigh its expected benefits;

- If the likely bidders and, indeed the likely lowest-cost bidder, may already be known to the procurer. In this context, it may be more efficient for the procurer to approach the least-cost bidder directly to negotiate a price (perhaps with the threat of competitive tendering if it is felt necessary);
- If it is not possible to contractually specify in advance all the elements of the services to be supplied, as may be the case with complex projects which are difficult to define in advance and where there is significant scope for adaptations as the project develops;
- If other policy reasons or other explicit reasons exist, which do not require the procurer to select the lowest-cost supplier, i.e. if diversity of supply is essential to ensure continuity of service;
- If secrecy considerations prohibit the public solicitation of bids; this may be the case where national security interests are at stake;
- If the number of potential bidders is very small and a single bidder may have very significant market power; in this case, a tender will not yield an efficient outcome and it may be appropriate to adopt more sophisticated contracting approaches to procurement.

From a corruption perspective, however, non-competitive procurement contracts are considered a source of concern because of their lack of transparency and democratic oversight. Procurement officials authorised to enter into such contracts have greater power over which company receives the most lucrative contracts. Without appropriate supervision, individual preferences can easily become part of the official's final decision. From the vendor's perspective, receiving lucrative contracts without being subject to the discipline of competition is highly desirable and firms can see benefits of eliminating the risk of losing the contract by influencing and/or bribing the procurement official.

Similarly, procurement officials might find it more effective to use *framework contracts*, i.e. standing agreements used as a basis for purchasing goods and services from pre-qualified firms meeting a number of quality standards. Again framework agreements can save time and resources by eliminating numerous bidding processes, hence reducing the overall costs for procuring the goods or services. However, the use of framework agreements may raise ethical concerns, particularly if prices are not fixed before frameworks are drawn up. In this case, the agreement is left opened to the risk of discrimination and favouritism.

### 3.3 *Policy Considerations*

Given that the many different forms of procurement models are not all equal from the point of view of fighting collusion and corruption, it is important that procurement officials are aware of the risks attached to certain bidding models. Intuitively, *dynamic (or open) tenders* are more susceptible to collusion than *sealed-bid tenders*. Similarly, *private negotiations* and *framework agreements* with potential suppliers are less likely to lead to collusion than public tender processes. However, when it comes to fighting corruption, sealed-bid and non-competitive procurement are considered to be a potential source of concern due to a lack of transparency, limited democratic oversight and a high risk of corruption.

The choice of the bidding model largely depends on the circumstances of the procurement. If the risk of collusion is limited (because, for example, there are many potential suppliers) an open tender would be preferable. If the risk of collusion is significant, then it would be preferable to use a sealed-bid system. If the risk of both collusion and corruption is significant, procurement officials should still consider using a sealed-bid tender, but make the tender "corruption proof". In this case, the use of electronic or on-line bidding systems, for example, could ensure that both the risks of collusion and corruption are limited. Electronic bidding allows for a dynamic tender to take place, and at the same time ensures that a record is made of each bid and of each the person who had access to the bid. This prevents corrupt procurement officials from having had improper access to the bids before the bidding window is closed and the possibility of influencing the bidding process for personal gain. Similarly, to avoid improper

manipulations, the sealed bids could be opened in public, after the closure of the bidding window, and a requirement that no bid can be destroyed and replaced could be foreseen. Alternatively, technology which makes it impossible for the procurement official to tamper with the bids could also be used.

#### **4. Fighting Malfeasance in Public Procurement – How to Prevent and Punish Corruption and Collusion?**

Public procurement laws and regulations are designed to promote competition between bidders and secure the best value for public money. The fight against bid rigging and bribery should be an integral part of this process. National experiences show that there are many ways to fight malfeasance in the procurement process, but in general this can be done in three broad ways:

- Increasing the awareness of public administrations and procurement officials on the risks of corruption and collusion in public procurement. Officials should be trained to apply adequate rules and control mechanisms to prevent and detect malfeasance. The use of guidelines and best practices can be particularly useful in this area where a multi-disciplinary approach can secure important results. Training should aim at improving understanding among officials of the costs that such practices have on public resources and on the benefits of ethics for the contracting authority and its officials. Training should focus on detecting signs of collusion or corruption and should also encourage officials to come forward and report instances of corruption or collusion.

##### **Box 2. The OECD Bid Rigging Guidelines**

The OECD has long recognised the vital roles that competition and procurement agencies play in fighting hard core cartels in public procurement. In 2009, the Competition Committee developed a specific methodology to help governments improve public procurement by fighting bid rigging. The OECD Guidelines for Fighting Bid Rigging in Public Procurement assist procurement officials to reduce the risks of bid rigging through careful design of the procurement process and to detect bid rigging conspiracies during the procurement process. The purpose of the Guidelines is to help procurement officials to identify:

- Markets in which bid rigging is more likely to occur so that special precautions can be taken;
- Methods that maximise the number of bids;
- Best practices for tender specifications, requirements and award criteria;
- Procedures that inhibit communication among bidders;
- Suspicious pricing patterns, statements, documents and behaviour by firms, that procurement agents can use to detect bid rigging.
- More information on the OECD Bid Rigging Guidelines can be found at [www.oecd.org/competition/bidrigging](http://www.oecd.org/competition/bidrigging).

##### **OECD Principles for Enhancing Integrity in Public Procurement**

The OECD has developed a set of Principles for Enhancing Integrity in Public Procurement. The Principles were approved as a Recommendation by the OECD Council in October 2008. This instrument provides guidance to policy makers on how to enhance integrity in public procurement. The Principles are anchored around 4 pillars: (i) Transparency; (ii) Good management; (iii) Prevention of misconduct, compliance and monitoring; and (iv) Accountability and control. The Principles support the implementation of international legal instruments developed within the framework of the OECD, as well as other organisations such as the United Nations, the World Trade Organisation and the European Union.

To help countries implement the Principles for Integrity in Public Procurement, the OECD has developed a compilation of existing tools used in member and non-member countries (the “Toolbox”). The aim of the Toolbox is to support public officials in designing and developing guidance and procedures at various points in the procurement cycle. The Toolbox is currently undergoing a consultation process with a broad group of key stakeholders from both OECD member and non-member countries. They include the national and sub-national governments, the business community, trade unions and civil society organisations.

More information on the OECD Principles for Enhancing Integrity in Public Procurement can be found at [www.oecd.org/gov/ethics/procurement](http://www.oecd.org/gov/ethics/procurement).

- Establishing national (and international) networks of experts from procurement administrations, competition authorities and public prosecutors to improve the exchange of information and experiences that can enhance the detection and prevention of corruption and bribery. Networks could also be used to help officials better understand the notions of bid rigging and corruption: how they come about, the importance of tackling them, how to detect them, and the steps that can be taken to prevent bid rigging and corruption from occurring.

**Box 3. Examples of National Co-operation Networks**

Chile – In 2008, the Fiscalía Nacional Económica (the Chilean Competition Authority) established an Interagency Taskforce for Fighting Bid Rigging to increase the effectiveness of detecting illegal practices in public procurement. The taskforce includes representatives of the independent body in charge of controlling the legality of the administration’s acts, the (E-)Public Procurement Bureau, the Ministry of Public Works, the Council for the Internal Auditing of Government and an association of officers and staff in charge of procurement areas of different public bodies. The Department of Housing and Urban Planning, the Transport supervisor and the Pensions regulator later joined the group.

South Africa - In July 2009, the South African government established a Ministerial Task Team charged with inter alia preventing fraud and corruption in public procurement. The task team includes representatives from the National Treasury, Receiver of Revenue, Auditor General, Special Investigations Unit, and the Financial Intelligence Centre. Although there is no specific mention for bid-rigging, the Competition Commission will interact with the taskforce and advocate for special measures with respect to collusion in public procurement. The Commission is also committed to working with the National Treasury which is the custodian of public procurement policy.

Singapore – Recognising that often collusion and corruption can occur together, the Competition Commission of Singapore (CCS) maintains close working relationships with the Corrupt Practices Investigation Bureau (CPIB), the agency which investigates and aims to prevent corruption in the public and private sectors in Singapore. In particular, the CCS has established a protocol with CPIB that addresses case allocation and administration between the two agencies and ensures clarity and efficiency in case management.

- The most effective deterrent for collusion and corruption is to develop clear best practices, rules and regulations on detecting collusion and corruption in procurement processes, coupled with strong enforcement. Experiences in both anti-corruption and anti-collusion polices clearly indicate that high penalties (both civil, criminal and administrative) have proved to be the most effective means to fight bribery and collusion in public procurement. In the area of public procurement, however, alternative tools could be adopted to further discourage firms and public officials from engaging in these practices. In particular, two seem to have yielded positive results: self-certifications and disqualification orders or blacklisting.

**Box 4. Self-certifications**

Certifications of compliance with the law by bidders and by procurers alike have proved to be very useful. In some countries, for example, bidders are required to submit a Certificate of Independent Bid Determination (CIBD) as a requirement for bidding. CIBDs typically require each bidder to certify under oath that it has not agreed with its competitors about bids, that it has not disclosed bid prices to any of its competitors and that it has not attempted to convince a competitor to rig bids. CIBDs not only inform bidders about the illegality of bid rigging, but they also make prosecution of bid riggers easier, and they add additional penalties, including possibly criminal penalties for the filing of a false statement to the government. Similarly, in some countries such as the United States, government officials involved in procurement are required to certify that they have no knowledge of or did not improperly release procurement information and that they have attended specific training courses. In some cases, they are asked to provide on a voluntary basis personal financial information to rule out possible conflict of interests.

### **Disqualification Orders**

Next to the conventional civil, criminal and administrative sanctions, some countries have adopted specific sanctions for illegal conduct in public procurement. In particular, sanctioning corruption and bid rigging through a denial of access to future bidding opportunities – also known as disqualification or debarment – has received particular attention. Views on how to implement these sanctions are mixed. On the one hand, debarment can be a serious weapon to achieve specific and general deterrence. On the other hand, as a systematic (and automatic) debarment policy bears risks for collusion in markets where there are already few potential suppliers. These drawbacks could be avoided if the disqualification order would concern individuals involved in the conspiracy and not their company. Debarment of individuals reduces incentives to engage in illegal conduct, but allows the company to continue to participate in future procurement opportunities. Other sanctions, such as monetary sanctions, could still be imposed to the companies for the breach of competition or ethical rules by their employees.

#### **4.1 *The Role of Competition Authorities and Competition Policy in the Fight against Corruption***

Good laws for the financing of political parties, high ethical standards in the civil service, a satisfactory level of resources and technical expertise, as well as transparent information for controlling bodies are essential for fighting corruption. This requires strong working relationships between competition, corruption, and procurement authorities. By taking stock of existing working methods and concerns, competition authorities' advocacy programmes will be better able to respond to the joint challenges facing procurement agencies. Advocacy efforts by competition authorities (and indeed by procurement agencies) can also target private companies, particularly those who are frequently active in bidding markets. While this effort could be costly in terms of resources and time, it may have beneficial effects in the long-term. There are various ways this could be achieved, including the following:

- Firms could be required by the tender notice to adopt internal procurement compliance programmes as a condition for bidding in a public procurement tender. Such compliance guidelines could be written in co-operation with or approved by the competition authority;
- Another condition could be to require the individuals who are responsible for bidding to have attended regular briefings and programmes thereby encouraging knowledge of the penalties for collusion and corruption. Those programmes could be offered by officials of the various authorities concerned, including the competition and procurement agencies.

Beyond advocacy, an effective antitrust regime and vigorous antitrust enforcement can significantly contribute to reducing corruption in public procurements. It is well established that rents induced by a lack of competition can foster corruption. When a company enjoys a rent and its business is under the influence of a public official, the public official can reap some of the rent by surrendering his control rights in exchange for a bribe. Thus an increase in rents, even those originating from a restriction of competition, tends to increase corruption. This suggests that policies aimed at fighting corruption should not only reform the legal system to increase punishment for malfeasance or to increase remunerations of public officials to reduce their incentive to accept kick backs, but should also adopt measures to increase competition in the procurement process as a way of limiting the scope for corruption.

#### **5. Finding the Most Effective Institutional Framework**

In many countries the enforcement of antitrust laws (usually entrusted to the competition authority) is entirely unrelated to the enforcement of anti-corruption statutes (usually entrusted to the judiciary or anti-corruption body). The complementarities between corruption and anti-competitive practices noted earlier suggest that a lack of co-ordination unnecessarily diminishes the deterrent effect of both competition and anti-corruption law. Conversely, a co-ordinated approach is likely to increase the probability that

objectionable practices are identified and it makes punishment of complementary corruption/collusion practices more effective. In the long run, a unified approach is likely to yield larger social benefits.

Systematic exchanges of information between various enforcement agencies and joint investigations are therefore highly recommended. In particular, it would seem wise to systematically open a competition investigation on procurement markets for which evidence of corruption has been found. In addition, it may be possible to control collusion and favouritism by designating procurement-oversight agencies. This may involve the creation of a separate supervisory body to monitor the procurement official's conduct and ensuring that the procurement process is not used to distort competition.

**Box 5. The German Bundeskartellamt as Public Procurement Tribunal**

In Germany, for example, the competition authority has three public procurement chambers which act as a public procurement review body (i.e. as an appeal court against decisions of public procurement agencies). The guiding principles of the Bundeskartellamt's public procurement tribunals are competition, transparency, non-discrimination and fair tendering procedures.

In Germany, public contracts principally have to be awarded under competitive conditions through a public tender in a transparent and non-discriminatory way. In principle the contract is awarded to the bidder submitting the economically most advantageous offer.

The three public procurement tribunals set up at the Bundeskartellamt, review, upon request, whether public contracting entities have met their obligations in the award procedure. The tribunals are entitled to take suitable measures to remedy a violation of rights and to prevent any impairment of the interests affected.

Some countries have enacted specific legislation aimed at fighting collusion when public procurement officials are directly involved in orchestrating the bid rigging. While the anti-competitive conduct of the firms involved is caught by the provision in the competition laws, the competition authorities generally lack enforcement tools against the illegal conduct of the public officials involved. This is often the case as corruption is considered in many countries a criminal offence, which is prosecuted under the general criminal law enforcement system. Japan, however, is an example of a country where the competition authority has some enforcement powers against the public officials involved in the bid rigging.

**Box 6. The Japanese Involvement Prevention Act**

In order to solve the recurring problem of the involvement of procurement officials in bid rigging, Japan enacted a new law in 2002 (the Act Concerning Elimination and Prevention of Involvement in Bid Rigging) which allows the Japanese Federal Trade Commission (JFTC) to take actions against the public officials involved in bid rigging (so-called "government-initiated bid rigging"). When the JFTC finds that of procurement officials have been involved in a bid rigging conspiracy, it enforces the Antimonopoly Act against the companies involved and at the same time it can request the head of the procurement institution involved to investigate the alleged misconduct by their employees and to take all necessary measures to eliminate their involvement in the bid rigging conspiracy. The adopted measure must be made public. In addition, if the investigation has confirmed the involvement of public officials in bid rigging, under the new law the administration is entitled to demand from the involved employees compensation for the damages caused.

**6. Final Remarks**

Given the significance of public procurement for national economies, it is important for governments to address the difficult issues arising from the interface between policies aiming at

eliminating collusion and corruption in public tenders. Both practices generate significant damages for taxpayers and should be addressed in a co-ordinated fashion to maximise the deterrent effect of both anti-competition and anti-corruption laws. There may be difficult trade-offs between the two policies. As this introductory paper has identified, the desired degree of transparency of the procurement process is one of example of these difficult policy choices. Should governments opt for a maximum level of transparency to reduce the risks of corruption and keep public officials accountable? Or should they opt for a minimum level of transparency to limit the opportunities for bidders to engage in collusive practices? Should open and transparent procedures be favoured in every case over direct negotiations? These questions cannot be answered in the abstract and procurement officials should tailor their choices to the specifics of each tender.

32. Competition and anti-corruption authorities can be of great support in helping procurement officials finding the most appropriate balance. Improved national and international cooperation between the three sets of officials is therefore key to tackling collusion and corruption in public procurement. The use of guidelines and best practices, possibly reflecting experiences at an international level, alongside concerted information sharing information between the public officials involved can result in more efficient procurement. This in turn will deliver cost savings to governments and taxpayers, which can benefit economic development and growth in developed and developing economies alike.

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## ANNEX II - QUESTIONS AND ISSUES FOR DISCUSSION

*(From the letter calling for country contributions of 1 December 2009, DAF/COMP/GF(2009)14)*

### 1. Size and policy objectives

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

### 2. Corruption

- What is the cost of corruption?
- What factors facilitate corruption? Do some factors appear to be more important than others?
- How do transparency programmes help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?
- Are firms required to certify during the procurement process that they have not bribed an official?
- What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.
- Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?

### 3. Collusion

- What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?
- What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement?
- What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?
- Does your country employ certificates of independent bid determination?
- When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

**4. Fighting collusion and corruption**

- What cases from your jurisdiction have involved both corruption and collusion in public procurement?
- Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?
- What methods and techniques for fighting corruption would aid the fight against collusion?
- When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?

**5. Advocacy**

- How do regulatory or institutional conditions help facilitate bid rigging and corruption?
- In what ways can competition authorities work to improve the efficiency of public procurement?
- What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? 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 your jurisdiction and what have been the results?
- 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?
- Has your competition agency undertaken competition advocacy in this area?
- If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?



## NOTE DE RÉFÉRENCE

*par le Secrétariat*

### Introduction

Les gros marchés publics soulèvent, dans beaucoup de pays, de sérieux problèmes de collusion, corruption et favoritisme. Étant donné l'importance des sommes en jeu, les incitations à la collusion peuvent être fortes pour les soumissionnaires de même que les tentations de corruption pour les agents publics.

La présente note examine rapidement quelques-unes des complémentarités et options qui s'offrent aux responsables de l'élaboration des politiques dans le cadre de la lutte contre la collusion et la corruption. Elle considère notamment les aspects suivants:

- L'importance des marchés publics dans les économies nationales et les relations entre la collusion et la corruption dans leur passation;
- Comment le degré de transparence du processus d'appel d'offres peut avoir un effet sur la probabilité de corruption et de collusion;
- Comment le choix de la procédure de soumission peut influencer sur les risques de collusion ou de corruption pendant le processus de passation des marchés;
- Les avantages d'une lutte coordonnée contre la collusion et la corruption dans les marchés publics;
- Les cadres institutionnels qui peuvent faciliter la détection de la collusion et de la corruption dans les marchés publics ainsi que les enquêtes et les poursuites y afférentes.

L'annexe I présente la liste des documents portant sur les questions examinées dans la note qu'il est suggéré de consulter.

L'annexe II reproduit la liste des questions et problèmes à examiner qui figurait dans l'appel à contributions adressé aux pays le 1er décembre 2009 [document DAF/COMP/GF(2009)14].

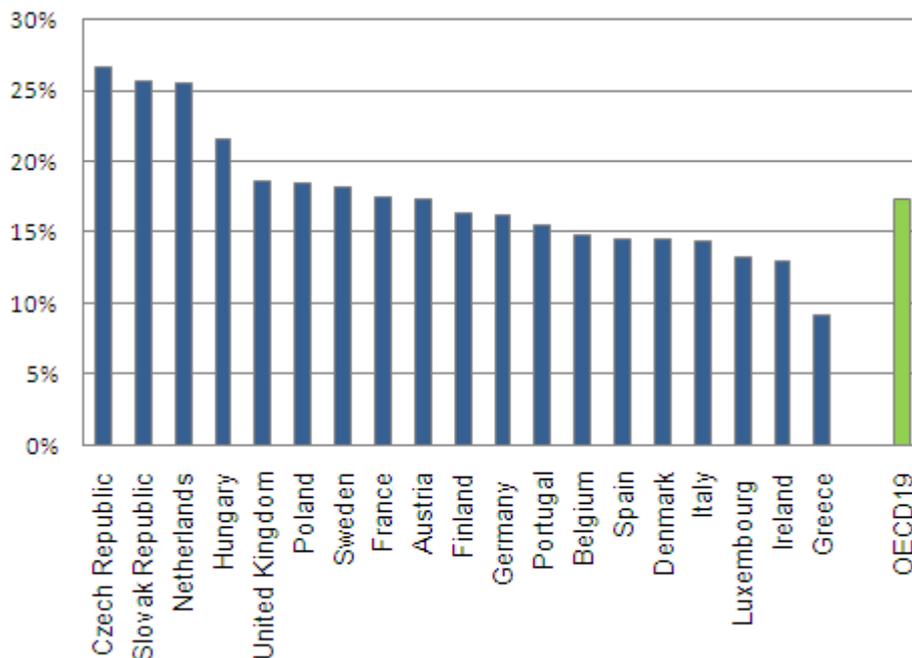
### 1. Collusion, corruption et marchés publics

Le fonctionnement des marchés publics a d'importantes répercussions sur l'efficacité de la gouvernance, tant dans les pays développés que dans les pays en développement. Comme le montrent les statistiques qui suivent, les marchés publics représentent plus de 15 % du produit intérieur brut (PIB) des pays de l'OCDE. Ils constituent une part encore plus importante du PIB dans les pays non membres de l'Organisation<sup>1</sup>. De plus, ils concernent souvent des biens et services qui jouent un rôle économique et social important, tels que les infrastructures de transport, les hôpitaux et les services de santé, ainsi que l'enseignement.

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<sup>1</sup> OCDE (2005), « Public Procurement » in *Fighting Corruption and Promoting Integrity in Public Procurement*, Paris.

Graphique 1. Parts des marchés publics dans le PIB (2006)



Source: OCDE, 2006

L'objet essentiel des marchés publics est d'obtenir des biens et services au plus bas prix possible ou, de manière plus générale, d'assurer une utilisation efficace des deniers publics. Pour garantir un fonctionnement efficace de ces marchés, les autorités doivent atteindre concrètement deux objectifs distincts, mais étroitement liés: (i) promouvoir une concurrence effective entre les fournisseurs, et (ii) assurer l'intégrité des procédures administratives. Malheureusement, tous les pays et tous les secteurs sont vulnérables aux risques de collusion et de corruption dans les marchés publics. La collusion et la corruption sont, en outre, souvent associées à d'autres délits comme le blanchiment d'argent, la fraude comptable, la fraude fiscale et l'extorsion de fonds.

Lorsqu'ils portent sur de gros marchés, les appels d'offres publics peuvent susciter une forte concurrence à laquelle les entreprises peuvent essayer de se soustraire en recourant à la collusion et à la corruption:

- La *collusion* est une entente entre soumissionnaires qui a pour effet de limiter la concurrence et de léser l'acheteur public. En cas de soumissions concertées, le prix payé par l'administration publique pour des biens ou services est artificiellement relevé. Ces pratiques ont un effet direct et immédiat sur les dépenses publiques et, partant, sur les contribuables;
- La *corruption* implique une relation verticale entre au moins un des soumissionnaires et le fonctionnaire responsable du marché public concerné. C'est avant tout un problème « principal-agent » dans lequel l'agent (le fonctionnaire responsable du marché) s'enrichit au détriment du « principal » (l'acheteur public ou, d'une manière plus générale, le public). On parle de corruption dans le cadre de la passation d'un marché public, lorsque le fonctionnaire chargé par l'entité adjudicatrice de gérer la procédure est convaincu, en contrepartie de pots-de-vin ou d'autres gratifications, de l'organiser, ou d'en modifier l'issue, de manière à avantager une entreprise en particulier. Le poids des marchés publics dans les économies nationales étant important, le préjudice que la corruption peut porter à celles-ci est non négligeable.

La collusion et la corruption compromettent l'efficacité de l'attribution des marchés publics. Elles impliquent, par définition, que les marchés ne sont pas attribués comme ils l'auraient été si le principe de mise en concurrence avait été respecté. La collusion se traduit par l'attribution d'un marché public à l'entreprise choisie par les participants à l'entente. La corruption aboutit à accorder un marché à l'entreprise qui a offert le pot-de-vin. C'est en ce sens qu'elle fausse la concurrence. Par conséquent, bien qu'elles représentent des enjeux distincts pour les pouvoirs publics, la lutte contre la collusion et la lutte contre la corruption sont souvent très complémentaires. C'est notamment le cas quand le fonctionnaire responsable de la passation d'un marché est payé pour organiser et surveiller une collusion par soumissions concertées.

### **Encadré 1. Exemples d'affaires de collusion et de corruption**

Hongrie – Plusieurs affaires de soumissions concertées ont éclaté sur le marché hongrois de la construction routière au cours des dernières années. La plus grosse amende antitrust (27.7 millions EUR environ) imposée jusqu'à présent l'a été pour une affaire de soumissions concertées concernant la construction d'une route. Le marché était évalué à 630 millions EUR. L'autorité hongroise de la concurrence a constaté que les soumissionnaires s'étaient antérieurement mis d'accord sur celui d'entre eux qui remporterait le marché ainsi que sur le soumissionnaire auquel l'entreprise générale offrirait un contrat de sous-traitance pour les travaux de construction. La presse a maintes fois signalé que des projets de construction routière avaient pu constituer un cadre idéal pour la corruption et soupçonné que les gains illicites tirés des soumissions concertées représentaient une source de financement importante pour les campagnes politiques.

Japon - En 2005, la Commission japonaise de la concurrence (JFTC) a enjoint à 45 constructeurs japonais de ponts en acier de cesser de truquer les offres pour les marchés publics. Plus de 70% des contrats concernant des ponts en acier accordés entre 1999 et 2004 par la Japan Highway Public Corporation ont été remportés par 47 entreprises appartenant à deux associations. Leurs offres étaient presque exactement identiques aux estimations de l'entreprise publique. Dans le cadre de l'une des plus grosses affaires de collusion lors d'une adjudication, la JFTC a aussi sommé la Japan Highway Public Corporation d'améliorer ses pratiques pour la passation des marchés publics concernant les ponts en alléguant qu'une vingtaine d'anciens agents publics avaient participé au trucage d'offres en vue d'obtenir un emploi dans l'une des 45 entreprises. D'après un décompte, près de 60% des bureaucrates qui avaient occupé un emploi concernant les travaux routiers ont été embauchés après leur départ à la retraite par l'un des dix premiers établissements de travaux routiers.

France – Un autre exemple d'affaire est celui des trois principales entreprises françaises de construction (Bouygues, Suez-Lyonnaise et Vivendi) qui ont fait l'objet d'une grande enquête pour un scandale décrit comme « un système convenu de détournements de fonds publics » (Le Monde, 10 déc. 1998). Ces trois entreprises ont participé à une entente frauduleuse pour des travaux de construction d'écoles en Ile-de-France (la région qui entoure Paris) entre 1989 et 1996. Elles se sont partagé des marchés d'une valeur de plus de quatre milliards d'euros. Le système impliquait aussi une part de corruption politique, un prélèvement de 2% sur tous les marchés servant à financer les principaux partis politiques dans la région.

## **2. Le rôle de la transparence dans les marchés publics**

La transparence est indispensable à une saine procédure de passation des marchés. Elle est comprise comme l'accès à l'information concernant le processus de décision. Cela couvre non seulement la publicité donnée à l'événement, mais aussi l'information divulguée aux soumissionnaires avant ou après l'appel d'offres.

L'effet de la transparence sur le processus de passation des marchés publics est double:

- Un système de passation des marchés opaque et complexe offre un contexte idéal pour le développement de la corruption. La transparence constitue donc l'un des moyens les plus

efficaces d'empêcher celle-ci. Des procédures transparentes permettent à un large éventail de parties prenantes d'examiner de près les décisions et le comportement des fonctionnaires et des entrepreneurs, ce qui permet d'assurer que ceux-ci restent comptables de leurs actes.

- La transparence ne garantit toutefois pas à elle seule l'efficacité du processus de passation des marchés publics. Il faut veiller à ce qu'en renforçant la transparence de ce processus pour lutter contre la corruption, on n'augmente pas les possibilités de recours à des pratiques anticoncurrentielles. Un système de passation des marchés plus transparent peut, en effet, accroître les risques de collusion entre soumissionnaires si ceux-ci ont la possibilité de connaître la stratégie de leurs concurrents et de s'aligner sur elle au détriment de la concurrence.

### **2.1 *Les relations entre la transparence et la corruption***

Les obligations de transparence contribuent à éradiquer et empêcher la corruption, dans la mesure où elles imposent la publication des informations relatives aux appels d'offres organisés pour l'attribution des marchés publics. L'imposition de règles pour la passation de ces marchés peut accroître le degré de transparence du système en exigeant que soient rendus publics les principaux faits et chiffres, les critères d'attribution du marché et leur pondération relative, l'identité de l'adjudicataire et des autres soumissionnaires ainsi que les conditions des offres présentées par chacun des soumissionnaires. L'introduction de la transparence dans le processus de passation des marchés publics empêche la corruption de plusieurs façons:

- la publication et la transparence des procédures permettent d'examiner de près les décisions des agents publics qui sont ainsi responsabilisés. Un degré élevé de transparence réduit les asymétries d'information et facilite le suivi, la surveillance et le contrôle du processus de passation des marchés publics. Il favorise également le contrôle public quand l'information est librement accessible;
- la transparence responsabilise les soumissionnaires et facilite la détection des agissements illicites et leur sanction. La transparence augmente aussi les chances que d'autres soumissionnaires dénoncent les actes de corruption, ce qui envoie des signaux positifs sur la confiance qu'inspire le processus;
- la transparence permet aux soumissionnaires d'éviter le dilemme du prisonnier lorsqu'ils ignorent si d'autres soumissionnaires offrent ou non des pots-de-vin. En l'absence de transparence, ils choisiraient le plus souvent de recourir eux-mêmes à la corruption ou de renoncer à soumissionner, deux solutions qui se solderaient par un résultat non efficace pour la procédure de passation du marché public concerné;
- enfin, la transparence permet aussi aux commissaires aux comptes de détecter plus facilement les comportements illicites.

### **2.2 *Les relations entre la transparence et la collusion***

La question de savoir si une plus grande transparence des marchés publics permet d'assurer l'efficacité et l'efficacité du système de passation des marchés mérite de retenir davantage l'attention. Le renforcement de la transparence réduit la liberté d'action de l'agent chargé des marchés publics et permet aux organismes de contrôle de suivre plus facilement le processus. Il a ainsi des chances de réduire la corruption. Il faut toutefois veiller à ce qu'en renforçant la transparence pour faire reculer la corruption, on n'augmente pas les risques de pratiques anticoncurrentielles.

La transparence est l'un des facteurs nécessaires à une collusion soutenable. Pour fixer les conditions de la coordination, s'assurer que ces conditions sont respectées et sanctionner efficacement les

manquements, les entreprises doivent disposer d'informations détaillées sur les stratégies de tarification et/ou de production de leurs concurrents. La suppression artificielle de l'incertitude entourant l'action des concurrents, qui est l'essence même de la concurrence, peut en soi éliminer la rivalité concurrentielle normale. C'est particulièrement le cas sur les marchés très concentrés (ce que sont la plupart des marchés de contrats publics) sur lesquels une plus grande transparence permet aux entreprises de mieux prédire ou anticiper le comportement de leurs concurrents et donc de s'aligner ouvertement ou tacitement sur lui.

Dans le cadre des appels d'offres de marchés publics auxquels participe normalement un nombre limité de fournisseurs, les effets de l'échange d'information résultant de la transparence du processus de passation des marchés soulève des problèmes non négligeables au niveau de la concurrence. Les informations sur le résultat de la procédure qui sont révélées par l'autorité adjudicatrice peuvent, en effet, faciliter la collusion. Si, par exemple, l'autorité adjudicatrice révèle l'identité des soumissionnaires et les prix offerts, cela renforce l'efficacité d'une entente en permettant à ceux qui y participent de repérer plus facilement les manquements éventuels à l'accord de collusion. Autrement dit, la transparence facilite la surveillance du respect des termes de l'accord. Dans l'ensemble, moins il est fourni d'informations sur le résultat d'une adjudication, plus il est difficile de réussir à truquer les offres.

### **2.3 *Considérations de principe***

En définissant les règles et les procédures relatives à la transparence, il faudrait sérieusement envisager d'établir des obligations claires et précises pour la divulgation de diverses catégories d'information. Les règles fixées devraient aussi préciser quand et à qui ces informations devraient être fournies. Plusieurs autres approches pourraient être suivies pour rendre la collusion plus difficile sans compromettre la réduction nécessaire du risque de corruption:

- il pourrait n'être exigé que de divulguer l'information relative à l'offre retenue, celle concernant les autres offres pouvant n'être communiquée qu'à l'émetteur de l'appel d'offres et aux contrôleurs et non aux concurrents d'une manière générale;
- en raison de l'effet déstabilisateur que la non-divulgation de l'identité des soumissionnaires pourrait avoir sur une éventuelle collusion, le fonctionnaire responsable de la passation d'un marché public pourrait envisager de ne révéler ni le nombre de soumissionnaires en lice, ni l'identité de chacun d'eux en ne les désignant, par exemple, que par leur numéro d'enregistrement;
- l'agent chargé de la passation d'un marché public pourrait permettre que les offres soient communiquées par téléphone ou par courrier au lieu d'obliger les soumissionnaires à remettre leurs offres personnellement à un moment et un endroit précis où ils peuvent être observés par tout le monde;
- l'agent responsable de la passation d'un marché public pourrait autoriser chaque soumissionnaire à présenter plusieurs offres sous des numéros ou des identités différents;
- le moment de la divulgation d'informations sensibles (comme l'identité des soumissionnaires perdants et les données concernant leur offre) pourrait être retardé pour atténuer les effets de ces révélations sur la collusion.

### **3. Les procédures d'appels d'offres et les risques de collusion et de corruption y afférents**

Les questions concernant le degré de transparence approprié dans le processus de passation des marchés publics sont étroitement liées au choix de la procédure d'appel d'offres. C'est un exercice important et délicat, les diverses procédures offrant des degrés de transparence différents qui peuvent les

exposer aux risques de collusion ou de corruption. Le choix du « bon » modèle d'appel d'offres (ou plutôt, du modèle le plus approprié compte tenu des particularités du marché public concerné) est donc le point de départ de tout effort visant à assurer l'efficacité de la passation d'un marché public.

### **3.1 Adjudications ouvertes et adjudications sous plis scellés**

Les candidats à une *adjudication ouverte* se réunissent au même moment et au même endroit pour soumettre plusieurs offres. Le marché est octroyé au soumissionnaire de la meilleure offre par l'entité adjudicatrice. Dans les enchères dynamiques, les soumissionnaires peuvent observer le comportement de leurs concurrents, ce qui facilite la coordination des offres et la surveillance de la répartition convenue des marchés. Plus des enchères dynamiques durent, plus il est facile aux soumissionnaires de coordonner leurs offres puisqu'ils ont davantage de possibilités de se mettre d'accord pour l'attribution des marchés. En outre, un système dans lequel les offres sont ouvertes en public et où le prix et les caractéristiques de chaque offre sont connus constitue l'instrument idéal pour détecter les ventes à bas prix. Il permet donc aux parties à un accord de collusion de sanctionner les entreprises qui ne s'y conforment pas.

Il serait préférable, en cas de risque important de comportement anticoncurrentiel, que l'agent responsable de la passation du marché ait recours à un modèle d'*adjudication sous plis scellés* qui limite la capacité et l'intérêt des soumissionnaires à agir en collusion. Dans ce type d'adjudication, chaque soumissionnaire présente sa « meilleure offre définitive », généralement par écrit, et les autres soumissionnaires en ignorent la teneur. Une collusion est certes possible, mais plus difficile à réaliser: elle implique une communication préalable entre ses participants qui sont en outre beaucoup plus incités à ne pas respecter les termes de l'accord de collusion du fait que les possibilités de sanction sont réduites, voire inexistantes.

Du point de vue de la lutte contre la corruption, toutefois, les systèmes d'enchères (comme les enchères dynamiques) paraissent offrir moins de possibilités aux agents responsables des marchés publics de favoriser une entreprise particulière. Ces systèmes sont généralement l'objet de plusieurs niveaux de surveillance, des instances extérieures évaluant la qualité, la spécificité et le rapport qualité-prix des offres. De plus, les entreprises qui n'obtiennent pas un marché, peuvent théoriquement attirer l'attention du public et de la justice sur leurs éventuels soupçons d'irrégularités.

### **3.2 Négociations directes et contrats-cadres**

Du point de vue de la concurrence, il n'est pas toujours nécessaire de recourir à un processus d'appel d'offres pour obtenir le résultat le plus efficace pour un marché public. C'est le cas lorsque des *négociations particulières* avec un nombre limité de fournisseurs sont susceptibles de produire le résultat le plus rentable. On pourrait, par exemple, se trouver dans cette situation dans les circonstances suivantes:

- si le coût de l'organisation et de la réalisation d'un appel d'offres est élevé et supérieur aux avantages que l'on en attend;
- si les soumissionnaires probables, et même, le soumissionnaire le moins disant probable, sont déjà connus de l'acheteur public. Dans ce cas, il peut être plus efficace que ce dernier entre directement en contact avec le moins disant probable pour négocier un prix (en utilisant au besoin la menace du recours à un appel d'offres);
- s'il n'est pas possible de préciser contractuellement à l'avance tous les aspects des services à fournir comme ce peut être le cas avec des projets complexes qui sont difficiles à définir à l'avance et qui peuvent être adaptés au fur et à mesure de leur avancement;

- si d'autres raisons de fond ou d'autres raisons explicites existent qui font que l'acheteur public n'est pas tenu de choisir le fournisseur le moins cher, c'est-à-dire si la diversité de l'offre est essentielle pour assurer la continuité du service;
- si des considérations de confidentialité empêchent la tenue d'un appel d'offres, par exemple, si des intérêts de sécurité nationale sont en jeu;
- si le nombre de soumissionnaires potentiels est très faible et l'un d'entre eux jouit d'un pouvoir de marché considérable; un appel d'offres ne produira pas, dans ce cas, un résultat satisfaisant et il peut être indiqué d'opter pour une procédure plus élaborée pour passer le marché.

Du point de vue de la lutte contre la corruption, toutefois, les marchés passés en dehors de toute mise en concurrence suscitent des inquiétudes en raison de leur manque de transparence et de l'absence de contrôle démocratique. Les responsables des marchés publics qui sont autorisés à conclure ces contrats contrôlent davantage le choix des entreprises auxquelles seront accordés les contrats les plus lucratifs. Sans une surveillance adéquate, leurs préférences personnelles peuvent facilement intervenir dans leur décision finale. Sous l'angle du vendeur, il est hautement souhaitable d'obtenir des contrats lucratifs sans être soumis à la discipline de la concurrence de sorte que les entreprises peuvent être tentées d'éliminer le risque de voir ces contrats leur échapper en influençant et/ou corrompant l'agent responsable.

De même, celui-ci peut trouver plus efficace de recourir à des *contrats-cadres*, c'est-à-dire des accords permanents servant de base aux achats de biens et de services effectués auprès d'entreprises présélectionnées qui satisfont à un certain nombre de normes de qualité. Là encore, ces accords peuvent permettre de réaliser des économies de temps et de ressources en supprimant les procédures d'appels d'offres et en réduisant ainsi le coût global des achats de biens ou de services. L'utilisation d'accords-cadres peut cependant soulever des problèmes éthiques surtout si les prix ne sont pas fixés avant leur rédaction. Dans ce cas, les accords sont vulnérables au risque de discrimination et de favoritisme.

### 3.3 *Considérations de principe*

Les nombreuses formes de modèles de passation des marchés ne se valent pas du point de vue de la lutte contre la collusion et la corruption, il est important que les fonctionnaires responsables soient conscients des risques liés à certaines d'entre elles. Intuitivement, les *enchères dynamiques (ou ouvertes)* semblent plus vulnérables à la collusion que les *enchères sous plis scellés*. De même, les *négociations privées* et les *accords cadres* conclus avec les fournisseurs potentiels risquent moins de conduire à la collusion que des appels d'offres publics. Toutefois, les formules de passation des marchés reposant sur la remise de plis scellés et excluant toute mise en concurrence sont vues comme une source potentielle de problèmes du point de vue de la lutte contre la corruption du fait qu'elles se prêtent fortement à celle-ci et qu'elles pèchent par leur manque de transparence et de contrôle démocratique.

Le choix du modèle d'appel d'offres dépend en grande partie des circonstances qui entourent la passation du marché public. Si le risque de collusion est limité (du fait, par exemple, que les fournisseurs potentiels sont nombreux), il est préférable de recourir à des enchères ouvertes. Si le risque de collusion est important, la préférence doit être accordée à un système sous plis scellés. Si le risque à la fois de collusion et de corruption est significatif, l'agent responsable doit continuer d'envisager de recourir à cette dernière formule, mais faire en sorte qu'elle ne se prête pas à la corruption. Dans ce cas, l'utilisation de systèmes électroniques ou de soumissions en ligne, par exemple, peut permettre de limiter les deux risques. Les soumissions électroniques permettent non seulement de tenir des enchères dynamiques, mais aussi d'enregistrer chaque soumission et le nom de chaque personne qui a pu en prendre connaissance. Cela empêche que des agents corrompus puissent consulter les soumissions avant la fermeture de l'appel d'offres et influencer le processus à des fins personnelles. Pour éviter des manipulations indues, on pourrait aussi ouvrir en public les enveloppes scellées, après la fermeture de l'appel d'offres et envisager

d'empêcher totalement la destruction et le remplacement des soumissions. On pourrait également faire appel à des dispositifs technologiques rendant impossible l'altération des soumissions par l'agent responsable.

#### **4. Lutte contre les agissements illicites dans le cadre des marchés publics – Comment empêcher et sanctionner les actes de corruption et de collusion?**

Les lois et les règlements relatifs aux marchés publics sont conçus pour favoriser la concurrence entre les soumissionnaires et assurer une utilisation rationnelle des deniers publics. La lutte contre les soumissions concertées et les pots-de-vin doit faire partie intégrante de ce processus. Les expériences nationales montrent qu'il existe de nombreuses façons de lutter contre les agissements illicites dans le cadre du processus de passation des marchés publics, mais on distingue, dans l'ensemble, trois principales démarches pour atteindre cet objectif:

- Sensibilisation des administrations publiques et des agents responsables aux risques de corruption et de collusion dans la passation des marchés publics. Les agents doivent être formés à appliquer des règles et des mécanismes de contrôle appropriés pour empêcher et détecter les agissements illicites. Il peut-être particulièrement utile d'appliquer des lignes directrices et les meilleures pratiques dans ce domaine où une approche pluridisciplinaire peut permettre d'obtenir des résultats importants. La formation doit viser à faire mieux comprendre aux agents les coûts de ces pratiques délictueuses en termes de ressources publiques et les avantages de l'adoption de comportements éthiques pour l'autorité contractante et ses fonctionnaires. La formation doit être axée sur la détection des signes de collusion ou de corruption et encourager également les agents à signaler les cas où ces agissements sont observés.

#### **Encadré 2. Les lignes directrices de l'OCDE pour la lutte contre les soumissions concertées**

L'OCDE reconnaît depuis longtemps le rôle capital que les organismes responsables de la concurrence et des marchés publics jouent dans la lutte contre les ententes illicites caractérisées dans le cadre des marchés publics. En 2009, le Comité de la concurrence a mis au point une méthode spécifique pour aider les pays à améliorer la passation des marchés publics en luttant contre le trucage des offres. Les Lignes directrices de l'OCDE pour la lutte contre les soumissions concertées dans les marchés publics aident les fonctionnaires responsables de la passation de ces marchés à réduire les risques de collusion lors des adjudications, grâce à des processus soigneusement conçus, et à détecter les cas de soumissions concertées au cours de ces processus. Ces lignes directrices visent à aider les agents concernés à déterminer:

- quels sont les marchés qui sont les plus vulnérables au risque de trucage des offres afin de prendre les précautions qui s'imposent;
- les méthodes qui permettent d'obtenir le plus grand nombre de soumissions;
- les meilleures pratiques à suivre pour établir les spécifications des appels d'offres, les conditions à remplir et les critères d'attribution des marchés;
- les procédures permettant d'empêcher les soumissionnaires de communiquer entre eux, et
- les modes de fixation des prix, les déclarations, les documents et les comportements des entreprises qui doivent conduire les agents chargés des marchés publics à soupçonner l'existence d'une collusion.

Pour de plus amples informations sur les Lignes directrices de l'OCDE pour la lutte contre les soumissions concertées, consulter le site: [www.oecd.org/competition/bidrigging](http://www.oecd.org/competition/bidrigging).

#### **Principes de l'OCDE pour renforcer l'intégrité dans les marchés publics**

L'OCDE a élaboré une série de principes en vue de renforcer l'intégrité dans les marchés publics. Ces principes

ont été approuvés sous la forme d'une recommandation du Conseil de l'OCDE en octobre 2008. Ils constituent un instrument visant à aider les responsables de l'action gouvernementale à renforcer l'intégrité dans les marchés publics. Ils reposent sur quatre piliers: (i) transparence; (ii) bonne gestion; (iii) prévention des comportements réprouvés, respect des règles et surveillance, et (iv) obligation de rendre des comptes et contrôle. Les principes énoncés appuient la mise en œuvre des instruments juridiques internationaux élaborés dans le cadre de l'OCDE ainsi que d'autres organisations comme les Nations unies, l'Organisation mondiale du commerce et l'Union européenne.

Pour aider les pays à mettre en œuvre ses Principes pour renforcer l'intégrité dans les marchés publics, l'OCDE a réuni les outils existant dans les pays membres et non membres dans ce qu'elle appelle la « boîte à outils ». Celle-ci a pour objet d'aider les fonctionnaires à concevoir et élaborer des instructions et des procédures pour différentes étapes du processus de passation des marchés. Elle fait actuellement l'objet de consultations auprès d'un vaste groupe réunissant des représentants des principales parties intéressées dans les pays membres et non membres de l'OCDE, à savoir notamment: les administrations nationales et infranationales, les milieux d'affaires, les syndicats et des organisations de la société civile.

Pour de plus amples informations sur les Principes de l'OCDE pour renforcer l'intégrité dans les marchés publics, consulter le site: [www.oecd.org/gov/ethics/procurement](http://www.oecd.org/gov/ethics/procurement).

- Mise en place de réseaux nationaux (et internationaux) d'experts appartenant aux administrations chargées des marchés publics, aux autorités de la concurrence et du ministère public en vue d'améliorer l'échange d'informations et d'expériences susceptibles d'améliorer la détection et la prévention de la corruption active et passive. Ces réseaux pourraient aussi permettre d'aider les agents concernés à mieux comprendre les notions de collusion et de corruption: comment ces pratiques frauduleuses se manifestent, pourquoi il est important de s'attaquer à elles et comment les détecter et les empêcher.

### Encadré 3. Exemples de réseaux nationaux de coopération

Chili – En 2008, la *Fiscalia Nacional Económica* (l'autorité chilienne de la concurrence) a établi un comité interinstitutionnel de lutte contre la collusion en vue de rendre plus efficace la détection des pratiques illégales dans les marchés publics. Ce comité réunit des représentants de l'organisme indépendant chargé de contrôler la légalité des actes administratifs, de la direction des marchés publics, du ministère des Travaux publics, du conseil de l'audit interne des administrations publiques et d'une association des fonctionnaires et du personnel chargés des achats de divers organismes publics. Le ministère du Logement et de la Planification urbaine, le responsable des transports et l'autorité chargée de la réglementation des retraites ont, par la suite, rejoint le comité.

Afrique du Sud - En juillet 2009, le gouvernement sud-africain a mis en place une équipe ministérielle chargée notamment de prévenir la fraude et la corruption dans les marchés publics. Cette équipe inclut des représentants du Trésor public, de l'administration fiscale, du Commissaire général aux comptes, de l'Unité des enquêtes spéciales et du Centre d'information financière. Bien qu'il ne soit pas fait spécifiquement mention des soumissions concertées, la Commission de la concurrence doit dialoguer avec cette équipe ministérielle et préconiser des mesures spéciales pour lutter contre la collusion dans les marchés publics. La Commission est aussi déterminée à collaborer avec le Trésor public dont relève la politique concernant les marchés publics.

Singapour – Consciente du fait que la collusion et la corruption vont souvent de pair, la Commission de la concurrence de Singapour (CCS) collabore étroitement avec le Bureau d'enquête sur les pratiques délictueuses (CPIB), l'organisme chargé d'enquêter sur la corruption dans les secteurs public et privé et d'y faire obstacle. La CCS a notamment établi avec le CPIB un protocole qui fixe les responsabilités des deux autorités et vise à assurer une gestion claire et efficace des cas rencontrés.

- La façon la plus efficace de décourager la collusion et la corruption est de définir clairement les meilleures pratiques, règles et règlements pour la détection de la collusion et de la corruption dans les processus de passation des marchés publics, et de les faire résolument respecter. L'expérience des mesures de lutte contre la corruption et la collusion montre clairement que l'application de

lourdes sanctions (aussi bien civiles que pénales et administratives) s'est avérée être le moyen le plus efficace pour lutter contre la collusion active et passive dans les marchés publics. D'autres outils pourraient toutefois être adoptés pour dissuader les entreprises et les fonctionnaires de se livrer à ces pratiques dans le cadre des marchés publics. Il en est deux qui semblent avoir plus particulièrement donné des résultats positifs: l'autocertification et l'interdiction de participation ou la mise en liste noire.

#### **Encadré 4. Autocertification**

L'autocertification du respect de la législation par les soumissionnaires et les acheteurs publics s'est révélée très utile. Dans certains pays, par exemple, les soumissionnaires doivent remettre une attestation d'absence de collusion dans l'établissement de leur soumission pour pouvoir participer à un appel d'offres. Dans cette attestation, chacun d'eux doit en général certifier sous serment qu'il ne s'est pas concerté avec ses concurrents sur les offres présentées, qu'il n'a divulgué les prix de son offre à aucun de ses concurrents et qu'il n'a pas tenté de convaincre l'un d'eux de truquer les offres. L'attestation d'absence de collusion informe non seulement les soumissionnaires du caractère illégal des soumissions concertées, mais elle facilite aussi la poursuite judiciaire des contrevenants et elle introduit des sanctions supplémentaires, y compris des sanctions pénales éventuellement, pour toute fausse déclaration aux autorités. Dans quelques pays, comme les États-Unis, les fonctionnaires chargés des marchés publics sont, de même, tenus de certifier qu'ils n'ont pas eu connaissance, ou n'ont pas indûment divulgué, des informations sur les marchés et qu'ils ont suivi des cours de formation spéciaux. Dans certains cas, ils sont invités à fournir, s'ils le souhaitent, des informations sur leur situation financière personnelle afin d'exclure le risque de conflit d'intérêts.

#### **Interdiction de participation**

En dehors des sanctions civiles, pénales et administratives traditionnelles, des pays ont introduit des sanctions spécifiques pour les actes illicites commis dans le cadre des marchés publics. Une attention particulière a notamment été accordée à l'interdiction de participer à de nouveaux appels d'offres, aussi connue sous le nom de « disqualification ». Les avis sur les façons d'appliquer ces sanctions sont partagés. D'un côté, l'interdiction de participation peut constituer un moyen sérieux de dissuasion ponctuel ou général. De l'autre, si elle est appliquée de manière systématique (et automatique), cette mesure s'accompagne d'un risque de collusion sur les marchés où le nombre de fournisseurs potentiels est déjà limité. On pourrait éviter cet inconvénient en frappant d'interdiction uniquement les personnes coupables de collusion et non leur entreprise. Cette solution permettrait de dissuader de commettre un acte illicite sans empêcher l'entreprise concernée de continuer de soumissionner pour des marchés publics. Elle n'exclurait pas l'application d'autres sanctions, monétaires notamment, à l'entreprise pour le manquement au droit de la concurrence ou au code d'éthique commis par son personnel.

#### **4.1 *Le rôle des autorités de la concurrence et de la politique de la concurrence dans la lutte contre la corruption***

Une bonne législation pour le financement des partis politiques, l'application de normes éthiques élevées dans la fonction publique, un niveau satisfaisant de ressources et d'expertise technique ainsi qu'une transparence de l'information pour les organismes de contrôle sont des conditions indispensables pour lutter efficacement contre la corruption. Elles exigent une forte collaboration entre les autorités chargées de la concurrence, de la lutte contre la corruption et de la passation des marchés publics. En faisant le point sur les méthodes de travail employées et les problèmes rencontrés, des programmes de défense de la concurrence des autorités compétentes en la matière aideront à relever les défis partagés avec les entités responsables de la passation des marchés publics. La promotion des principes de concurrence par les autorités compétentes (ainsi que par les responsables des marchés publics) peut également être effectuée auprès des entreprises privées, surtout celles qui participent souvent aux marchés d'enchères. Bien qu'un tel effort puisse être couteux en termes de ressources et de temps, il est susceptible d'avoir des effets bénéfiques à long terme. L'objectif visé pourrait être atteint de diverses façons. Par exemple:

- l'avis d'appel d'offres pourrait indiquer aux entreprises que le droit de soumissionner est subordonné à l'adoption de programmes internes visant à assurer le respect des règles des marchés publics. Les grandes lignes de ces programmes pourraient être établies en coopération avec l'autorité de la concurrence ou être approuvées par elle;
- l'avis d'appel d'offres pourrait aussi exiger que les personnes responsables des soumissions aient participé à des séances et des programmes d'information périodiques sur les sanctions encourues en cas de collusion et de corruption. Ces séances et programmes pourraient être offerts par les responsables des diverses autorités concernées, comme l'autorité de la concurrence et les entités chargées des marchés publics.

Au-delà des activités de sensibilisation, un système antitrust efficace et une mise en œuvre vigoureuse du droit de la concurrence peuvent notablement contribuer à réduire la corruption dans la passation des marchés publics. Il est bien connu que les rentes favorisées par un manque de concurrence peuvent encourager la corruption. Quand une entreprise jouit d'une rente et ses activités sont tributaires des décisions d'un fonctionnaire, celui-ci peut bénéficier d'une partie de la rente en abandonnant ses droits de contrôle en échange d'un pot-de-vin. Un accroissement des rentes, même si celles-ci résultent d'une restriction de la concurrence, a donc tendance à augmenter la corruption. Cela donne à penser que les politiques visant à lutter contre la corruption devraient non seulement modifier le système juridique pour sanctionner davantage les agissements illicites ou augmenter les traitements des fonctionnaires pour qu'ils soient moins incités à accepter des dessous-de-table, mais aussi prendre des mesures pour augmenter la concurrence dans le processus de passation des marchés publics en vue de limiter les possibilités de corruption.

## 5. Recherche du cadre institutionnel le plus efficace

L'application du droit de la concurrence (généralement confiée à l'autorité de la concurrence) n'est pas liée du tout, dans de nombreux pays, à l'application des dispositions prises pour lutter contre la corruption (généralement confiée au pouvoir judiciaire ou à un organisme spécialisé). Étant donné les complémentarités existant entre la corruption et les pratiques anticoncurrentielles que nous avons signalées plus haut, il semble que cette absence de coordination réduit inutilement l'effet dissuasif du droit de la concurrence et de la législation anti-corruption. À l'inverse, une approche coordonnée a des chances d'augmenter la probabilité de la détection des pratiques répréhensibles tout en rendant plus efficace la répression des actes complémentaires de corruption et de collusion. Une approche unifiée devrait avoir à long terme de plus importantes retombées sociales bénéfiques.

Les échanges systématiques d'informations entre les diverses entités chargées d'appliquer les dispositions en vigueur et la conduite d'enquêtes conjointes sont donc fortement recommandés. Il semblerait notamment judicieux d'ouvrir systématiquement une enquête de concurrence sur les marchés publics pour lesquels des signes de corruption ont été observés. Il est, en outre, peut-être possible de lutter contre la collusion et le favoritisme par le biais d'organismes de surveillance des marchés publics. Il peut-être pour cela nécessaire d'établir une instance de surveillance spéciale, chargée d'observer le comportement des agents responsables des marchés publics et de veiller à ce que le processus de passation de ces marchés ne soit pas utilisé pour fausser la concurrence.

### Encadré 5. Le *Bundeskartellamt* allemand et sa fonction de tribunal des marchés publics

En Allemagne, par exemple, l'autorité de la concurrence s'appuie sur trois chambres spéciales chargées de réexaminer l'attribution des marchés publics auprès desquelles il peut être fait appel de décisions prises par les entités adjudicatrices. Les principes qui guident l'action du *Bundeskartellamt* sont la concurrence, la transparence, la non-discrimination et l'équité des procédures d'appels d'offres.

En principe, les marchés publics allemands doivent être attribués dans le cadre d'une procédure de mise en

concurrence à l'issue d'un appel d'offres public transparent et parfaitement équitable. La règle prévoit que c'est le mieux disant économique qui remporte le marché.

En cas de saisine, les trois chambres créées dans le cadre du *Bundeskartellamt* vérifient que les entités contractantes ont respecté leurs obligations au regard de la procédure d'adjudication. Ces chambres sont habilitées à prendre des mesures pour remédier à toute violation de droits et éviter tout préjudice aux parties intéressées.

Certains pays se sont dotés d'une législation spécifique pour traiter les cas de collusion dans lesquels les agents responsables des marchés publics participent directement à l'organisation de soumissions concertées. Si la conduite anticoncurrentielle des entreprises en cause relève du droit de la concurrence, les autorités de la concurrence sont généralement impuissantes en ce qui concerne l'éventuelle complicité d'agents publics. C'est souvent le cas, car de nombreux pays considèrent la corruption comme une infraction réprimée par le droit pénal général. Le Japon, toutefois, est l'un des pays où les autorités de la concurrence disposent d'un certain nombre de prérogatives pour sanctionner les fonctionnaires ayant contribué à des soumissions concertées.

#### **Encadré 6. La loi japonaise de prévention des soumissions concertées impliquant des agents publics**

Pour régler le problème récurrent de l'implication de responsables des marchés publics dans les affaires de soumissions concertées, le Japon a adopté, en 2002, une loi de prévention et de répression des soumissions concertées qui permet à la Commission japonaise de la concurrence (*Japan Fair Trade Commission, JFTC*) de poursuivre les agents publics cités dans les dossiers de soumissions concertées. Quand celle-ci conclut à leur culpabilité, elle applique les dispositions de la loi antimonopole aux entreprises concernées et elle peut demander aux responsables des institutions adjudicatrices incriminées d'enquêter sur les écarts présumés de leurs agents et de prendre toutes les mesures nécessaires pour y mettre un terme. Ces mesures doivent être rendues publiques. Qui plus est, une fois que l'enquête a confirmé la participation d'un agent public au trucage d'un appel d'offres, l'administration peut s'appuyer sur la nouvelle loi pour exiger des réparations de l'intéressé.

## **6. Remarques finales**

Étant donné le poids des marchés publics dans les économies nationales, il est important que les gouvernements se penchent sur les problèmes délicats qui résultent de l'interaction entre les mesures visant à éliminer la collusion et la corruption dans les marchés publics. Ces deux pratiques sont très dommageables pour les contribuables et il faudrait s'y attaquer de manière concertée pour optimiser l'effet dissuasif des législations les concernant. Des arbitrages difficiles devront peut-être être opérés entre les deux catégories de mesures. Comme il a été indiqué dans cette note liminaire, le degré souhaitable de transparence à atteindre dans le processus de passation des marchés publics est un exemple des choix difficiles à opérer pour les pouvoirs publics. Doivent-ils opter pour une transparence maximale pour réduire les risques de corruption et faire en sorte que les agents publics restent comptables de leurs actes? Ou doivent-ils, au contraire, opter pour une transparence minimale afin de limiter, pour les soumissionnaires, les possibilités de se livrer à des pratiques collusoires? La préférence doit-elle être accordée dans tous les cas à des procédures ouvertes et transparentes plutôt qu'aux négociations directes? Il est impossible de répondre à ces questions dans l'abstrait et les responsables des marchés publics devraient opérer leurs choix en fonction des particularités de chaque appel d'offres.

Les autorités chargées de la concurrence et de la lutte contre la corruption peuvent très utilement aider les agents chargés des marchés publics à trouver le juste équilibre. Une meilleure coopération entre ces trois catégories de fonctionnaires, aux niveaux national et international, s'impose donc pour lutter contre la collusion et la corruption dans les marchés publics. L'application de principes directeurs et des meilleures pratiques, tenant éventuellement compte des leçons tirées de l'expérience au niveau

international peut, si elle s'accompagne d'un partage concerté de l'information entre les fonctionnaires concernés, permettre de rendre plus efficiente la passation des marchés publics. Cela se traduira, à son tour, par des économies pour les pays et leurs contribuables qui pourront avoir un effet bénéfique pour le développement et la croissance économiques des pays développés comme des pays en développement.

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## ANNEXE II - QUESTIONS ET PROBLÈMES À EXAMINER

*(Liste figurant dans l'appel à contributions adressé aux pays le 1er décembre 2009, document DAF/COMP/GF(2009)14)*

### 1. Ampleur et objectifs des marchés publics

- Quelle fraction de votre économie représentent les marchés publics?
- Quels sont leurs principaux objectifs?

### 2. Corruption

- Quel est le coût de la corruption?
- Quels sont les facteurs qui la facilitent? Certains semblent-ils plus importants que d'autres?
- Comment les programmes de transparence contribuent-ils à la lutte contre la corruption? Quelles autres dispositions facilitent cette lutte? Quelles méthodes et techniques semblent particulièrement efficaces dans votre juridiction?
- Les entreprises sont-elles tenues de certifier pendant la procédure de passation des marchés publics qu'elles n'ont corrompu aucun agent public?
- Quelles sanctions peuvent être infligées aux entreprises et aux individus qui se sont rendus coupables de corruption active ou passive dans votre juridiction?
- Quelles sont les autorités compétentes pour engager des poursuites dans les affaires de corruption? L'autorité de la concurrence dispose-t-elle de prérogatives en la matière?

### 3. Collusion

- Quels facteurs facilitent la collusion dans les marchés publics? Quels secteurs semblent tout particulièrement exposés aux soumissions concertées?
- Dans votre juridiction, quels secteurs ont connu des cas de soumissions concertées dans le domaine de marchés publics?
- De quelle expérience dispose votre organisme en termes de contribution à l'élaboration de systèmes de passation des marchés publics destinés à minimiser les risques de soumissions concertées?
- Votre pays emploie-t-il des certificats de détermination indépendante des offres?

- Lorsque des entreprises se sont engagées dans des pratiques collusoires, doit-on leur interdire de participer aux procédures de passation des marchés publics pendant un certain temps?

#### **4. Lutte contre la collusion et la corruption**

- Dans votre juridiction, quelles affaires ont porté à la fois sur des faits de corruption et de collusion dans le cadre de la passation de marchés publics?
- Les faits avérés ou allégués de collusion et de corruption recensés se sont-ils produits de manière prédominante au niveau d'administration local, provincial ou national?
- Quelles méthodes et techniques de lutte contre la corruption contribueraient à la lutte contre la collusion?
- Lorsque des individus ou des entreprises se sont rendus coupables de corruption active ou passive, peuvent-ils bénéficier de mesures de clémence dans votre juridiction?

#### **5. Promotion de la concurrence**

- En quoi le cadre réglementaire et institutionnel contribue-t-il à faciliter les soumissions concertées et la corruption?
- Comment les autorités de la concurrence peuvent-elles s'employer à améliorer l'efficacité des procédures de passation des marchés publics?
- Quelles dispositions ont été prises pour améliorer l'efficacité des procédures de passation des marchés publics dans votre juridiction? Des mesures spécifiques ont-elles été adoptées pour réduire la collusion et la corruption dans les marchés publics? Si oui, lesquels et quel est le bilan de ces mesures à ce jour? D'autres approches destinées à faire reculer la collusion et la corruption ont-elles été tentées dans votre juridiction, et quels ont été les résultats obtenus?
- Lors de l'adoption de mesures destinées à réduire la collusion et les soumissions concertées dans les marchés publics, avez-vous pris en compte l'impact que pourraient avoir ces mesures sur les risques de corruption?
- Votre autorité de la concurrence a-t-elle pris des mesures de promotion de la concurrence dans ce domaine?
- Si votre organisme a engagé des poursuites contre les responsables présumés de faits de corruption ou de collusion, quelles mesures correctives avez-vous envisagées?

## ALBANIA

### 1. Size and policy objectives

#### 1.1 *What fraction of your economy does public procurement account for?*

According to the latest statistical data, public procurements in Albania are more than 15.4% of General Domestic Product (GDP) and this figure is very similar with the global average of public procurement vs. GDP, 15%<sup>1</sup>. In some countries the government expenditure for public procurement is up to 20% of GDP.

#### 1.2 *What are the principle policy objectives of public procurement?*

The main objectives of an effective procurement are efficiencies of public funds in terms of offers of best prices and quality offered by participants and to increase the competition in relevant market. This objective will be realised through some other sub-objectives as following:

- To increase efficiency and effectiveness for the procedures of public procurement made by contractual authorities;
- To secure the good use of public funds and to reduce the procedural expenses;
- To stimulate the participation of economic operators in the procedures of public procurement;
- To stimulate competition between economic operators;
- To secure an equal and non discriminatory treatment for all economic operators that participate in the procedures of public procurements;
- To secure integrity, public trust and transparency for public procurement procedures.

### 2. Corruption

#### 2.1 *What is the cost of corruption?*

The Albanian legislation provides an administrative and penal treatment for corruption in the field of public procurement. The Albanian Competition Law, almost adapted with the European legislation in the field of competition, treats prohibited agreements and abuse with dominant position as hard constrain of competition.

The Penal Code in the article Nr. 258 provides fines and incarceration sanctions up to 3 years for enagements of equilibration in procurements by the bureaucrats. In articles 244-245 and 259-260 are provided fines and incarceration sanctions for corruption of bureaucrats in public procurement.

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1. Source: OECD 2008 Fighting Cartels in Public Procurement.

According to the observations collected from our agency and their analyses, it was indicated an increased cost from 5% - 10% due to the concerted conduct among the firms involved in a certain case of a public procurement. The companies that co-ordinate with each other will increase the value of the bid from 95% - 99%, so near the limit of the fund. In the case where more bidders participate, the winning bid is 83% - 86 % of the fund. (Albanian Competition Authority-case)

## **2.2 *What factors facilitate corruption?***

The factors that facilitate corruption are:

- The existence of entry and exit barriers in the relevant market that create constraints for the possibility of more participants in public procurements;
- The existence of “specific” (i.e. particular not in the meaning in itself) criteria (economic or technical) that constrain the participation in public procurement and/or predetermine the potential bidders, creating the possibility for a coordinated behaviour.

Another factor may be the conflict of interest between the contractual authorities and the participants in public procurement. Even though it is foreseen in the law Nr 9643, (dated 20.11.2006) ‘On Public Procurement,’ it is difficult to measure the way they are implemented.

## **2.3 *Do some factors appear to be more important than others?***

Our experience is limited in this area of the infringements of the competition law, so it is not possible to provide a list of the factors that influence such behaviours of the players.

## **2.4 *How do transparency programmes help fight corruption?***

Transparency programmes help to increase the number of participants in public procurements and to increase competition by giving more information for the process. Through this programme the government and the consumers receive cheaper and better services. Since 2009 Albania is applying the online system of public procurement and at the same time in the website of the Public Procurement Agency information is published for the participants and winners.

## **2.5 *What other policies help fight corruption?***

The National Competition Policy, which aims to promote and protect free and effective competition in the market through preventing and detecting the anticompetitive practices, gives its contribution in fighting public procurement corruption.

## **2.6 *What methods and techniques seem particularly effective in your jurisdiction?***

Albanian legislation is adapted with the European Union legislation in the field of public procurement and Albania is using advanced techniques of public procurements such as the online system of public procurement.

## **2.7 *Are firms required to certify during the procurement process that they have not bribed an official?***

No. In the law 9643, dated 20.11.2006 ‘On public procurement’ is not yet provided the certificate for the independent bid CIBD, but the Albanian Competition agency may recommend it to the relevant public

body But after finishing the in depth investigation the Competition Authority can recommend this to the Public Procurement Agency.

**2.8 *What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction?***

Based on article 13/3 of the law Nr. 9643, dated 20.11.2006 'Public Procurement' the Public Procurement Agency can exclude an economic operator from participating in awarding procedures for a period of 1-3 years in the case of corruption in public procurement. Also the Penal Code in the article Nr. 258 provides fines and incarceration sanctions up to 3 years for enagements of equilibration in procurements by the bureaucrats. In articles 244-245 and 259-260 are provided fines and incarceration sanction for corruption of the bureaucrats in the public procurement.

**2.9 *Who are the competent authorities for prosecuting corruption cases?***

Based on the Procedural Penal Code, the competent authority for prosecuting corruption cases is the Prosecutor.

**2.10 *Does the competition authority have any power in this area?***

Not exactly in this respect. In order to foster competition policy and law advocacy, the Albanian Competition Authority has the power to make recommendations addressed to the relevant institutions for increasing competition in the field of public procurement based on the analysis of the primary and secondary legislation.

Also, the Competition Commission has the power to impose fines from 2-10% of the turnover if the companies abuse with the dominant position in the market (according the article 9 of the exciting law) and if companies have a prohibited agreement (according the article 4).

**3. Collusion**

**3.1 *What factors facilitate collusion in procurement?***

In the case of a small economy like Albania the most important factor that facilitates corruption is the small number of participants for a procured service or good and in the circumstances of the friendship network. This helps the companies to collude for the procedures of public funds.

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

In principle, the sectors/industries that seem vulnerable to bid rigging are those industries that have a limited number of participants, a limited number of licenses and detailed specifications for the participants. However, those factors are important and should take into consideration to identify the relevant determinants at the level of competition in the certain procurements procedures.

**3.3 *What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement?***

During 2009, the Albanian Competition Authority has analysed constrains of competition in the field of public procurement because of the impact that has the efficiency of the procurement of goods and services. The methodology used for this analysis is from OECD - GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT.

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

The Albanian Competition Authority has collaborated with the Public Procurement Authority for opening the markets of the procured goods and services. The Competition Commission gave some recommendations, with its decision Nr 114, dated 26.05.2009, for increasing competition for the public procurement in security services. The Competition Commission recommended increasing the number of bidders because of securing the participation of economic operators (according to their size small, medium and big enterprises).

**3.5 *Does your country employ certificates of independent bid determination?***

No.

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

Yes, based on article 13/3 of the law Nr. 9643, dated 20.11.2006 'Public Procurement' the Public Procurement Agency can exclude an economic operator from participating in awarding procedures for a period of 1-3 years in the case of corruption in public procurement.

**4. *Fighting collusion and corruption***

**4.1 *What cases from your jurisdiction have involved both corruption and collusion in public procurement?***

The Competition Authority and the Prosecutor have not had any common case until now. Each institution investigates from different prospective a certain case, focusing in the respective aspects of the constraints of competition and corruption. However, both public bodies based their relevant activities on the same source of information (at the large extent. In this respect their cooperation is very crucial to develop an appropriate information exchange system.

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

Collusion cases occurred only at national level until now. But it is possible to detect anticompetitive practices even in local government level.

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

Transparency in the procedures and in the selection process.

**4.4 *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?***

No.

**5. *Advocacy***

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

No information.

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

According to law Nr 9121 'On competition protection', the Competition Authority gives recommendations for local and national institutions for the protection of effective competition. The Competition Authority has signed a memorandum of understanding with the Public Procurement Agency and has planned in 2010 to organise a training programme for the contractual authorities for detecting cartels.

**5.3 *What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? 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 your jurisdiction and what have been the results?***

N/A.

**5.4 *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?***

N/A.

**5.5 *Has your competition agency undertaken competition advocacy in this area?***

Yes. The advocacy of competition comes through the recommendations given to the Public Procurement Agency and to the Directory of the Concentrated Procurements. We are also planning training for detecting and preventing collusion in public procurement.

**5.6 *If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?***

The Competition Authority has started an in depth investigation for a suspected case of collusion in public procurement market. When the investigation will finish the Competition Authority will give administrative measures for the companies that are involved in a prohibited agreement. Also, Competition Commission has recommended the procurement agency to approach the right size of bidding cluster with the size of the most players in the relevant markets, aiming to involve even the small and medium firms.

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## AUSTRALIA

The Australian Competition and Consumer Commission (the ACCC) has developed an extensive education and advocacy programme for government officials involved in public procurement.

This paper discusses the experiences of the ACCC in seeking to promote greater awareness of competition issues amongst procurement officials. It focuses, in particular, on the ACCC's recent advocacy initiatives in relation to cartel conduct. It also highlights the importance of having an integrated compliance programme, which includes a mix of education, advocacy and enforcement action, to promote awareness of the obligations of businesses to comply with the *Trade Practices Act 1974*.

### 1. Public Procurement in Australia

In Australia the principles which apply to the Commonwealth in respect to public procurement are set out in the Commonwealth Procurement Guidelines<sup>1</sup> (CPGs). The CPGs establish the core procurement policy framework and articulate the Australian Government's expectations for certain Commonwealth departments and agencies (agencies) and their officials, when performing duties in relation to procurement.<sup>2</sup> The Commonwealth Department of Finance and Deregulation is responsible for administering the Commonwealth's procurement policy framework.

The CPGs define procurement in the following way:<sup>3</sup>

*Procurement encompasses the whole process of acquiring property or services. It begins when an agency has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract.*

The core principles which apply to procurement under the CPGs are:

- Value for Money;
- Encouraging Competition;
- Efficient, Effective and Ethical Use of Resources;
- Accountability and Transparency.

<sup>1</sup> A copy of the CPGs is available at <http://www.finance.gov.au/publications/fmg-series/procurement-guidelines/index.html>.

<sup>2</sup> Australia's state and territory governments operate their own separate public procurement frameworks. These frameworks are determined on a state-by-state / territory-by-territory basis.

<sup>3</sup> Commonwealth Procurement Guidelines (December 2008), p. 3.

Competition is a key element of the Australian Government's procurement policy framework. It enhances value for money, the core principle underpinning Australian Government procurement. Effective competition requires non-discrimination in procurement and the use of competitive procurement processes.

The Commonwealth procurement policy framework is non-discriminatory. All potential suppliers should have the same opportunities to compete for government business and be treated equitably based on their legal, commercial, technical and financial abilities. Equitable treatment of suppliers enables business to be conducted fairly, reasonably and with integrity.

Procurement methods must not discriminate against potential suppliers due to their degree of foreign affiliation or ownership, location or size. The property or services on offer must be considered on the basis of their suitability for their intended purpose and not on the basis of their origin.

The procurement process itself is an important consideration in achieving value for money. Participation in a procurement process imposes costs on agencies and potential suppliers and these costs should be considered when determining a process commensurate with the scale, scope and relative risk of the proposed procurement.

## **2. ACCC Compliance Initiatives**

The ACCC is Australia's national competition regulator. It is responsible for administering the *Trade Practices Act 1974* (the Act), including by educating Australian consumers, businesses and governments about their trade practices rights and responsibilities. The ACCC is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcing the Act and the state/territory application legislation.

The ACCC has actively engaged with procurement officials across all levels of government to alert them to the issues and risks that may arise in relation to cartel conduct. In particular, the ACCC has focused on:

- Risks for government;
- The law in Australia;
- Procurement design;
- Detection tips;
- Deterrence tips;
- Do's and don'ts in public procurement.

In 2005 the ACCC launched its first specific compliance programme for procurement officials. The primary objective of this programme was to alert officials on how to detect possible cartel activity in the procurement process. The material released by the ACCC provided guidance to officials on how to detect the warning signs of cartel conduct.

### **2.1 Consultation with Procurement Officials**

The ACCC compliance programme was developed with the benefit of advice and information provided by officials directly involved in Commonwealth procurement. The ACCC conducted extensive consultation with a range of procurement officials, including the Commonwealth Department of Finance.

The ACCC also undertook a number of trial seminars with the draft material to determine whether the guidance was appropriate and would achieve the desired outcomes.

## **2.2 *Education Material***

The central component of the ACCC's compliance programme was a multi-media CD-ROM which was provided to public sector procurement agencies, as well as private companies involved in procurement. In developing this material, the ACCC was able to draw on the experience of the Canadian Competition Bureau and the United States Department of Justice, Antitrust Division.

The CD-ROM was interactive and allowed procurement officials to access a variety of different levels of information. This information included: how to identify cartel activity; the process for reporting suspected cartel or bid-rigging behaviour; the statutory provisions; and what a person should do if a cartel operation is suspected. The CD-ROM also included a checklist for procurement officials to determine whether or not there is any suspected cartel activity.

In addition to the CD-ROM, the ACCC developed guidelines for procurement officials on cartel conduct.

The material also contained a short video presentation from ACCC Chairman, Graeme Samuel, outlining the importance of detecting cartels in public procurement.

## **2.3 *Presentations & Seminars***

The initial roll out of the ACCC's procurement strategy included over 50 presentations by ACCC staff, at all levels, to procurement officials from Commonwealth, state and local governments. Importantly, a number of these seminars were delivered to national and state conferences for procurement officials.

## **2.4 *Advocacy***

In addition to the educational aspects of the compliance programme, the ACCC wrote to Commonwealth Government Ministers and the Premiers and Chief Ministers of each of Australia's states and territories. The purpose of this was twofold. Firstly, to seek support for the ACCC's education and compliance programme at a high level within each Government. This support was received from all Governments.

The second purpose was to request all Governments to examine their procurement frameworks and introduce measures requiring officials to take into account competition laws when designing their procurement policies and guidelines. This proposal had mixed results with only some government agencies introducing measures to deal with cartel conduct.

## **2.5 *Investigations and Litigation***

As a result of the initial procurement compliance programme, the ACCC received various reports from procurement officials identifying activity which may breach competition laws. Whilst there were some investigations as a result of these reports, none of these have led to enforcement action by the ACCC to date.

## **3. *Review of Procurement Compliance Programme***

In 2007 the ACCC reviewed and updated its compliance programme, and developed a DVD which was sent to Chief Financial Officers in 23 Commonwealth agencies. Unlike the initial roll-out of the

programme, the ACCC did not undertake the same extensive presentations and seminar series to educate procurement officials. One of the reasons for this was pending court action in the Baxter<sup>4</sup> case.

#### **4. Baxter Case – Derivative Crown Immunity**

The ACCC took these proceedings following a complaint from a medical practitioner that exclusivity agreements between the government and Baxter Healthcare Pty Ltd (Baxter) limited the choice of treatment which would best meet the needs of their patients requiring dialysis.

The ACCC alleged that Baxter had entered into long-term, exclusive, bundled contracts with state purchasing authorities (SPAs) which tied the supply of sterile fluids to the supply of peritoneal dialysis products. It claimed that bundling all sterile fluids and peritoneal dialysis products in this way amounted to exclusive dealing in breach of section 47 of the Act, and that Baxter had taken advantage of its substantial market power in sterile fluids to structure the terms on which it offered to enter into the contracts.

##### **4.1 Federal Court Decision**

On 16 May 2005 the trial judge, Justice Allsop, handed down judgment applying a line of judicial authority based on the High Court's decision in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*<sup>5</sup> (Bradken). This authority provided that where the Crown enjoys immunity from the Act (which was not contested in the case), this immunity should extend to corporations with which the Crown deals, where the application of the Act would interfere with the proprietary, contractual and/or other legal interests of the Crown (known as derivative Crown immunity). Applying this authority, Justice Allsop held that the Act did not apply to either Baxter's contracts with the SPAs or its other conduct.

But for the existence of Crown or derivative Crown immunity, Justice Allsop said he would have found that Baxter had committed one breach of section 46 and a number of breaches of section 47 of the Act.

The ACCC appealed the decision on the basis that Justice Allsop had incorrectly held that the Act did not apply to Baxter's conduct.

##### **4.2 Full Federal Court Decision**

On 24 August 2006 the Full Federal Court handed down its decision, holding that Justice Allsop's finding on the Crown immunity issue was correct.

The Court made the following observations about the possible implications of its decision:

*It is one thing to exempt the executive government from legislative prohibition as to conduct... It is another to have a substantial area of commerce in which restrictive practices can be carried on by all those dealing with a government, perhaps to the disadvantage of the public purchasing authority, but also to the detriment of other suppliers and consumers.*

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<sup>4</sup> *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2005] FCA 581 (16 May 2005) available at <http://www.austlii.edu.au/au/cases/cth/FCA/2005/581.html>.

<sup>5</sup> [1979] HCA 15 (5 April 1979) available at <http://www.austlii.edu.au/au/cases/cth/HCA/1979/15.html>.

The ACCC sought special leave to appeal the decision to the High Court and, on 29 August 2007, the High Court upheld the appeal, finding that the Act applied to Baxter's conduct. The High Court was of the view that:<sup>6</sup>

*The construction urged by the respondents imposes a very extensive qualification upon the Act's object of promoting competition and fair trading in the public interest, in the name of the protecting of the capacities of the Crown, a qualification strikingly at odds with the way the Act deals with governments when they themselves carry on a business.*

Baxter would therefore be liable for penalties, injunctions and other sanctions (to be determined by the Full Federal Court on remittal<sup>7</sup>).

### **4.3 Implications of the Baxter Case**

Following the Federal Court and Full Federal Court decisions in Baxter, the ACCC was concerned that Crown immunity may pass through to businesses involved in cartel conduct if a bid was submitted for a government tender. However, the High Court's decision confirms that the Act *will* apply to collusive practices in the context of government procurement.

### **4.4 Procurement Outreach Programme**

The Baxter case was significant in that it removed any uncertainty that collusive practices involving Government tenders would be subject to the cartel provisions under the Act.

Following the High Court's decision, the ACCC trialled a new education and advocacy approach for public procurement. The trial programme commenced in the state of South Australia and following its initial success was implemented nationally.

The trial programme involved extensive consultation and liaison with state and local government entities, including over 70 presentations by ACCC staff. In addition to these presentations, an ACCC Outreach Officer was specifically tasked to liaise directly with these government entities, focusing on education and advocacy for procurement reform.

The ACCC also updated its guidelines for procurement officials on cartel conduct to reflect the decision in Baxter, and pending commencement of the new criminal cartel regime.<sup>8</sup>

In April 2009 the ACCC released a new guidance publication for procurement officials: "*Cartels: deterrence and detection — a guide for government procurement officers*".<sup>9</sup>

During the four years following the release of the ACCC's compliance programme, the ACCC did not bring any bid-rigging case to court. However, in 2009 this changed when the ACCC instituted proceedings

<sup>6</sup> *Australian Competition and Consumer Commission v Baxter Healthcare* [2007] HCA 38 (29 August 2007), at para 74. The decision is available at: <http://www.austlii.edu.au/au/cases/cth/HCA/2007/38.html>.

<sup>7</sup> *See Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2008] FCAFC 141 (11 August 2008) available at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/141.html>.

<sup>8</sup> New laws criminalising cartel conduct came into effect in Australia on 24 July 2009. More information about the new criminal cartel regime is available at: <http://www.accc.gov.au/content/index.phtml/tag/cartels/>.

<sup>9</sup> The guide is available at: <http://www.accc.gov.au/content/index.phtml/itemId/869010>.

against American-based company, DRS C3 Systems<sup>10</sup> (DRS), for alleged market sharing in the international military defence training systems industry.

The conduct relates to an alleged agreement between DRS and another company that DRS would withdraw from a proposed procurement for an air combat manoeuvring instrumentation system, conducted by the Australian Government. The case is ongoing.

Whilst the DRS case is an important step in highlighting anti-competitive conduct in the public procurement sector, a more recent investigation into the construction sector in the state of Queensland has had a more significant impact in raising public awareness of the economic harm of bid-rigging, especially amongst government Ministers.

The ACCC commenced legal proceedings on 21 September 2009 alleging that three construction companies<sup>11</sup> engaged in price fixing and misleading or deceptive conduct in tendering for government construction projects in Queensland. The alleged conduct involved the exchange of cover prices (a practice referred to in the building industry as “cover pricing”) for the construction of a school, rail facilities and an airport refurbishment.

As the conduct covers a wide range of government tenders, this case has significantly raised awareness of the risks of cartel activity within the public procurement sector.

## 5. ACCC – Lessons Learnt from Public Procurement Outreach Programmes

In the course of implementing our compliance programmes, the ACCC has learnt that to successfully achieve our compliance objectives, particularly with respect to public procurement, it is necessary to have a mix of strategies and approaches. For example, education and advocacy messages (while necessary) will not be successful in raising awareness about the economic harm associated with bid-rigging for government tenders, or in preventing breaches of the law, without strong enforcement action.

In the ACCC’s experience it is necessary to have an integrated approach, which includes:

- Enforcement of the law, including resolution of possible contraventions, both administratively and by litigation;
- Encouraging compliance with the law by educating and informing both businesses and officials involved in procurement about their rights and responsibilities under the *Trade Practices Act 1974*; and
- Developing ongoing and effective partnerships with other government agencies to implement these objectives.

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<sup>10</sup> ACCC v DRS C3 Systems, Inc [NSD588/2009](#).

<sup>11</sup> ACCC v T F Woollam & Son Pty Ltd & Ors [QUD236/2009](#).

## BANGLADESH

### 1. Size and policy objectives

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

Public procurement accounts for 20% of government expenditure worldwide and Bangladesh is no exception.

The set of laws, rules and regulations (including amendments) on public procurement in Bangladesh can be accessed at Central Procurement Technical Unit (CPTU) website ([www.cptu.gov.bd](http://www.cptu.gov.bd)). The website was launched on 9 February 2010. The parent law governing public procurement in Bangladesh is Public Procurement Act 2006 which was then amended in 2008. The subordinate legislation includes the Public Procurement Rules 2008 and associated amendments. In order to facilitate e-procurement, Governing Principles of e-Government Procurement were drafted on 6 August 2009.

### 2. Corruption

#### 2.1 *What is the cost of corruption?*

There are no available estimates on the cost of corruption. General perception is that they are high.

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

Same factors that facilitate corruption in other countries. There are no available assessments of which factors are deemed more or less important.

#### 2.3 *How do transparency programmes help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?*

One of the techniques the current Government of Bangladesh (GoB) has introduced a Central Procurement Technical Unit (CPTU) under the Ministry of Planning (website: [www.cptu.gov.bd](http://www.cptu.gov.bd)). Under the CPTU, e-Government Procurement system (e-GP) has been introduced to enhance the efficiency and transparency in public procurement through the implementation of a comprehensive e-GP solution to be used by all government organisations in the country. Initially, on pilot basis, this will apply to a few Procuring Entities (PEs) of four target agencies namely Bangladesh Water Development Board (BWDB), Rural Electrification Board (REB), Roads and Highways Department (RHD) and Local Government Engineering Department (LGED), in Bangladesh. The System, later on, will be rolled-out across all the procuring entities in a phased manner.

The Anti Corruption Commission (ACC) was created through the Anti-Corruption Commission Act 2004 promulgated on 23 February 2004 that went into force on 9 May 2004. Although initially, it could not make the desired impact, but immediately following its reconstitution in February 2007, the ACC began working with renewed vigour and impetus duly acceding to the United Nation's convention against corruption that was adopted by the General Assembly on 31 October 2003.

**2.4** *Are firms required to certify during the procurement process that they have not bribed an official?*

No. There are other laws and policies that forbid bribery.

**2.4.1** *What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction?*

There are criminal and civil law sanctions/penalties that can be determined through legal proceedings on a case by case basis.

**2.5** *Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?*

Actions can be instituted by various Government departments under the existing legal system.

Bangladesh does not have a Competition Law or Authority at present.

**3. Collusion**

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

Same as in other jurisdictions world-wide. There are no country specific factors in this regard

**3.2** *What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?*

There have been several *allegations* in sale of State-owned assets, purchase of staple products.

**3.3** *Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?*

Bangladesh does not have a competition law or other provisions dealing specifically with collusion. There are some provisions in other laws that could be invoked in this regard.

**4. Fighting collusion and corruption**

**4.1** *What cases from your jurisdiction have involved both corruption and collusion in public procurement?*

As indicate above, there have been *allegations* of corruption and ‘syndication’ in some areas of provision of staple products but no cases have been prosecuted due to lack of sufficient evidence and lack of a competition law.

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

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

The Government of Bangladesh is considering enacting a Competition Law with specific provisions against collusive activity

**4.4** *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?*

No

## **5. Advocacy**

Current experience in this area is limited and does not permit answers to the questions that follow below. Some questions do not apply to the current situation in Bangladesh...for example those pertaining to competition agency/advocacy. Under the new CPTU and e-government policy measures there has been increased transparency in the public procurement process in order to minimise opportunities for bribery and corruption.



## BRAZIL

The competition law and practice in Brazil is governed primarily by Law No. 8,884, of 1994, as amended in 2000 and 2007. The Brazilian Competition Policy System (BCPS) is composed of three agencies which are in charge for the enforcement of the Brazilian Competition Law at the administrative level – namely the Secretariat of Economic Law of the Ministry of Justice (SDE), the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), and the Council for Economic Defence (CADE).

SDE, through its Antitrust Division, is the chief investigative body in matters related to anticompetitive practices and it also issues non-binding opinions in merger cases. SEAE issues non-binding opinion in merger review and it may also issue non-binding opinions related to anticompetitive practices. CADE is the administrative tribunal, composed of seven Commissioners, which makes the final rulings in connection with anticompetitive practices and merger review, after reviewing the opinions issued by the Secretariats.

Since 2003, the BCPS has passed through important changes aimed to improve competition and the enforcement of competition law and policy in the country. The focus has been to enhance – through better working methods, priority-setting goals and communication flow between the BCPS and other government authorities – the effectiveness of its efforts to improve the functioning of markets on behalf of consumers, focusing on anti-cartel enforcement and competition advocacy.

Fighting cartels is a top priority for the Secretariat of Economic Law (SDE). Since 2003, SDE has started to use the enhanced investigative tools granted by the Brazilian Congress in 2000 (dawn raids and leniency), and CADE began imposing record fines on companies and executives found liable for cartel conduct. Currently 75% of SDE's resources are devoted to cartel investigations. SDE is also increasingly cooperating with criminal authorities and foreign antitrust authorities, resulting in more effective investigations related to such anticompetitive practices.

Since 2007, SDE has also established fighting bid rigging as a priority. As determined by the Minister of Justice, a special unit within SDE was created for this specific purpose aiming at (i) investigating bid rigging in public procurement proceedings and (ii) developing knowledge with the purpose of helping procurement authorities to identify and avoid cartels in the tenders they promote.

The development of this unit counted with the valuable assistance of the Organisation for Economic Cooperation and Development (OECD), in the context of the “Project to Reduce Bid Rigging in Latin America”. The two-year Project was launched at the “Latin American Competition Forum” in 2007 with pilot projects in Brazil and Chile. Within the Programme, the OECD prepared several briefs for SDE on a variety of topics, such as specific amendments to the Procurement Law and the Certificate of Independent Bid Determination (CIBD), which undoubtedly contributed to enhance the Brazilian enforcement against bid rigging. OECD also helped SDE to establish a close working relationship with representatives of key public bodies involved in public procurement in Brazil, as stated below.

Some recent achievements on fighting collusion in public procurement are presented below, as well as other positive results derived from the enhanced cooperation with anti-corruption authorities and criminal authorities in this area.

## 1. Introduction

In Brazil, mandatory bidding procedures are established by 1988 Brazilian Constitution. Its Article 37, item XXI, states that public bidding procedures must be followed in all public sector contracts of construction projects, services, acquisitions and property transfers, in order to ensure equal conditions to all participants, resulting in the best value for public resources.

Bidding proceedings are governed primarily by Law No. 8,666 of 1993 (The Public Procurement Law) and its amendments. It establishes a great variety of principles that must be observed in these proceedings, such as free competition, publicity, strict observance of the terms of the tender notification, objective judgment and compulsory awarding. However, the greatest of all principles is the supremacy of the public interest, which interacts with all of the other principles involved.

The Brazilian government has been making considerable efforts to promote competitive public tender practices by implementing more efficient contracting – such as the extensive use of electronic procurement<sup>1</sup> as well as enhancing transparency and its external and internal controls exercised by the authorities responsible for bidding procedures. Furthermore, the competition authorities are now devoting especial attention to preventing and prosecuting collusive practices among competitors in public tenders.

However, it is widely known that public procurement is a propitious scenario for cartels activities and other fraud schemes. Many factors contribute for it, such as that the government spends great amounts of resources to purchase goods and services required for its activities in a great variety of relevant areas, such as health services, education, public safety and infrastructure.

Additionally, in Brazil, where there is a great decentralisation of bids (each public agency or unit shall promote its own bids), the frequency of contacts between competitors can be quite significant and, as a consequence, it may increase the opportunity for collusion schemes.

In private contracts, buyers have more flexibility to respond or suspend a tender if they observe any sign of collusion between suppliers. However, due to the legal framework applicable to public tenders in Brazil, in general, the government is not able to timely react in such cases. Finally, the high number of bidding processes is a challenge that requires constant interaction among the agencies responsible for fighting collusion, frauds and corruption in public tenders.

Consequently, since 2007 SDE has made a major effort to build and enhance its relationship with those authorities who also work with public procurement in order to enlarge the effectiveness of their work. The BCPS is also spreading measures to enhance competition and prevent anticompetitive practices in public tenders, as stated below.

## 2. Enhanced Cooperation among Government Authorities

Since 2007 SDE has made a major effort to build a close working relationship with key officials of the Brazilian government who also deal with public procurement in Brazil. The main objective is to increase the effectiveness of Brazilian authorities in fighting bid rigging. This is a great priority for Brazil, especially in the context of the forthcoming World Cup in 2014 and Olympic Games in 2016, as stressed by the Brazilian President Luiz Inacio Lula da Silva during the second edition of the Anti-Cartel Enforcement Day, celebrated on October 8<sup>th</sup>, 2009.

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<sup>1</sup> According to the Ministry of Planning, in 2008 only the federal government saved approximately R\$ 3,8 billions (US\$ 1,62 billion) by using the electronic procurement. Source: [www.comprasnet.gov.br](http://www.comprasnet.gov.br), access in December 24, 2009.

As part of the OECD Project, the initial efforts focused on the Ministry of Planning, the Office of the Comptroller General and the Federal Court of Auditors. To encourage these agencies to fight bid rigging, SDE focused on explaining the significant cost of bid rigging to the government. Collusion cases from Brazil and other jurisdictions were used to illustrate this point and also that bid rigging conspiracies can often last many years. Work with these organisations progressed quickly, and after nearly three years of sustained engagement, considerable advances have been made.

SDE's joint work with the Ministry of Planning has focused on accessing data regarding public procurement and improving the detection of bid rigging. The Ministry of Planning is responsible for all information technology systems that support federal government procurement (such as *ComprasNet*, the e-procurement unit of the federal government). There are important initiatives within that Ministry for developing software tools which can more quickly identify suspicious patterns of behaviour by suppliers in bids.

As a practical result of this cooperation, the Ministry of Planning authorised SDE to access the Data Warehouse of *ComprasNet*, which is an aggregated data storage on federal government purchases applied for monitoring a number of indicators. It includes business intelligence tools, and allows SDE to extract and analyse data regarding public procurement at a federal level. It is a valuable tool for SDE to conduct consultations regarding suspicious bidding processes.

Furthermore, following a SDE recommendation, the Ministry of Planning issued in 2009 a regulation that makes mandatory for all participants in federal public bids to file a Certificate of Independent Bid Determination (CIBD). This important measure can be seen as the turning point in the fight against bid rigging in Brazil as will be further discussed below.

The work has also focused on the Office of the Comptroller General (*Controladoria Geral da União – CGU*), which is responsible for auditing the expenses of the federal executive branch. CGU is the internal audit unit and the anti-corruption agency of the Brazilian federal government. The joint work between SDE and CGU has focused on using existing methods for detecting fraud and corruption in public procurement to help identify possible bid rigging conspiracies (as bid rigging can occur when these other crimes occur). That cooperation was institutionalised by a cooperation agreement signed in 2009.

In addition, SDE has been using CGU's Public Expending Observatory (*Observatório da Despesa Pública – ODP*), which is a data-matching and a tracking system originally designed to detect fraud and corruption, to help the competition authorities identify bid rigging cases and patterns. It has enabled SDE to conduct sophisticated investigations of public tenders with the aid of electronic data. More information about ODP can be found on Annex I.

SDE has also established a positive relationship with the Federal Court of Auditors (*Tribunal de Contas da União – TCU*), which resulted in a cooperation agreement signed in 2008. TCU audits the accounts of administrators and other persons responsible for federal public funds, assets, and other valuables, as well as the accounts of any person who may cause loss, misapplication, or other irregularities that may cause losses to the public treasury<sup>2</sup>.

SDE and TCU have focused on outsourcing contracts, which was identified as a kind of contract highly vulnerable to fraud schemes. This joint work has enabled SDE to better investigate possible collusive practices in this sector.

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<http://portal2.tcu.gov.br/portal/page/portal/TCU/english/inside>.

Additionally, TCU, CGU and SDE have recently developed a typology concerning suspicious patterns applied to this contracts that will be spread among other authorities, especially the criminal ones, in order to better detect and prosecute bid rigging and corruption in this kind of contracts.

Furthermore, since 2007, SDE has focused its efforts on strengthening the cooperation with the criminal authorities, in order to increase the impact of its anti-cartel enforcement policy. In Brazil, cartel is both an administrative infringement and a crime, punishable with criminal fines or prison terms that may range from 2 to 5 years. The police and the Public Prosecutors Office – at the Federal and State levels – are in charge of the criminal prosecution, pursuant to Law No. 8137/90 (Economic Crimes Law) and Law No. 8.666/93 (Public Procurement Law).

The goal of this joint work with the criminal authorities was to explain the legal standards for a violation of the competition law, to raise awareness of anticompetitive practices, and to discuss penalties, given that bid rigging is also a criminal offence. Moreover, because bid rigging may occur alongside other crimes, such as fraud, money laundering, tax violations and corruption, it is important for public prosecutors and the Federal Police to be aware that additional penalties can be imposed. SDE also sought to deepen its connection with the Federal Police in order to increase the effectiveness of its investigative work. In 2009, for example, the Federal Police participated together with the SDE in a dawn raid in connection with an alleged bid rigging case regarding information technology services in the Federal District.

The competition authorities also participate in many inter-ministerial groups, in order to input competition enforcement in the policies conducted by the Brazilian government. Concerning public procurement issues, for instance, it is noteworthy that SDE integrates the National Strategy to Fight Corruption and Money Laundering (*Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro* - ENCCLA).

ENCCLA is composed by 70 agencies or bodies of the Executive, Legislative and Judiciary branches plus the Federal Prosecutor's Office, the Office of the Comptroller General and the Brazilian Court of Auditors among other authorities. It is a high level arena for discussions about fighting money laundering and corruption as well as other related crimes, as bribery and collusion in public procurement. In its 7<sup>th</sup> edition, on November 21, 2009, ENCCLA approved 21 actions to be conducted by its members in 2010. Among them, it is noteworthy the risk analysis of bidding processes related to outsourcing contracts and bidding processes associated to the forthcoming events of the World Cup (2014) and Olympic Games (2016) in Brazil.

Concerning these important events to be held in Brazil, SDE will also integrate the Task Force conducted by the Federal Public Prosecutors Office to analyse the bidding processes related to the World Cup of 2014. The main objective is to prevent and effectively repress any evidence of illegal practices in the context of these processes, including collusive evidence.

### **3. SDE Materials on Fighting Bid Rigging**

In 2008, SDE launched a brochure on preventing and fighting bid rigging, especially designed to procurement agents and authorities. It explains what bid rigging is, the antitrust laws, suspicious behaviour and bidding patterns, and how to contact the competition authority (especially through the SDE's e-tool "click here to report a violation").

The document is based on OECD documents, such as the *Roundtable Report: Public Procurement – The Role of Competition Authorities in Promoting Competition* (2007).<sup>3</sup> It also presents some relevant tips on how design procurement processes in order to enhance competition and minimise the risks of bid rigging.

The brochure as well as the folder and posters about fighting bid rigging contributed to increase awareness of the harms caused by cartels that fraud competition in public bids, stressing that it is also a crime in Brazil. SDE handed out these materials in related-events and sent them all States of Brazil and to different audiences, including procurement authorities, business community, courts, prosecutors, consumers, and schools.



Brochure “Fighting Bid Rigging”



Poster “Fighting Bid-rigging” (back)



Folder “Fighting Bid-rigging” (front)



Folder “Fighting Bid-rigging” (back)

<sup>3</sup> OECD Report, Public Procurement – The Role of Competition Authorities in Promoting Competition, <http://www.oecd.org/dataoecd/25/48/39891049.pdf>.

#### **4. Outreach Programmes**

In addition to these efforts, since 2007, there has been a significant increase in outreach to front-line public procurement agents. A significant goal of the outreach programme was to increase the willingness of procurement agents to report bid rigging.

There were two main elements to these outreach efforts. First, both general and customised events were held for important public procurement organisations. More general events simply involved inviting public procurement agents from a variety of agencies, and raising awareness about the harm from bid rigging as well as how to detect it. In August 2008, for example, around 200 public procurement agents from more than 40 agencies participated in a major event in Brasilia.

Outreach events for specific agencies have targeted SABESP (Sao Paulo basic sanitation company), the Ministry of Health and the National Agency for Terrestrial Transport, among others. In addition, the Transport Agency was also advised that it should take steps to increase the uncertainty about both the number and identity of the bidders during an upcoming tender process for an interstate bus transportation concession in order to reduce the chances of collusion.

Second, thousands of brochures, folders and other materials have been distributed to public procurement officials in order to increase awareness. Feedback from the distribution was very positive, and has led to many tips on possible anticompetitive practices (see below).

##### **4.1. Road Show “Fighting Bid Rigging in Public Procurement”**

In July 2009, as a conclusion of the “OECD Latin America Bid-Rigging Programme”, SDE and OECD organised the event “Fighting Bid Rigging in Public Procurement”, which received financial and technical support from the OECD. It took place in five Brazilian cities: Recife in the Northeast, Brasília in the Centre-West, Belém in the Northern Region, São Paulo in the Southeast and Curitiba in the South. It was fundamental to spread around the country the benefits of fighting collusion among competitors in public tenders.

The events consisted of two training sessions: one for procurement officials and another for criminal investigators responsible for fighting bid rigging in the criminal area. A senior-economist of the OECD Competition Committee, also participated in the Roadshow, which helped SDE to spread to prosecution and procurement authorities a valuable amount of knowledge, founded on the international best practices on fighting bid rigging. Over 600 public procurement agents and criminal enforcement officials attended the event and highly complimented the initiative. More than 2,500 copies of the “OCDE Guidelines for Fighting Bid Rigging” and the SDE’s Brochure on Fighting Bid Rigging were handed out.

After that, a number of presentations in other cities were requested and provided by the SDE. In August 2009, SDE attended an event on how to prevent bid rigging to public prosecutors of the State of Rio de Janeiro. After, SDE attended an event in the State of Espirito Santo, where about a hundred of procurement officials of that State were updated on how to prevent and detect bid rigging in the public tenders they conduct.

Finally, in November 2009, SDE participated in the meeting of the National Council of the Brazilian Internal Controllers<sup>4</sup>, which congregates the State authorities responsible for auditing the public tenders

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<sup>4</sup> Conselho Nacional dos Órgãos de Controle Interno dos Estados Brasileiros e do Distrito Federal (CONACI).

around the country and, as a consequence, may also detect evidence of collusive behaviour among bidders during that process.

## **5. SDE's Opinion on Amendments to the Procurement Law**

In the context of the OECD Project above mentioned, the Organisation prepared several briefs for SDE on a variety of topics, which undoubtedly contributed to enhance the Brazilian enforcement against bid rigging. For example, a short brief was submitted to SDE in February 2008 examining several proposed amendments to the procurement law which may impact the construction industry.

Based on this brief, SDE submitted a report to the Presidency of the Brazilian Republic<sup>5</sup> in March 2008 proposing significant modifications to the amendments, particularly regarding rules that facilitate the identification of bidders at early stages of the procurement processes and bid bonds and collaterals. In April 2009, a modified version of the report was sent to key congressmen involved in the Bill.

## **6. Guidelines for the Analysis of Complaints Involving Public Procurement and the Certificates of Independent Bid Determination (CIBD)**

On July 3rd, 2009, SDE released its Guidelines for the Analysis of Complaints Involving Public Procurement (SDE's Ordinance No. 51 of 2009), together with a recommended Model of Certificate of Independent Bid Determination (CIBD), in order to help procurement agents fight bid rigging in public procurement and to encourage them to take steps to reduce the risk of collusion in the procurement process.

The Guidelines clarify the limits of the application of Brazilian competition law in public procurement proceedings, and also indicate how the Secretariat will analyse cases of anticompetitive conduct by bidders, such as bid rigging, facilitating practices by trade associations and some kinds of bid consortia. It is considered an important measure to SDE rationalises its works and it also grants predictability to the companies which may be investigated by the SDE.

By its turn, as suggested in the context of the OECD Project, SDE recommended in that Ordinance, a Model of CIBD, in order to assist procurement agents to increase deterrence of bid rigging in Brazil.

Based on this SDE's initiative, on September 17th, 2009, the Brazilian Ministry of Planning published the Regulatory Instruction No. 02 of 2009 that obliges participants in federal public bids to present the CIBD. As stated before, the Ministry of Planning is responsible for regulating the bidding processes in federal level as well as operating *ComprasNet*, which is the e-procurement unit for the Brazilian government. This important measure can be seen as the turning point in the fight against bid rigging in Brazil. As far as SDE is concerned, Brazil is the only country in the world to systematically require CIBDs in all federal procurement.

The CIBDs require each bidder or a consortium to sign a statement that it has not (i) agreed with its competitors about bids, (ii) disclosed bid prices to any of its competitors and (iii) attempted to convince a competitor to rig bids. There are a number of advantages in adopting the CIBDs: they not only inform

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<sup>5</sup> The Presidency of the Brazilian Republic is the chief body of the Federal Executive Power. In the Presidency's structure, there is the Presidential Staff Office (Casa Civil), which is recognised as essential and works in the coordination and integration of governmental actions. This body is also in charge for analysing the merit and opportunity of the bills of law pending in the National Congress, according with the governmental guidelines.

bidders about the illegality of bid rigging, but they also make prosecution of bid riggers easier, adding other criminal penalties for the filing of a false statement by the conspirator.

Furthermore, in this context, in 2009 a Congressman presented a bill before Congress (Bill No. 5506/2009), which amends Brazil's Procurement Law (Law No. 8,886/93), making mandatory the signature of CIBDs in all government procurement (Federal, State and local levels). The bill is still pending before Congress.

## **7. Example of a Bid Rigging Case Condemned in Brazil**

In October 2003, one of the members of a bid rigging cartel involving security service provider companies with activities in Rio Grande do Sul applied to the Brazilian Leniency Programme. The target of the cartel was a number of public tenders organised primarily by the Superintendência Regional da Receita Federal in Rio Grande do Sul and Secretaria Municipal de Saúde of Porto Alegre.

In order to obtain full immunity from administrative fines and criminal sanctions, the leniency applicant submitted direct evidence of the bid-rigging, including employees' testimonies and audio records of telephone conversation held between the leniency applicant's employees and the other cartel participants.

The leniency applicant provided sufficient information to enable SDE and the Public Prosecutors to run simultaneous dawn raids in four companies and two trade associations allegedly involved in the bid rigging. Approximately 80 people were involved in the dawn raids, including officials from the Federal Police. Seized evidence showed that the defendants held weekly meetings to organise the outcomes of bids for public tenders.

There was an intense cooperation with the Public Prosecutor Office throughout the case and, as a result, criminal proceedings were also opened before the Judiciary against the individuals allegedly involved in the conspiracy, with exception to the beneficiary of the leniency agreement.

After reviewing SDE's investigation and conclusion for the existence of a hard-core cartel, CADE issued its decision in 2007. It imposed a fine on 16 companies ranging from 15 to 20 per cent of their 2002 gross turnover for cartel conduct. Executives of the condemned companies and three industry associations were also found guilty of cartel offense and fined by CADE. The total amount of fines imposed is in excess of R\$40 million.

In addition to that, companies were prohibited to take part in bidding processes sponsored by the government and to engage in contracts with official financial institutions for the period of five years<sup>6</sup>. The decision had to be published in a major newspaper at Rio Grande do Sul State, at the expenses of the convicted trade associations and labour union.

At the same occasion, CADE recognised that the beneficiary of the leniency agreement fulfilled all the conditions imposed in the agreement with SDE and, therefore, no sanctions were imposed.

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<sup>6</sup> Pursuant to Law No. 8,884/94, Article 24, besides fines, companies may be condemned as ineligible for official financing or participation in bidding processes involving purchases, sales, works, services or utility concessions with the federal, state, municipal and the Federal District authorities and related entities, for a period equal to or exceeding five years.

## **8. Recent Bid Rigging Investigations**

As stated above, a noticeably closer working relationship with important government agencies has been established. Thousands of procurement agents, public prosecutors, members of the Federal Police and other government officials have learned about bid rigging, why it is harmful, and how to report it.

Tips from procurement agents have provided solid leads and have led to numerous investigations.

For example, in two matters, anonymous tips and analyses of procurement data led to a dawn raid of four companies involved in providing information technology services to the Brazilian government and to a dawn raid of four companies providing services for public banks. Many other cases are currently under investigation.

## **9. Conclusions**

As observed, the competition and criminal authorities, as well as the internal and external audits are investing in effective ways to prevent and detect fraud schemes in public procurement, especially collusion and corruption schemes. The enhanced cooperation has been very effective, and a number of cases have been initiated after SDE received leads from authorities involved in public procurement.

SDE's Antitrust Division has made important improvements on the mechanisms to analyse and better prosecute bid rigging cases, considering its peculiarities. Today SDE adopts more efficient analysis methodology, in cooperation with other authorities.

Furthermore, SDE has been promoting more competitive tenders by publicising steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging. This includes explanations on how to design the tender process to effectively reduce communication among bidders and to maximise the participation of bidders. All these efforts will certainly result in saving significant government resources.

**ANNEX 1: PUBLIC SPENDING OBSERVATORY -  
ODP (OBSERVATÓRIO DA DESPESA PÚBLICA):  
A TOOL AGAINST BID RIGGING<sup>1</sup>**

In the last years, the Brazilian Federal Government has invested in new technologies to identify suspicious patterns of illegal behaviour in the context of public expenditure which were, at first glance, not perceived and, therefore, hidden. These tools have been developed and used to reveal cases of corruption, fraud and collusion in public procurement. The major focus of this initiative is on the Public Spending Observatory – ODP (acronym from the Portuguese *Observatório da Despesa Pública*), a newly created unit within the Office of the Comptroller-General - CGU (Controladoria-Geral da União).

The Office of the Comptroller-General (CGU) is a federal agency responsible for assisting directly and immediately the President of the Republic regarding matters related to the defence of public assets as well as increasing the transparency of administration. CGU's main focus is internal control through auditing and disciplinary actions against civil servants. In addition, CGU also devotes efforts to research and develop new techniques to prevent and fight corruption in Brazil.

This challenge requires CGU to monitor and detect potential frauds in relation to the use of federal public resources by devising solutions in order not only to expose current corruption cases, but also to prevent future events.

In 2008, CGU established the Public Spending Observatory - ODP, a permanent unit of intelligence, based on a modern and innovative concept: combine the practical knowledge and experiences of auditors with the use of advanced tools of information technology to speedily process an enormous volume of data.

The main goal of the ODP is to foresee fraud-risk situations. This knowledge-building exercise is quite useful in designing public policies aimed at preventing and combating corruption. Based on systematic information and periodic updates, the ODP provides CGU and some other government agencies with elaborated knowledge, analytical statements about the quantity and quality of public spending as well as with indications of sensitive areas of public spending, in terms of corruption risk.

The novelty of the ODP derives from the fact that it consolidates all the available public expenditure information - fragmented in several computerised systems from different bodies and constructed in a variety of technology platforms, from the oldest to the latest - in only one database. As a consequence, ODP transforms these disaggregated data into knowledge of high added value, contributing to the efficient management of public resources as it may help the authorities to identify, prosecute and prevent cases of misappropriation and other frauds.

ODP is built around a multi-disciplinary environment composed by auditors and IT staff. In addition, specific task forces are formed depending on the matter to be investigated, which might include other authorities other than CGU officials.

As an important example of the capabilities of the Observatory, it is noteworthy the use of its analysis tools to fight cartels and collusion schemes in public procurements.

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<sup>1</sup> Annex I was prepared by the Office of the Comptroller-General.

Originally, the basic elements of a bidding process and its bidders were already available in a federal database. ODP processes and compares this information with other comprehensive databases maintained by other agencies, such as: tax administration system provides information about the corporate structure of bidder companies and its partners; family relationships and jobs are known by the social security service, and multiple databases register addresses.

Crossing these data, the ODP identifies “trails” indicating atypical situations, which do not a priori constitute evidence of misappropriation or irregularities, but do require further attention, such as: the participation of companies with common shareholders in the same procurement procedures, different bidders with the same address, family bonds and past and present employer-employee relationship between partners and directors of the bidder companies. Internal analysis of the procurement databases may also indicate suspicious patterns of bid-rotation and market division among competitors by sector, geographic area or time, which might indicate that bidders are acting in a collusive scheme.

Those “trails” are automatically followed in a daily basis, resulting in “red” or “orange” warnings to the administrative or criminal authorities or even to the federal agency responsible for the problematic procurement process. Once detected a suspicious pattern, it is loaded in an OLAP (Online Analytical Processing) tool which results in reports and management review panels. The main objective is to analyse the distribution of bidding processes of a product or service by geographic area, government agency, amount of resources involved, per year during a certain period of time.

It is noteworthy that the work of the ODP has already been used in cooperation with the Secretariat of Economic Law (SDE) of the Ministry of Justice in some concrete cases still under investigation regarding alleged cartels in public procurement.

The joint work between CGU and SDE is presenting some quite positive results, especially concerning the exchange of valuable information and expertise in public procurement. Corruption prevention and fighting cartels are too complex and too broad to be dealt in a single front. The protection of public treasury cannot be separated of the discussion of efficiency and efficient purchases in public procurements. Bid rigging schemes make government spends more money than it should be necessary if the competition in public procurement was effective. Additionally, in some cases, the cartel may sponsor the corruption scheme. Consequently, if the authorities tackle the corruption, but not the cartel, the next procurement official or agency, for example, may be negatively influenced by the cartel.

Criminal punishment of corruption cases is quite important, but it is not enough. To deal with corruption in a modern way, comprehensive techniques are required, as long as a broad comprehension of this phenomenon. To this extent, the activities performed by state control agencies, like CGU, and competition authorities, like SDE, are essential to fighting cartels and corruption efficiently. Due to the impossibility of continuous human presence and overseeing on all fronts, modern technologies and initiatives to maximise the capabilities of these bodies, as the ODP, shall also be of paramount importance in this way.



## CANADA

### 1. Bid-Rigging in Canada

Bid-rigging is a serious crime that undermines competitive markets and has significant negative economic consequences for businesses and the public, costing taxpayers millions of dollars annually. It is a form of cartel activity that occurs when bidders secretly agree not to compete, or to submit bids that have been pre-arranged among themselves.

Under section 47 of the *Competition Act* (the “Act”), it is a criminal offence for two or more bidders, in response to a call or request for bids or tenders, to agree that one or more will refrain from bidding, to agree to withdraw a submitted bid, or to agree among themselves on bids submitted, without making the agreement known to the person calling for bids. In Canada, firms and individuals convicted of bid-rigging face fines in the discretion of the court and/or imprisonment for up to fourteen years.

The Competition Bureau (the “Bureau”) is responsible for the enforcement of the Act, including the bid-rigging provision. In addition to active investigation and enforcement, the Bureau actively reaches out to stakeholders engaged in procurement to provide them with the tools and expertise necessary to detect and deter bid-rigging activities. Corruption does not fall under the purview of the Act, but rather the *Criminal Code* of Canada. As such, this submission will focus on collusion and, more specifically, bid-rigging activities in public procurement.

### 2. Scope and Scale of Public Procurement in Canada

#### 2.1 *Size of the Public Procurement Market*

In Canada, the public sector undertakes a significant volume of procurement, most of which is conducted through competitive processes; however, the overall value of public procurement as a proportion of the Canadian economy is unknown.

The federal department of Public Works and Government Services Canada (“PWGSC”) provides federal government departments and agencies with procurement services. It is the federal government’s central purchasing agent and Canada’s largest public purchaser of goods and services. PWGSC’s purchases account for over 85% of the total value of federal government procurement, buying, on average, CAD\$14 billion worth of goods and services each year, through approximately 60,000 transactions.<sup>1</sup>

#### 2.2 *Principal Public Procurement Policy Objectives*

PWGSC plays a key role in assisting government departments define their requirements or scope of work, and to obtain the goods and services they need at competitive prices. PWGSC must procure goods and services in a manner that enhances access and competition, treats industry fairly, and obtains the best value for Canadians. Every purchase is subject to Canadian laws, regulations and government policies, and

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<sup>1</sup> Public Works and Government Services Canada's (PWGSC) Report on Plans and Priorities for 2009-2010. Available online at: <http://www.tbs-sct.gc.ca/rpp/2009-2010/inst/svc/svc01-eng.asp>.

must meet Canada's trade obligations. PWGSC purchases goods and services using a competitive procurement process whenever possible, while retaining the option of non-competitive processes in exceptional circumstances.<sup>2</sup>

### **3. Detecting and Prosecuting Bid-Rigging**

#### **3.1 Factors Facilitating Bid-Rigging**

A number of factors facilitate bid-rigging in public and private procurement. In Canada's experience, the industries or industrial structures that are especially susceptible to bid-rigging often exhibit the following characteristics:

- Similar products or commodities: in markets where competitors' products may be readily substituted for one another, price is the most important element of competition and, because of the standardised nature of the product, price is the only variable upon which parties must agree. As a result, it is easier in these markets for firms to form a collusive agreement, such as bid-rigging;
- Products or services that are simple or straightforward, or are not subject to rapid technological advances or change: it is more difficult to maintain an arrangement if a product is rapidly evolving, or where there are features upon which firms may compete other than price;
- Products where there are few or no close substitutes: when purchasers cannot switch to an alternative to the product controlled by the agreement, they have fewer options and cannot turn to outside substitutes;
- A small number of competitors and sparse or no entry: the presence of these factors can make it easier to reach consensus on an agreement and can make it easier to observe whether someone is cheating on the agreement;
- Relatively few customers: in these circumstances, it is easier for suppliers to allocate markets;
- Facilitating organisations: while most trade associations operate legitimately, some provide the opportunity for members to form illegal agreements.<sup>3</sup>

#### **3.2 Industries at Risk**

The Bureau recently conducted a review of bid-rigging matters investigated since 1990. The review indicates that, while hardly the only industry trend to be active in criminal bid-rigging, the highest number of allegations of bid-rigging, between 1996 and 2009, related to the construction services sector. This finding is consistent with the experience of other OECD member states.<sup>4</sup> Approximately 40% of the total number of cases investigated by the Bureau in that period involved the construction industry. By comparison, the next highest sector, transportation, represented only 11% of the cases investigated. The

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<sup>2</sup> How the Government of Canada Buys Goods and Services. Available online at: <http://www.contractscanada.gc.ca/en/how-e.htm>.

<sup>3</sup> Competition Bureau obtains court order against the Saskatchewan Contractors Roofers Association. Available online at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03085.html>.

<sup>4</sup> OECD Policy Roundtables: Construction Industry 2008. Available online at: <http://www.oecd.org/dataoecd/32/55/41765075.pdf> at page 9.

construction industry also ranked highest in terms of penalties imposed during this time period; more than half of the total amount of fines imposed resulted from convictions for participants in that sector. This review of Bureau investigations further revealed that most bid-rigging allegations involved government procurement at either the municipal, provincial or federal level.<sup>5</sup>

It is notable that the Bureau has been particularly vigilant since the federal government's announcement, in its Second Report to Canadians on its Economic Action Plan, that it was accelerating and increasing expenditure on infrastructure,<sup>6</sup> including CAD\$12 billion in new stimulus funding announced in the January 2009 budget.<sup>7</sup> At the time, the Commissioner indicated that "bid-rigging...[is] an area [where] we reasonably fear [we] may see an up tick in bid-rigging activities in view of the likely significant increase in public infrastructure spending."<sup>8</sup>

### 3.3 *Recent Case Examples*

To take an example from the non-construction context, in February 2009, criminal charges were laid against 14 individuals and 7 companies accused of rigging bids to obtain Government of Canada contracts for information technology ("IT") services. The Bureau's findings supported these charges, indicating that several IT services companies in the National Capital Region had secretly co-ordinated their bids in an illegal scheme to defraud the government by winning and dividing contracts, while blocking out competitors.<sup>9</sup> The Bureau's investigation had found evidence of criminal activity in 10 competitive bidding processes for contracts worth a total of approximately CDN \$67 million. The contracts all related to IT professional services provided to government departments (the Canada Border Services Agency, PWGSC and Transport Canada).<sup>10</sup>

In 2008, three construction companies and their presidents were charged with rigging bids submitted for the expansion and refitting of the emergency room at the Chicoutimi Hospital, and finishing work to be performed at the Alcan smelter in Alma, Quebec.<sup>11</sup> After a preliminary hearing, the accused were committed on October 9, 2009 to stand trial on the charges.

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<sup>5</sup> This may, in part, be attributed to the fact that public procurement agencies are under some obligation to take action where they identify concerns to ensure sound expenditure of taxpayers' dollars. This concern is not as relevant for private entities engaged in procurement, owing to the fact that they may be able to pass on additional expenditures down the distribution chain; or they may simply decide to terminate the relationship with the vendor or vendors in question.

<sup>6</sup> Canada's Economic Action Plan: A Second Report to Canadians (June 2009). Available online at: <http://www.actionplan.gc.ca/grfx/docs/cap-eng.pdf> at page 111.

<sup>7</sup> Canada's Economic Action Plan: Budget 2009. Available online at: <http://www.budget.gc.ca/2009/pdf/budget-planbudgetaire-eng.pdf> at page 11.

<sup>8</sup> Speaking notes for Melanie L. Aitken, Commissioner of Competition to the Northwinds Professional Institute 2009 Competitive Law and Policy Forum available online at: <http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02994.html> at page 5.

<sup>9</sup> Competition Bureau Announces Charges Against Companies Accused of Rigging Bids for Government of Canada Contracts. Available online at: <http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02983.html>.

<sup>10</sup> To date, two individuals have pleaded guilty to a criminal charge of rigging bids. The charges against the other accused remain outstanding.

<sup>11</sup> Quebec Construction Companies Charged with Bid-rigging Following Competition Bureau Investigation. Available online at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02748.html>.

### **3.4 Outreach**

Procurement agencies have well-established steps that they can take to promote more effective competition in public procurement and to reduce the risk of bid-rigging. The Bureau has been a strong advocate in this regard by actively engaging with procurement agencies at the federal, provincial and municipal levels of government to encourage them to adopt measures to effectively prevent, deter and detect bid-rigging in public procurement.

The Bureau's outreach activities are aimed at providing a better appreciation of the risk of bid-rigging and the means to detect and minimise such activities. Over the past year alone, the Bureau has given approximately 50 outreach presentations to more than 1,700 government officials.

These activities have been welcomed by PWGSC, among many others. Currently, the Bureau and PWGSC are examining ways to formalise their collaborative efforts.

In addition, in association with the Treasury Board Secretariat, the federal government department responsible for setting Canada's procurement policy, the Bureau has been successful in incorporating anti bid-rigging material into educational programmes designed for federal government employees involved in procurement. The Bureau seeks to ensure that all courses relevant to federal procurement officers provide a comprehensive explanation of bid-rigging, are explicit about associated risks and outline the Bureau's bid-rigging mandate.

The Department of National Defence has also incorporated a chapter on bid-rigging into its Fraud Prevention Handbook, which is distributed to all Canadian Armed Forces.

Finally, a renewed online anti-bid-rigging presentation was launched in April 2008 on the Bureau's Web site, featuring greater interactivity and enhanced multimedia components, including surveillance video excerpts from an actual cartel in progress.<sup>12</sup> The presentation provides public and private organisations engaged in procurement with information to help them detect, prevent and report suspected incidents of bid-rigging.

### **3.5 Independent Bid Determination**

To deter bid-rigging activity, the Competition Bureau (the "Bureau") has developed a model Certificate of Independent Bid Determination<sup>13</sup> ("CIBD"), attached as Appendix A, for use by tendering authorities when calling for bids, tenders or quotations. This document requires bidders to disclose, to the tendering authority, all material facts regarding any communications and arrangements between the bidder and its competitors in respect of a specific call for tenders. Accordingly, bidders are explicitly advised that the procurement agency is monitoring the bid process for any signs of collusion.

The Bureau strongly encourages public procurement agencies to adopt a CIBD, or a similar one of their own design, when buying goods or services through a competitive process. Take up is growing; for example, PWGSC has incorporated CIBD-type concepts in its Code of Conduct for Procurement, although it does not make use of a stand-alone CIBD.

Another example is the Vancouver Organising Committee ("VANOC") for the 2010 Vancouver Winter Olympics. VANOC included a "no collusion requirement" similar to the CIBD in its tender documents following discussions with Bureau representatives. The "no collusion requirement" stipulated

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<sup>12</sup> Available online at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02601.html>.

<sup>13</sup> Available online at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00599.html>.

that bidders must arrive at their bids independently and that communications with other bidders must be disclosed. VANOC also reserved the right to request a CIBD in addition to the “no collusion requirement” if it had reason to suspect that bids were not arrived at independently.

The Bureau has recently begun to track steps taken by procurement agencies to strengthen their processes in light of the Bureau’s outreach activities. While data is only preliminary, it is nonetheless interesting to note that a number of procurement agencies in Canada have recently adopted CIBDs. The Bureau has also learned that implementing CIBDs has, in some cases, stopped bid-rigging in its tracks, as parties have realised the enhanced scrutiny that procurement agencies are applying to bidders’ activities.

### **3.6 Immunity Programme**

The availability of immunity from prosecution by the Crown under the Bureau’s Immunity Programme provides a powerful incentive for parties engaged in bid-rigging to disclose the existence of the offence and to fully co-operate with the Commissioner and the Crown, who are in charge investigating and prosecuting the illegal activity. Accordingly, while challenging in practice, consistency between a jurisdiction’s competition law immunity policy and public procurement policies pertaining to disqualification from future bidding (because of vendor malfeasance) should be given due consideration.

## **4. Collusion and Corruption**

As noted previously, corruption does not fall under the Bureau’s mandate as a competition law enforcement agency. However, in response to allegations of corruption and bid-rigging in the construction industry, police forces in the province of Quebec recently announced the creation of a unit comprised of 40 officers from various law enforcement agencies, including the Bureau, dedicated to investigating corruption and bid-rigging allegations. The Bureau’s role is to provide advice and expertise on aspects falling within its enforcement responsibilities, such as bid-rigging.

## **5. Conclusion**

In Canada, the Bureau’s active enforcement and outreach activities with respect to bid-rigging demonstrate how serious we consider this criminal behaviour to be. To effectively detect and deter bid-rigging in public procurement, the Bureau has engaged in numerous collaborative efforts with organisations responsible for public procurement policy, practice and training. Shared “ownership” has been a key to success in promoting more effective competition in public procurement and in reducing the risk of bid-rigging.<sup>14</sup>

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<sup>14</sup> See Management Response to IC Mid-Term Evaluation of the Competition Bureau’s Anti Bid-rigging Activities recommendation 2. Available online at: [http://www.ic.gc.ca/eic/site/ae-ve.nsf/vwapi/Management\\_Response\\_Competition\\_Bureau\\_Mid-Term\\_Evaluation\\_of\\_Anti\\_Bid-Rigging\\_Activities-eng.pdf/\\$FILE/Management\\_Response\\_Competition\\_Bureau\\_Mid-Term\\_Evaluation\\_of\\_Anti\\_Bid-Rigging\\_Activities-eng.pdf](http://www.ic.gc.ca/eic/site/ae-ve.nsf/vwapi/Management_Response_Competition_Bureau_Mid-Term_Evaluation_of_Anti_Bid-Rigging_Activities-eng.pdf/$FILE/Management_Response_Competition_Bureau_Mid-Term_Evaluation_of_Anti_Bid-Rigging_Activities-eng.pdf).

**APPENDIX A**

**CERTIFICATE OF INDEPENDENT BID DETERMINATION**

I, the undersigned, in submitting the accompanying bid or tender (hereinafter “bid”) to:

\_\_\_\_\_ (Corporate Name of Recipient of this Submission)

for: \_\_\_\_\_ (Name and Number of Bid and Project)

in response to the call or request (hereinafter “call”) for bids made by:

\_\_\_\_\_ (Name of Tendering Authority)

do hereby make the following statements that I certify to be true and complete in every respect:

I certify, on behalf of: \_\_\_\_\_ that:  
(Corporate Name of Bidder or Tenderer [hereinafter “Bidder”])

- 1 I have read and I understand the contents of this Certificate;
- 2 I understand that the accompanying bid will be disqualified if this Certificate is found not to be true and complete in every respect;
- 3 I am authorised by the Bidder to sign this Certificate, and to submit the accompanying bid, on behalf of the Bidder;
- 4 each person whose signature appears on the accompanying bid has been authorised by the Bidder to determine the terms of, and to sign, the bid, on behalf of the Bidder;
- 5 for the purposes of this Certificate and the accompanying bid, I understand that the word “competitor” shall include any individual or organisation, other than the Bidder, whether or not affiliated with the Bidder, who:
  - (a) has been requested to submit a bid in response to this call for bids;
  - (b) could potentially submit a bid in response to this call for bids, based on their qualifications, abilities or experience;
- 6 the Bidder discloses that (check one of the following, as applicable):
  - (a) the Bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with, any competitor;

(b) the Bidder has entered into consultations, communications, agreements or arrangements with one or more competitors regarding this call for bids, and the Bidder discloses, in the attached document(s), complete details thereof, including the names of the competitors and the nature of, and reasons for, such consultations, communications, agreements or arrangements;

**7** in particular, without limiting the generality of paragraphs (6)(a) or (6)(b) above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:

(a) prices;

(b) methods, factors or formulas used to calculate prices;

(c) the intention or decision to submit, or not to submit, a bid; or

(d) the submission of a bid which does not meet the specifications of the call for bids;

except as specifically disclosed pursuant to paragraph (6)(b) above;

**8** in addition, there has been no consultation, communication, agreement or arrangement with any competitor regarding the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates, except as specifically authorised by the Tendering Authority or as specifically disclosed pursuant to paragraph (6)(b) above;

**9** the terms of the accompanying bid have not been, and will not be, knowingly disclosed by the Bidder, directly or indirectly, to any competitor, prior to the date and time of the official bid opening, or of the awarding of the contract, whichever comes first, unless otherwise required by law or as specifically disclosed pursuant to paragraph (6)(b) above.

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(Printed Name and Signature of Authorised Agent of Bidder)

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(Position Title)

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(Date)



## CHILE

### Introduction

The fight against corruption in Chile has traditionally been conducted separately from competition policy. The Competition Agency (Fiscalía Nacional Económica or FNE) has the duties of investigating and prosecuting competition infringement cases, and the Competition Tribunal (Tribunal de Defensa de la Libre Competencia or TDLC) is a judicial body that has the power to adjudicate and impose sanctions in competition matters. The final decisions of the Competition Tribunal are reviewed only by the Supreme Court. On the other hand, policies against corruption are in charge of other public bodies detailed in this document. The research for this contribution has generated an interesting opportunity to explore how an accurate co-ordination between these two policies may reinforce each other.

### 1. Size and policy objectives

#### 1.1 *What fraction of your economy does public procurement account for?*

According to the OECD (2007),<sup>1</sup> public procurement accounts for about 15% of the GDP in OECD countries. In the case of Chile, the public current expenditure represents 20% of the GDP and public real investment about 2.5% of the GDP.<sup>2</sup> By mean of the e-procurement system, 5000 million USD were traded in 2008, representing about 50% of the addition of public current consumption of goods and services plus public real investment.<sup>3</sup> The Public Works Ministry is directly responsible for around 50% of public real investment.<sup>4</sup>

#### 1.2 *What are the principle policy objectives of public procurement?*

The principle policy objectives of public procurement are contained in several statutes applicable to public administration in general and to public procurement in specific. The general legal framework for public administration accounts for the principles of responsibility, efficiency, effectiveness, co-ordination, probity, transparency and publicity, among others.<sup>5</sup> In regard to public procurement and, in particular, to

<sup>1</sup> OECD, Bribery in Procurement, Methods, Actors and Counter-Measures, 2007.

<sup>2</sup> Dirección de Presupuestos, Ministerio de Hacienda, Chile, Estadística de las Finanzas Públicas 1999-2008, p. 130. Available at [http://www.dipres.cl/572/articles-49739\\_doc\\_pdf.pdf](http://www.dipres.cl/572/articles-49739_doc_pdf.pdf). These percentages are for the year 2008 and include the central government, the regional government and the municipalities. Not all the items of current expenditure are necessarily relevant for corruption or collusion purposes. For example, salaries of civil servants accounts for 5% of GDP, pensions payments for about 5% of GDP and subsidies & state aids for about 6% of GDP.

<sup>3</sup> Presentation of the Annual Report 2008 of the Head of Dirección de Compras Públicas (Chilean e-procurement public body) [http://www.chilecompra.cl/cuenta\\_publica/doc/ChileCompra\\_v7.pdf](http://www.chilecompra.cl/cuenta_publica/doc/ChileCompra_v7.pdf).

<sup>4</sup> Annual Budget of Public Works Ministry for the year 2008. Available at <http://www.dipres.cl/574/multipropertyvalues-14552-15192.html>.

<sup>5</sup> Act on General Legal Framework for Public Administration (Ley de Bases Generales de la Administración del Estado), art. 3.

contracts for the supplying of goods and services to the administration, the legal framework states the following policy objectives of procurement by auctions:

*Tender conditions shall provide for requirements that allow the achievement of the most convenient combination between all the benefits of the good or service that will be procured and all its current and future costs, direct and ancillary ones. In the case of frequent supplying services procured by means of periodical tendering, better work and salary conditions provided by a bidder to its workers will be highly ranked. These requirements cannot arbitrarily discriminate among bidders and winning criteria cannot be the bidding price solely. [...] In any case, the Administration shall aim at performing procurement with effectiveness, efficiency and saving public funds.<sup>6</sup>*

## **2. Corruption**

### **2.1 What is the cost of corruption?**

There are no official statistics or measures regarding the costs of corruption in Chile. International Transparency reports that for the year 2008 the Index on Perception of Corruption ranked Chile in 23<sup>rd</sup> position among 180 countries with a 6.9 score within a 0-10 scale.<sup>7</sup>

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

There are several factors that facilitate corruption among which it is worth mentioning the weakness of institutions and lack of co-ordination among different public bodies; the absence of effective control of government expenditures and of payments between public bodies or payments from public to private entities; the lack of transparency in government activities, the absence or incompleteness of accountability regarding projects and public investments; some established practices such as the tolerance by the community of minor acts of compensated favouritism by government officials. It is not easy to give more preponderance of any of these elements over another one, but pro-transparency reforms seem to carry good outcomes in the medium term.

### **2.3 How do transparency programs help fight corruption?**

Transparency is a main instrument to fight corruption, since it allows civil society to have a complete access of most of government's decision-making proceedings and their grounds. When private entities interact significantly with public bodies, transparency is in addition a tool for deterring private incitations for corruption. Since a number of public decisions affect collective or public goods or general interests, transparency is a guarantee of their protection.

### **2.4 What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?**

Training aimed at preventing corruption, within both the public and private sectors, is also fundamental.

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<sup>6</sup> Act on Contracts for public procurement of goods and services, Art. 6 (Ley de Bases sobre Contratos Administrativos de Suministro y Prestación de Servicios) N° 19.886/2003. Some amendments to labor law in 2008 introduced in public procurement law this indirect way of enforcing labor rights, maybe inappropriately blending two different policies.

<sup>7</sup> [http://www.chiletransparente.cl/home/inst\\_indice.html](http://www.chiletransparente.cl/home/inst_indice.html).

The design of programs, jointly by government, civil society and business, which purpose is to fight corruption is also advisable. It is also recommended the drafting of codes of conduct setting standards of behaviour of individuals belonging to private and public entities, at the time of confronting the risk of corruption.

The development of interagency links and exchanges between different bodies interested in fighting corruption is also very important.

A well suited system for detection (*ex-officio* and complaints filling) and known proceedings for handling cases are significant requirements for a successful system. Complainants should be protected and should receive information of the different stages and of final outcomes of the investigation. The conclusions of the investigation should be publicised.

All public entities should comply with high accountability standards.

Developing indexes and other objective indicators of corruption seems to be also very important.

## **2.5 *Are firms required to certify during the procurement process that they have not bribed an official?***

Bidders in public procurement auctions and firms in public procurement in general are not required to sign any document, certificate or statement that they have not bribed civil servants.

## **2.6 *What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in Chile?***

A private individual who bribes or intends to bribe can be imprisoned up to 3 years.<sup>8</sup> If a fraud against government is proved, sanctions of imprisonment can be higher.<sup>9</sup> In addition, fines can be imposed up to 3 times the amount of the bribe offered or paid.<sup>10</sup> Besides that, as sanctions, the individual's right to practice its profession can be suspended up to 3 years, and he can be deprived of his capacity to become a civil servant temporary or definitively.<sup>11</sup> According to public procurement law an individual sanctioned by this kind of crimes cannot supply to the government.<sup>12 13</sup>

Firms that have engaged in corruption or bribery have traditionally been excluded from prosecution. A new law enacted in 2009 introduced in Chilean criminal law the possibility of firms to be criminally sanctioned for the following crimes: money laundry, terrorism and bribery to national and foreign civil servants.<sup>14</sup> According to this new law, firms sanctioned for corruption can be punished with a fine; with a temporary suspension of its activities in whole or in part; with the deprivation of its legal entity or the order to dissolve the company; with the lost of public benefits such as subsidies; also an order to cease and desist

<sup>8</sup> Penal Code, art. 250 in connection with arts. 248, 248bis and 249.

<sup>9</sup> Penal Code, art. 250 in fine, in connection with arts. 468, 473, 470 N°8.

<sup>10</sup> Penal Code, art. 250 in connection with arts. 248, 248bis and 249.

<sup>11</sup> Penal Code, art. 250 in connection with arts. 248, 248bis and 249.

<sup>12</sup> Regulation of the Public Procurement Act, Decree 250/2004, as amended, art. 92 N° 1.

<sup>13</sup> The prosecution of private individuals in corruption cases and the introduction of prison for bribing are the result of law amendments and changes in prosecution policies and jurisprudence of the last 10 years.

<sup>14</sup> Act N° 20.393 December 2<sup>nd</sup>, 2009, on criminal liability of legal entities.

of performing the kind of transactions that have been criminally judged.<sup>15</sup> According to public procurement law an individual sanctioned by this kind of crimes cannot supply to the government.<sup>16</sup>

The sanctions for civil servants who have engaged in corruption are contained in the statute of civil servants (administrative liability - lower sanctions) and in the penal code (higher sanctions). Criminal sanctions are similar to those explained above for the case of a private individual involved in bribery.

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

In general terms, every public entity has a disciplinary authority on its own officers. The lower chamber of the Congress (the chamber of the Deputies) also has a power to control the governmental acts of government. The competent authority with general powers to administratively prosecute corruption cases is the General Comptroller Office (Contraloría General de la República), a constitutionally independent body in charge of controlling *ex-ante* and *ex-post* the legality of the Administration's acts. The National Criminal Prosecutor (Ministerio Público), a constitutionally independent body is in charge of criminal prosecution of corruption before criminal judges. There is also a Prosecutor for the Fiscal Interest (Consejo de Defensa del Estado) that usually participates as a plaintiff in the prosecution of criminal corruption cases.

Recently, the Act for the Publicity of Public Information, N° 20.285/2008 created another public body, the Transparency Council. Its principal duties are to guarantee the respect of the principle of publicity of government activities and to legally enforce the duties of public entities in this field. It is an administrative body integrated by four prestigious professionals which nomination system assures the independence of the body's decisions. Its decisions can be challenged before courts.

Competition authorities do not have general authority to prosecute corruption cases beyond the disciplinary authority over their own officers.

## **3. *Collusion***

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

A wrong design of relevant procurement decisions or tender requirements by public entities can introduce excessive predictability for industry members and/or raise unjustified entry barriers. This allows firms to easier achieve an effective collusive agreement. When these internal risks are combined with some characteristics of the product or service and of the industry, such as those detailed in the OECD Guidelines,<sup>17</sup> a strong scheme of incentives directs firms' behaviour towards collusive strategies.

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<sup>15</sup> Act N° 20.393 December 2<sup>nd</sup>, 2009, on criminal liability of legal entities, art. 8.

<sup>16</sup> Regulation of the Public Procurement Act, Decree 250/2004, as amended, art. 92 N° 1.

<sup>17</sup> OECD Guidelines for Fighting Bid Rigging in Public Procurement.

**3.2 *What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?***

There have not been many punished bid rigging cases in Chile so far. An interesting case before the Competition Tribunal in 2006 involved the supplying of oxygen for public hospitals.<sup>18</sup> Another one in 2008 involved the asphalt for roads industry.<sup>19</sup> There are bid rigging cases pending before the Competition Tribunal involving ambulances<sup>20</sup> and advertisement agencies<sup>21</sup> sectors.

The competition agency has not focused its competition outreach and advocacy activities before public procurement entities in actively helping the design of competitive procurement systems so far. The oxygen case is very interesting from the point of view of competitive improvements to a tendering process. Before the case was brought to the competition authorities, significant amendments had been made by a team of consultants in order to change the rules of tendering process and making them more competitive.<sup>22</sup> These amendments are very illustrative of a pro-competitive improvement and regularly used as a benchmark in FNE's presentations for outreach activities before public procurement entities. In a number of other cases involving tenders for concessions or tenders for the sale of an essential facility or a scarce input, the Competition Agency has challenged directly before the regulator or before the Competition Tribunal some of the tender requirements.

**3.3 *Does your country employ certificates of independent bid determination?***

There is no general legal provision imposing this requirement. However, as part of the outreach activities performed by the competition agency, the instrument has been advocated before several public bodies and the FNE recently achieved to introduce this requirement in an important tender by the regulator of the pension funds management industry. The aim of the FNE is to continue to advocate on this matter to promptly disseminate the use of this important instrument to many industries, and expect results in the near future.

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

No. This ancillary sanction was abrogated by a recent amendment to the Regulation of the Public Procurement Act.

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<sup>18</sup> Ruling N° 43, Competition Tribunal, September 7th, 2006, 4 firms condemned. Decision overturned by the Supreme Court.

<sup>19</sup> Ruling N° 79, Competition Tribunal, December 10<sup>th</sup>, 2008, dismissed. Decision affirmed by the Supreme Court.

<sup>20</sup> Case Number 163-08.

<sup>21</sup> Case Number 177-08.

<sup>22</sup> These include changes such as demand aggregation and reduction of the number of tenders (to only 3 in an industry with 4 firms), extending the contracting period to 5 years, and keeping reference price confidential, among others.

#### **4. Fighting collusion and corruption**

##### **4.1 *What cases from your jurisdiction have involved both corruption and collusion in public procurement?***

None of the cases above mentioned in paragraph 12 included corruption elements. However, since several collusion cases in the last year have been sent to the Competition Agency for investigation by the General Comptroller Office - whose duties are closer to corruption than to collusion matters - some of these cases will likely include both wrongdoings. That is why it is currently relevant for our system to identify how corruption and collusion interact and how to co-ordinate the fight against them.

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

There is no public information available to answer, regarding corruption cases. All collusion cases mentioned in paragraph 12 occurred at a national level.

##### **4.3 *What methods and techniques for fighting corruption would aid the fight against collusion?***

A first method that deserves to be mentioned is the use of general audits performed by the General Comptroller Office. It is worth mentioning that several criteria regarding collusion detection were additionally incorporated by this public body in its audits during 2009. This was an outcome of the joint work with the Competition Agency.

The periodical performance of internal audits at national, provincial and local government levels is another useful technique for increasing detection of both, corruption and collusion. It is very important for effectiveness in detection to identify in the risk matrix, the risks associated to both kinds of wrong.

It is also important to develop methods and working practices that foster inter-agencies work, with joint sessions, exchanges of information, collaboration, reciprocal training, parallel investigations, etc. Chile has recently advanced along this road.

Training of public procurement officers is also an important duty of agencies in charge of fighting corruption and collusion in order to increase awareness of procurement officers of these wrongs and for helping them in the definition of standards of behaviour.

Dissemination of toolkits and guidelines for prevention and detection easy to be used by civil servants can also be very effective.

Signalling to the private sector that different agencies are working together in a co-ordinated way can also prove to be a very effective deterrent. The FNE efforts have pursued this effect by broadly publicising most of the initiatives undertaken in this area, such as the 2008 Competition Day, entirely focused on bid rigging, and by issuing press releases each time a collaboration agreement has been subscribed which was the case with the General Comptroller Office and with the Ministry of Public Works, among others.

##### **4.4 *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in Chile?***

There are no especial leniency rules for bribery or corruption crimes but the general Penal Code rules that provides for criteria for raising or diminishing the sanction.

## 5. Advocacy

### 5.1 *How do regulatory or institutional conditions help facilitate bid rigging and corruption?*

Several factors have been identified as corruption facilitators, such as the weakness or absence of controls of budgets expenditure or of transactions between different entities within the public sector or in public-private rapports; the lack of transparency in government activities; and, the absence of clear career rules for civil servants regarding promotion, hiring and firing and inappropriate labour conditions.

A wrong design of relevant procurement decisions or tender requirements by public entities can introduce excessive predictability for industry members and/or raise unjustified entry barriers. This facilitates firms to achieve an effective collusive agreement. On the other hand, increasing the levels of transparency has been identified as a very good tool against corruption but it is well known that, at the same time, excessive degrees of transparency can give industry members too much predictability thus facilitating effective collusion.

The relevant question seems to be, depending on the context, whether to privilege pro-competition & anti-collusion strategies or pro-transparency & anti-corruption ones. As stated by the philosopher Sissela Bok, “*While all deception requires secrecy, all secrecy is not meant to deceive*”.

### 5.2 *In what ways can competition authorities work to improve efficiency of public procurement?*

One of the main expertises of competition authorities seems to be the identification of concentrated markets, which are riskier from the point of view of collusion and to denounce unjustified entry barriers that can be facilitating this structure. Since these are the basic conditions for collusion, in the dissemination of a competition culture within the public sector, competition agencies should share this expertise for identifying such fundamental conditions. Only once a competition problem has been identified, alternative solutions can be evaluated with the support of competition experts. Should we change tendering processes in order to make future tenders more competitive by the mean of reducing entry barriers? Should we initiate audits of closed past tender proceedings in order to detect a wrong that ought to be investigated and prosecuted? Both strategies need a strong commitment by both, the public procurement body and the competition authority. Other efficiency improvements of public procurement can certainly be made but these are beyond the competition authorities’ competences.

In summary, competition authorities should help in the identification of risky situations for collusion and once a risky situation is identified, help in the choice of a solution between the alternatives. In the preventative strategy, competition officers can collaborate in the design of changes oriented to introduce an incentives scheme for competition. In the ex-post strategy, competition officers should collaborate in developing detection mechanisms jointly with procurement entities.

**5.3 *What steps have been taken to improve the efficiency of the public procurement process in Chile? 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 your jurisdiction and what have been the results?***

An important step towards a more efficient public procurement process was taken in 2004 with the establishment of a public body in charge of managing an electronic platform for public procurement. Significant resources have been saved because of e-procurement.<sup>23</sup>

Regarding measures aimed at reducing corruption, even though most of them aim at fighting corruption in general and not only confined to public procurement, it is worth mentioning the following. First, the subscription of international conventions concerning corruption prevention and detection.<sup>24</sup> Second, another public initiative has been the creation of Committees appointed by different Presidents of the Republic in order to tackle corruption issues: Comisión Nacional de Ética Pública (1994); Acuerdo Político-Legislativo para la Modernización del Estado, la Transparencia y la Promoción del Crecimiento (2003); and, the Agenda de Probidad y Transparencia (2006). Third, several amendments to different laws have been introduced oriented to increase transparency and to punish corruption conducts more severely. Finally, there have been some initiatives oriented to the identification and dissemination of best practices.

Regarding measures aimed at fighting collusion, in 2008 the Chilean Competition Agency, by the initiative of the OECD and the support of the OECD and the Competition Bureau of Canada, started a program oriented to increase awareness of public procurement officers and institutions of the problems of collusion and bid rigging and the relevance of a competitive tender design. This program has been a bridge between competition and public procurement worlds and resulted in the inclusion of the item 'fight against bid rigging' in the agendas of several public procurement bodies. Some amendments to tender procedures are beginning to be introduced and the number of investigation cases has been increasing, both as outcomes of these efforts.

**5.4 *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?***

We have not had a significant experience for supporting an answer to this question. The competition agency has not focused its competition outreach and advocacy activities before public procurement entities in actively helping the design of competitive procurement systems so far. However, some techniques such as certificates of independent bid determination are generating a raising interest among public procurement bodies; such was the case with the regulator of the pension funds management industry that effectively introduced the requirement in a tender, as reported in §13, supra.

**5.5 *Has your competition agency undertaken competition advocacy in this area?***

In May 2008, the FNE brought together several public bodies and an association of public procurement officers, to a work team which was named *Comité Anti-Colusión entre Oferentes en Licitaciones de Abastecimiento Público* (hereinafter, the Interagency Taskforce). This team included representatives of the Bureau of the General Comptroller, the (E-) Public Procurement Bureau (body in charge of modernising the public contracting through electronic purchases), the Ministry of Public Works,

<sup>23</sup> Savings of 70 million USD in 2005; 92 million USD in 2006; 118 million in 2007 and 140 million in 2008 are reported. [http://www.chilecompra.cl/cuenta\\_publica/doc/ChileCompra\\_v7.pdf](http://www.chilecompra.cl/cuenta_publica/doc/ChileCompra_v7.pdf).

<sup>24</sup> The Inter-American Convention Against Corruption (1996); the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

and the Council for the Internal Auditing of Government and Redaba (an association of officers and staff in charge of procurement areas of different public bodies). Delegates of the Department of Housing and Urban Planning, the Transport supervisor and the Pensions regulator later joined the group. This Interagency Taskforce has held 9 work meetings during 2008 and 2009.

Because of this initiative, seminars and training activities took place, as a result of bilateral links with the taskforce members and also as a byproduct of installing the risk of collusion among bidders in the agendas of such bodies. Nearly 1000 public procurement officers have attended these activities.

An ongoing market study on the construction sector is also expected to become a useful tool for advocating regulatory reforms in the Ministry of Public Works.

**5.6 *If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?***

As stated before, the competition agency does not have any competence for prosecuting corruption in general.

Regarding collusive tendering cases, remedies sought have commonly been fines to firms. In other cases involving tender design - but not necessarily collusive tendering cases - some remedies regarding tender conditions or requirements, aimed at making the tender more competitive, have been requested to the Competition Tribunal.

In October 12<sup>th</sup> an amendment to the Competition Act came into force introducing provisions for fighting cartels more effectively.<sup>25</sup> It is expected that higher fines will be requested against bid riggers in the near future.

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<sup>25</sup> Law N° 20.361/2009 gave powers to conduct dawn raids, to wiretap, and to institute a leniency program. Among others, it also raised the maximum amount of fines up to USD 20 million approx.



## COLOMBIA

### 1. Size and policy objectives

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

According to the OECD (2007), public procurement accounts for about 15% of the GDP in OECD countries<sup>1</sup>. Public procurement accounts for a large percentage of Colombia's GDP, near 25% as an average estimation. It is also one of the most important activities regarding private participation in public programs, since the legal framework (especially Law 1150 of 2007) establishes that most of the provision of goods and services, and the development of national and local infrastructure, should be carried upon by public procurement processes.

The principle policy objectives of public procurement in Colombia are contained in provisions in the Constitution, mainly laws 80/1993, 1150/2007 and the decrees that develop them. They are the following:

- **Transparency:** every public procurement process should be visible to the public in general and to its participants. Every decision regarding the winners of public tenders and the like has to be publicly announced<sup>2</sup>.
- **Agility:** administrative proceedings should be carried on with the least minimum requirements necessary to insure their adequacy and without undue delays<sup>3</sup>.
- **Responsibility:** public officials and private contractors are held responsible for violating the applicable legal regime, thus producing injuries through their actions or omissions<sup>4</sup>.
- **Economic and financial balance of public contracts:** the balance of duties and rights that result from a contract should be preserved, and a no-fault disruption creates a right for the affected party to ask for damages in order to restore the balance<sup>5</sup>.
- **Bona fide interpretation of contracts:** those provisions regarding the selection of contracting parties as well as those that constitute the contracts themselves should be interpreted according to their purposes and the principles mentioned above<sup>6</sup>.

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<sup>1</sup> OECD, Bribery in Procurement, Methods, Actors and Counter-Measures, 2007.

<sup>2</sup> Law 80/1993, Art. 24. Also, from this principle stems the principle of objective selection of the contracting party, established in article 5 of law 1150/2007, according to which the contracting party should be selected according to the most favorable offer for the contracting administrative institution.

<sup>3</sup> Law 80/1993, Art. 25. This principle is called, in Spanish, "Principio de Economía"

<sup>4</sup> Law 80/1993, Art. 26.

<sup>5</sup> Law 80/1993, Art. 27.

<sup>6</sup> Law 80/1993, Art. 28.

Every Colombian public entity has to carry on a detailed procedure for contracting, that can be summarised in the following steps: 1) the contract has to be previously authorised by the entity (and by the rules that determine what the entity may do), 2) it has to be backed-up by a budgetary provision, 3) the selection of the contracting party has to draw from a database that presents and ranks the available contractors<sup>7</sup>, 4) the institution has to choose among the different available contractors, 5) the contract has to be signed and, finally 6) published or given public notice in a nationwide media<sup>8</sup>.

## **2. Corruption**

### **2.1 *What is the cost of corruption?***

Corruption has many costs, both to the public administration and to the general population. Regarding the public administration has to assume a series of costs that it should not assume under an honest and transparent set of procurement processes. For example, it has to assume the acquisition of goods and services that do not meet the expected requirements, and thus are ill-suited for their purposes. Therefore, it has to afford the costs related to improve these goods and services in order for them to be adequate. It also has to afford the costs related to vigilance and punishment of corrupt officials and employees who benefit from corrupt practices. Recently, the Colombian Anticorruption Czar (see more below) stated that about \$2 billion dollars (about 1.5% of the Colombian GDP) are lost annually in bribes and handouts for corrupt officials<sup>9</sup>.

Regarding the population in general, corruption affects the people that depend upon government investments more than other groups of the population. In this sense, corruption is profoundly regressive, since it hinders the State from providing people with the goods and services that they need in order to overcome particular conditions related to poverty and deprivation. However, corruption also affects other segments of the population as well. It prevents both local and international actors from investing in the country, thus hindering the investments necessary for carrying through different economic activities that are both profitable and socially desirable.

These two types of costs are closely related, with corruption contributes to what are generally referred to as the traps of poverty. By obstructing the provision of social goods and services, the general population finds it harder to overcome their conditions of poverty; by hindering private investment, corruption impedes people and organisations from making investments both in the public and private sector that are socially beneficial. Thus corruption is a malaise that has to be fought upon with all the tools available to both individuals and the State.

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

There are many factors that facilitate corruption. Among the most relevant ones are the economic incentives that stem from engaging in corrupt practices both by individuals and by public officials. Private actors can, at a particular moment, decide to offer bribes and hand-outs as means to circumvent cumbersome regulations and achieve whatever purposes they seek. At the same time, public officials may accept these bribes and handouts as means to complement their wages and increase their incomes. In order

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<sup>7</sup> According to article 6 of law 1150/2007, every eventual contractor has to register in a unique database of contractors administered by the State (referred to as “Registro Único de Proponentes”), in which they have to rank themselves in terms of experience, legal and financial capacity to subscribe contracts, and corporative organisation. The score that results from this ranking is taken as the maximum capacity to contract of each contractor registered.

<sup>8</sup> Law 80 /1993, Art. 41.

<sup>9</sup> <http://www.anticorrupcion.gov.co/DiaContraLaCorrupcion.asp>. Visited on: 15/01/2010.

to reduce these incentives, the Colombian government has expended considerable resources in increasing the penalties for engaging in corrupt practices and investigating the probity of administrative proceedings.

Another particular factor that facilitates corruption is that ineffective law enforcement allows interest groups to permeate state institutions and “seduce” the authorities so that certain agencies, like competition agencies, refrain from conducting investigations in particular markets. This particular manifestation of corruption does not necessarily require bribes or hand-outs, since it is usually done via political pressure from certain government institutions.

**2.3 *How do transparency programs help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?***

Transparency programs help fighting corruption by making it harder for corrupt practices to go unnoticed by the supervising authorities. In this sense, transparency programs facilitate the detection of corrupt practices as they take place or after they have been committed. In the Colombian case, transparency programs are complemented with high sanctions, thus aiming at deterring effectively the occurrence of these practices.

Other policies that help fighting corruption are the creation and protection of independent and technical agencies that have capable personnel for the detection of corrupt practices. By remaining independent and having a technical staff, these agencies increase the probability of detecting these practices, for both independence and technical preparation are crucial for carrying forth successful investigations. Independence assures that the investigations are carried on without undue delays or obstacles, and that explore all the relevant details. In turn, a technical staff is better suited for understanding how the corrupt practices take place – a key element in terms of gathering evidence - and its possible implications.

Another important aspect is an effective judicial review of administrative decisions. Judicial review is based on the idea of an impartial analysis of the decisions taken by administrative agencies and individuals. Since corrupt practices may seem as jaundiced to an impartial reviewer, judicial review plays a key role in assessing whether the actions carried forth by both public officials and private parties in the procurement were legal. At the same time, this impartiality assures affected parties that their complaints and observations will not be discarded arbitrarily or as a result of undue political pressures.

Finally, criminal and administrative sanctions explained in point 4 below have proved to have an important deterrent effect on corruption practices.

**2.4 *Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.***

In Colombia, firms are not obliged to certify that they have not bribed an official during a procurement process. However, there are administrative and criminal laws that severely punish both officials and private actors engaged in corrupt practices. Administrative sanctions include the prohibition of assuming public offices for an extended period of time (from five to twenty five years), the duty to return any public resources that were unlawfully appropriated, and the payment of a fine proportional to the amounts appropriated. Criminal sanctions include a sentence of jail and the payment of a fine related to the amounts appropriated.

**2.5 Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?**

In the Colombian legal system there are several authorities competent for prosecuting corruption cases. They are the following:

- **Procuraduría General de la Nación:** This agency has the objective of carrying forth all the proceedings required to establish the administrative and disciplinary responsibility of a public official in administrative proceedings that may violate the law. Its investigations can begin by its own initiative as well as by a claim presented by any citizen, and take place during visits after which briefs are made reporting any findings. This agency has the faculty to oversee all the public procurement processes carried out by public institutions and to intervene when a process seems suspicious. It also can intervene in judicial cases related to public procurement processes.<sup>10</sup>
- **Fiscalía General de la Nación (Office of the Attorney General):** This prosecuting agency has the duty of investigating any behaviour that amounts to a criminally relevant behaviour, including collusion and corruption in public contracting involving both individuals or public officials<sup>11</sup>. It may begin its investigations either by its own initiative or on behalf of a claim presented by any citizen, and depending on its merits, a final report is issued suggesting prosecution, which, in turn, is directed by a judge<sup>12</sup>.
- **Contraloría General de la República:** This agency is responsible for controlling how public resources are spent through public contracts<sup>13</sup>. It exercises its control by having investigative offices at the different levels of territorial governance (at the national level, the department level, and at the town or “municipio” level) and through different procedures, some of which take place after the contract has been celebrated. This entity can review the proceedings undertaken once the contract is binding and in full force; after the payments stipulated in the contract have been done, and after the contracts have ended. Also, before the contract has ended – like when it supervises the expenditure record of the different state institutions at the different levels of governance<sup>14</sup> – or at any particular time of the contracting process – like when it issues a requirement to any public official and state employee to inform of their actions during any proceeding related with public procurement<sup>15</sup>. The Contraloría can also issue a report in which it certifies the probity of the actions undertaken. Furthermore, the Contraloría can carry on investigations against officials involved in corrupted practices and impose monetary fines.
- **Zar Anticorrupción (“Anticorruption Czar”):** The official in this post can ask for the prosecution of public officials or employees and private parties that are suspected of engaging in

<sup>10</sup> Constitución Política de Colombia, Art. 277.

<sup>11</sup> As a matter of fact, there are several criminal law provisions that sanction different aspects of corrupt behavior from public officials and employees. For example, articles 405 & 406 of law 599/2000 penalise any action or omission incurred by these that slows down a lawful duty or allows an action that goes against an established duty based on a promise of a reward. Articles 408 to 410 penalise any state contracted celebrated by a public official that ignore the regime of personal limitations, establishes a direct benefit for the official or is celebrated without de the due requirements.

<sup>12</sup> Law 80/1993, Art. 66.

<sup>13</sup> Constitución Política de Colombia, Articles 267 and following.

<sup>14</sup> See Law 87/1993.

<sup>15</sup> Law 80/1993, Art. 65.

corrupt practices, since it has no power to judge or sanction administrative actions (or omissions) on its own. Also, the Anticorruption Czar regularly presents information regarding the costs and consequences of corruption in Colombia, and engages in ongoing campaigns related to these topics<sup>16</sup>.

- **Superintendencia de Industria y Comercio (SIC):** This agency, Colombia's sole competition authority, has the power to investigate collusion in public procurement proceedings as an anticompetitive practice. Its approach is very different from that of the aforementioned institutions. It focuses on how the behaviour of private contractors participating in public procurement processes (with or without the help of public officials or employees) resulted in an undue selection of a contracting party, which in turn may produce an inefficient assignment of the resources assigned via the contract. The SIC can impose fines for both the company and the directors involved up to USD 25 millions<sup>17</sup>.

### 3. Collusion.

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

The Colombian government considers that corruption in public procurement processes should be tackled by approaching the issues related to both private and public behaviour. In this sense, just as corrupt practices affect the state's budget, so does the collusive behaviour that renders prices higher compared to what otherwise would be the result of the competitive behaviour of rival participants. In this sense, collusive behaviour is also deeply regressive and as socially harmful as corruption is deemed to be.

The 2009 OECD Guidelines for preventing collusion in public procurement suggest several factors that facilitate this practice. Among the ones that have been perceived in Colombia are the standard character of certain goods and services, the reduced number of participants in some procurement processes, and the close communications rival bidders can have among themselves. Almost all industries that engage in frequent acquisitions of standardised goods and services and that face a reduced number of sellers or buyers are vulnerable to bid rigging. The State is no exception to behaviours that fall within this category.

#### 3.2 *What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?*

There are many sectors in the Colombian jurisdiction that have been affected by bid-rigging conspiracies in public procurement. Some of them include the acquisition of standardised goods, like cement and computer software for keeping school grades and medical records, while others include the construction of public infrastructure, like highway systems and State facilities.

As of the last months, the Colombian competition agency (SIC) has been actively participating with other authorities in the development of procurement process systems designed to minimise the risks of bid rigging. Also, this agency continues to work in preparing guidelines that will be given to the different State agencies that enter into contracts via public procurement processes in order for them to be alert regarding suspicious behaviour. These guidelines will be the joint result of the efforts underwent by SIC as well as by other very important institutions for this purposes like the Procuraduría General de la Nación, among

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<sup>16</sup> This institution was originally created by decree 2405/1998, and is currently governed by decree 519/2003.

<sup>17</sup> Collusive behaviour is sanctioned by article 47 of decree 2153/1992.

others. The release of the guidelines will be accompanied with a training program of officials directly involved in public procurement and a follow-up scheme to evaluate the handout's impact.

**3.3 *Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?***

The Colombian laws regarding procurement processes do not require from their participants certificates of independent bid determination, since the applicable laws prohibit that rival bidders determine their bids in a co-ordinated manner. Also, when collusion takes place, the enforcement of the applicable laws may result in a prohibition from participating in successive procurement processes for an extended period of time. Furthermore, this prohibition applies to joint ventures expressly created for participating in a particular process, as well as to its members, thus preventing that bidders who have been condemned on grounds of bid-rigging circumvent the restrictions imposed to them.

**4. *Fighting collusion and corruption.***

**4.1 *What cases from your jurisdiction have involved both corruption and collusion in public procurement?***

There are several cases in Colombia that have involved both corruption and collusion in public procurement. To name the most recent one, in December of 2009 the Anticorruption Czar suggested that the CEO of Colombia's social security agency, known as the "Seguro Social", was fired from his post after he awarded a contract to a private party in a procurement process in which several ex-employees of the aforementioned institution worked just after they were fired and participated in the bid. The Czar considered that the process presented several irregularities that merited its termination and renewal. This case showed what is considered today to be a common practice, that is, that former employees of a State institution or agency find jobs in participants in procurement processes, in order to take advantage of their connections and the knowledge of how decisions are taken within these institutions.

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

Unfortunately, collusion and corruption cases and allegations are a general malaise of the different government levels. However, not much has been properly documented, and the available information is insufficient to warrant a detailed analysis.

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

There is a well known trade-off between transparency and collusive behaviour in both State and privately held procurement processes. Although transparency measures improve the accountability of the decisions taken by public officials and expose their behaviour both to the incumbent agencies and the people in general, they also facilitate co-ordination among bidding rivals, since it makes it easier for them to meet, make agreements and monitor their compliance given that more information, necessary for colluding strategies, is available. Therefore, most of the methods and techniques for fighting corruption would hinder instead of facilitate the fight against corruption.

However, certain approaches could be made to maintain transparency while making more difficult the occurrence of collusive behaviour. For example, public hearings in which the winner bids are chosen from all the available bids should be either replaced by private hearings in which impartial observers - like members of NGO's and research centres - guarantee the probity of the election, or modified so that all the bids are considered but only the winning bid is publicly announced. The key aspect to preserve from this

hearings is that the winners are chosen fairly and in accordance to the established rules; in order to do this, not all the bids that were handed in have to be known to the public, or they could be held on reserve until a certain amount of time has passed.

**4.4 *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?***

Yes. Individuals or firms that have engaged in bribery or corruption are able to receive leniency in the Colombian jurisdiction by the incumbent authorities, like the Fiscalía General de la Nación. The leniency figure is called “Principio de Oportunidad” and it is contained in the criminal law provisions – article 250 of Law 906/2004. Regarding the leniency regime in competition law, since it was founded only a couple months ago, the details regarding its implementation are still being discussed by the Colombian competition agency (SIC).

**5. Advocacy**

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

It is a well-known fact that regulatory or institutional conditions could help facilitate bid rigging and corruption. In the case of the bid – rigging, the regulatory or institutional conditions may create artificial barriers of entry that diminish the number of participants willing or able to participate in procurement processes, thus facilitating that the remaining participants reach agreements for bid rotation and similar practices. Also, these conditions may establish particular conditions that are hardly met by all the available participants, enabling only a few to participate. In turn, these conditions can be about the required goods or services to be provided, or about certain conditions that have to be met along the procurement process itself. In the case of corruption, regulatory or institutional conditions may create incentives for participant firms to circumvent the requirements established by offering bribes or handouts to the officials in charge of the procurement processes. Also, they can create such an unviable atmosphere for doing business that honest, private actors decide to search somewhere else for friendlier environments, thus leaving dishonest, private actors as the only ones available for contracting. In either case, regulatory or institutional conditions may hinder both transparency and competition, thus creating more harm than benefits.

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

Competition authorities can work to improve the efficiency of public procurement in several fronts. One of them is through real time council and supervision regarding how public procurement processes as they take place. Another one involves advice and training in procurement processes, in order to prevent collusive behaviours before the aforementioned processes actually take place. A third possibility is through careful research about the behaviour of the firms that participate in particular markets in which public procurement processes are used in order to find patterns of bid rotation and the like. These three fronts are conceived as interventions that increase the probability of detection. A fourth possibility is by increasing the sanctions imposed to colluding participants; this last front deals with the sanctions imposed. Together, these fronts may increase the deterring effect of the competition law regime, enabling it as a more effective tool for improving the efficiency of public procurement.

**5.3 *What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? 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 your jurisdiction and what have been the results?***

So far, the approach that has been adopted by the Colombian government has consisted in making public procurement processes more transparent and raising the penalties and fines in order to discourage the occurrence of collusion in public procurement processes. Recently, and thanks to the enactment of Law 1340/2009, the Colombian competition agency is implementing advocacy programs and a leniency program. The advocacy programs have been conceived in order to reduce the anticompetitive effects that some regulatory and institutional conditions have on determined markets. Also, the advocacy programs include the development of guidelines about collusive practices in public procurement that is to be handed out to any agency or public institution that undertakes public procurement processes. On the other hand, the leniency program is being conceived as a mechanism that facilitates information regarding specific collusive behaviours that are taking place or that have done so in the past.

**5.4 *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?***

The Colombian competition agency (SIC) is aware that measures adopted for reducing collusion and bid rigging in public procurement may have an impact on corruption. As mentioned above, the agency acknowledges that there is a trade-off between transparency and efficiency.

In this case, the trade-off suggests that to make public the full details about the merits of the selections implies making public information that facilitates future collusive behaviours and that allows monitoring its compliance. However, if public officials are not required to justify their decisions on the full merits of the bids and offers presented, it is likely that corruption will increase, since arbitrary considerations for selecting a winner will not be disclosed. Nevertheless, the agency considers that a sensible balance can be reached, in which transparency can be preserved while diminishing the risks of collusive behaviour, by for example modifying certain public hearings that allow rivals to monitor each others' compliance to their collusive agreement. Such modifications may include the participation of officials from agencies or entities different from the one conducting the procurement process and that vouch for its integrity.

**5.5 *Has your competition agency undertaken competition advocacy in this area?***

The Colombian competition agency (SIC) is currently undertaking competition advocacy in this area, by approaching agencies that commonly undergo public procurement processes, and by drafting guidelines about collusive behaviours in public processes, and how to spot them.

**5.6 *If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?***

In the cases regarding procurement collusion that the Colombian competition agency (SIC) has prosecuted, different types of remedies were considered. The most common remedies in these cases have been conduct-based remedies, and more particularly, direct prohibitions regarding management and independent bid elaboration by rival bidders. However, the agency has not disregarded the possibility of using structural remedies as long as they seem more adequate given the particular conditions of the markets affected by collusive behaviour.

## CROATIA

### 1. Introduction

The Public Procurement Act (OG 110/2007, 125/2008; furthermore: PPA) of the Republic of Croatia, regulates the following: (i) public procurement procedures of all values, whereby contracting authorities and bidders conclude public works contracts, public supply contracts and public service contracts; (ii) the competencies of the competent authorities; and (iii) legal protection concerning public procurement procedures.<sup>1</sup> The PPA provides for protection of competition, within the entire scope of the public procurement process<sup>2</sup>. The detailed implementation of the competition statutes follow based on the Croatian Competition Act (2003), whereas the authority in charge for the competition protection issues, the Croatian Competition Agency, provides the implementing authorities for the public procurement supervision, on expert advises and instructions on how to rightfully assess the particular situation of public procurement.

### 2. Particular questions for consideration<sup>3</sup>

#### 2.1 Size and policy objectives

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

According to the latest data, based on notices on concluded contracts, public procurement in the period of Year 2009 amounts nearly 35 billion HRK (less than 5 billion EUR). The Principles of public procurement in the Republic of Croatia according the PPA (Art. 6), are following: (i) the principle of freedom of movement of goods; (ii) the principle of freedom of establishment the businesses and to provide services, as well as the principles deriving out of the mentioned; (iii) the principle of competition; (iv) the principle of efficiency; (v) the principle of equal treatment; (vi) the principle of non-discrimination; (vii) the principle of mutual recognition; (viii) the principle of proportionality and (ix) the principle of transparency.

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1. Public Procurement Act (PPA -2008; consolidated version), Art. 1, item 1.

2. PPA, Art. 2(15e); Art. 6(1); Art. 10 (3); Art. 11(5), and others.

3. The responses on the questions under this section follow out of contribution from the side of the Ministry of Economy, Labor and Entrepreneurship of the Republic of Croatia, Office for Public Procurement (Dec. 29, 2009).

## **2.2 Corruption**

### **2.2.1 What is the cost of corruption?**

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

### **2.2.3 How do transparency programs help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?**

The greatest risks and possible measures for the suppression of corruption and conflict of interest in public procurement, according to the phases of procedure are the following:

*Planning, preparation and selection of public procurement procedures:*

- The greatest risks for corruption are the following:
  - Unnecessary investments that do not add value to the enterprise;
  - Overestimated quantities;
  - Selection of the negotiated procedure without prior notice contrary to the prescribed conditions;
  - Tendering documentation could be structured in a discriminating manner and could lead towards favouring certain economic operators (e.g. conditions and requirements were not set in accordance to the procurement objective);
  - Failure to adhere to the terms of the public procurement procedures in line with estimated values and decreasing the value of procurement to prevent its coming within the scope of the prescribed procurement procedure;
  - The excessive specification of the type of goods that puts the bidder/manufacturer in the privileged position;
  - Technical specifications could be prepared by the potential bidders, which could produce difficulties for other bidders in order to ensure them equal positions during the bidding process;
  - Technical specifications could be prepared in a way that only certain economic operator could comply with the conditions set out on the tender.
- Furthermore, the possible measures for insuring increased transparency and responsibility are the following:
  - Publishing the contracting authorities' and/or entities' profile;
  - Publishing the annual procurement plan at contracting authorities' website, so that interested business entities, particularly small and medium sized entrepreneurs, could timely prepare for the participation in particular tenders;

- Establishing internal rules, in which obligations and authorities of all participants involved in preparation and execution of public procurement procedures and contracts would be specified. It would also be recommended that internal rules include the obligation to maintain records about all steps in the preparation and implementation of the procedures, so that conflicts of interest and corruptive practices could be more easily determined.

*Implementation of public procurement procedures:*

In mentioned phase, the greatest risks for corruption appear in connection with setting of the tenders, when could come to the consolidation of different forms of cartel agreements in order to influence the outcomes of tenders. There are three types of agreements, which could possibly occur: (i) the price fixing agreement; (ii) the delivery agreement; and (iii) the agreement concerning the best bid. The major formal and material indicators of cartel agreements were recognised as: (i) the formal one, whereas different tenders contain the same mistakes: the bids appear identical, the contracting authority determines that bidder maintained contact during the procurement procedure; and (ii) the material one, whereas the large discrepancies between the highest and the lowest bids could occur. Namely, unknown (new) bidder submits the bid with extremely high price, and the prices for other bids would be adjusted accordingly. Tender documentation could be purchased by various bidders, but only one valid bid would be submitted even though the market conditions would indicate that more business entities were able to comply with the terms of the tender. In case of the most economically advantageous tender, the selected bidder did not sign the contract regardless of the lost collateral.

*Tender evaluation:*

- Uneven evaluation of the bid components, excluding bidders or bids that meet the tender terms, or accepting bids that should not be accepted;
- Measures for increasing transparency and responsibility;
- Preparation of Internal reports on all public procurement procedure phases on a regular basis;
- Establishing rules for reporting irregularities;
- Division of functions within public procurement procedures (for instance, the same person cannot be responsible for both the preparation and control over the execution of contracts);
- If the contracting authority contacts a particular bidder, all other bidders must be informed about it in a way that could be proven;
- In addition to the publication in the Electronic Procurement Classifieds, all relevant documents (including contracts, except the classified components) should be published at the contracting authorities' website.

*Contract execution; the greatest risks for corruption:*

- Failure to fulfil the contract, especially in terms of quality, prices and deadlines;
- Material changes in the contracts' terms that are in contradiction to the undertaken public procurement procedure (the price, the technical content, the completion date, etc.);

- The procurement subject could be partially or entirely changed during the execution of the contract;
- Signing of the contract for smaller quantities of goods, works or services. Afterwards additional procurements could be obtained from the same economic operator without contract notice. Frequent risks are on award of public contracts on additional works or services without fulfilment of prescribed requirements or in the way that could not be coherent to the Law;
- Signing the public procurement contract, annulling the part of the contract, and then signing a new contract (without the notification) with the explanation that the contract's price did not exceed the estimated value for which the implementation of the public procurement rules were prescribed.

*Measures for increasing transparency and responsibility:*

- Publishing contracts at the contracting authorities' website;
- Division of functions (signing the contract and exercising control over the execution of the contract);
- External control over the execution of contract.

**2.2.4 *Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.***

With regard to the qualification of suppliers to take part in the procedure, the Public Procurement Act (cons.vers.2008) prescribes three mandatory reasons for exclusion, among which are the following: the suppliers who had been subject of a conviction by final verdict for criminal acts of participation in a criminal organisation, corruption, fraud or money-laundering or corresponding acts in accordance with the legal provisions of the country where they had been established, would be obligatorily excluded from the tendering procedure.

**2.2.5 *Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?***

The institutional framework for the efficient identification, prosecution and sanctioning of the criminal offences of corruption is made up of the following: the National Police Office for the Suppression of Corruption and Organised Crime within the Ministry of Interior, the State Attorney's Office (USKOK), the Supreme Court, and county and municipal courts.

The Criminal Code regulates a number of criminal offences in corruption in the public and private sectors, thus enabling the sanctioning of all forms of corruption. A prison sentence is foreseen as a sanction for each criminal offence of corruption. Also, the Amendments of the Criminal Code from December 2008 (OF 152/2008) introduced the possibility of extended confiscation of property gains which were acquired by criminal offenses under the jurisdiction of the USKOK. It is assumed that the total property of the perpetrator was acquired as property gain of a criminal offense unless the perpetrator makes probable that their origin was legal. Consequently, the burden of proof that the property of the perpetrator of the criminal offense was acquired in a legal manner is "transferred" to the perpetrator.

### 2.3. *Collusion*

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

2.3.2 *What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?*

2.3.3 *Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?*

### 2.4 *Fighting collusion and corruption*

2.4.1 *What cases from your jurisdiction have involved both corruption and collusion in public procurement?*

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

Such cases are present at all levels, and it is hard to extract which one would be dominating.

For example, number of controls by Directorate for the Public Procurement (MELE) has been exercised over City of Zagreb, i.e., there have been frequent media cases related to public procurement procedures. However, the most publicly known case has been the one related to procurement of military trucks by the Ministry of Defence. USKOK has carried out inquiry on that case on October 28, 2009, and an indictment was issued for the former Minister of Defence and the Assistant Minister of Defence.

In the period from January 1, until December 1, of the year 2009, the Directorate has received 66 requests in total which were qualified as the prevention and instruction activities dossiers. The prevention and instruction activities were initiated:

- By anonymous application – 15;
- By application of concerted economic operator, citizen(s), councillor(s) (municipality, county, city level) – 32;
- By random check of the public procurement notices published Electronic classifieds – 2;
- By media articles -9;
- Upon request by other state authorities: the State Attorney's office, the Ministry of Interior; Sector for Budget of the Ministry of Finance – 8;

The structure of dossiers according to the category of the contracting authority / entity is:

- State authorities – 8;
- Municipalities, cities, counties and the City of Zagreb – 13;

- Legal persons established for specific purpose of meeting needs in the general interest, not having an industrial or commercial character referred to in Article 3, paragraph 1, item 3 of the PPA – 31;
- Utility companies – 14.

In 17 dossiers the Directorate had not exercise its powers due to the fact that the subject matter of the dossiers was not under the competencies of the Directorate or that candidate (the company in question was not on the list of entities bound by the PPA, the subject matter of the dossiers was not covered by the PPA, etc.) or the bidder requesting control in the public procurement procedure concerned had also initiated legal protection procedure before the State Commission for the Supervision of the Public Procurement Procedures.

### ***2.4.3 What methods and techniques for fighting corruption would aid the fight against collusion?***

In the year 2009, the Directorate for the Public Procurement System of the Ministry for Economy, Labour and the Entrepreneurship of the Republic of Croatia, had undertaken the activities directly focused on prevention of corruption and conflict of interest. Focus was put on ensuring of enforcement of Article 5 (c) of the PPA. The Article stipulates that contracting authorities shall not award public contracts to economic operators if the head of the body or a member of the management or supervisory board of the contracting authority concerned simultaneously; performs management duties in the economic operator concerned, or owns business shares, stocks or other voting rights by virtue of which he / she was involved in the management or the capital funds of the economic operator concerned in a share exceeding 20%.

Public contracts concluded contrary to the above mentioned provision shall be null and void. Contracting authorities shall publish a list of economic operators to which public contracts must not be awarded within the meaning of Art. 5 Paragraph 1, on their websites.

With the aim of rising awareness on obligation arising from the Article 5 (c), MELE submitted the reminder on this Article to the Association of Cities, the Association of Municipalities and the Croatian Counties Association (based on the Questionnaire submitted earlier in the first half of the year 2009) and those associations distributed it to their members (local and regional level). The reminder was also published on the Public Procurement Portal.

In addition, the Directorate drafted the short “Instruction on Conflict of Interest and Corruption Prevention in Public Procurement System”. The major part of the Instruction was dedicated to reminder on obligation arising from the Article 5 (c) of the PPA and clarifications on certain aspects of its implementation. Reminder of the Instruction contains some basic information related to relevant documents (brochures, legislation) and the greatest risks and possible measures for the suppression of conflict of interest in public procurement procedures.

The Instruction was submitted by e-mail system of the Electronic Public Procurement Classifieds to all registered contracting authorities and entities at the beginning of December 2009. The Instruction was also published on the Public Procurement Portal. The results of above mentioned activities on awareness rising on obligation from the Article 5 (c) were instantly visible. Number of the contracting authorities had published the list in accordance with the Article 5 (c) on their websites.

Furthermore, the “Anticorruption Program for State-Owned Enterprises for the Period 2010-2012” was adopted at the first session of the Committee chaired by the Prime Minister held on November 23, 2009. Extract from the “Anticorruption Program for State-Owned Enterprises for the Period 2010-2012” containing measures implementation of which is directly or indirectly related to public procurement procedures is given in the following text:

“Three main objectives of the Program are:

- Objective 1 – Improving integrity, responsibility and transparency;
- Objective 2 – Creating preconditions for the prevention of corruption at all levels;
- Objective 3 – Affirmation of the ‘zero tolerance’ approach for corruption”.

*Measures for the systematic elimination of the causes of corruption;*

- Objective 1. Improving integrity, responsibility and transparency:
  - Measure 1.1. Define and publish online: mission and vision statements; general and specific goals for the next 3 years period; basic organisational values and principles with regard to the relationship with third parties (customers, suppliers, government and other stake holders).
  - Expected execution date: February 2009.
  - Measure 1.2. Define and publish in form of a Guidelines, or incorporate in the already existing Rules of Internal Code of Conduct, specific values and rules for the prevention of corruption and ensuring the professional code of conduct with regard to: gifts and compensation given to or received from business partners; asset management; confidentiality and impartiality; engagement in and independent business practice; separation of private and business interests.
  - Expected execution date: February 2009.
  - Measure 1.3. Introduce the obligation to sign a “confidentiality and impartiality statement” for all employees, whose workplaces are perceived as highly risky in terms of corruption (public procurement employees, employees issuing documents necessary to earn certain rights, etc.). The statement in which the employees under material and criminal liability confirm that they performed their duties in accordance with the law and that they will do the same next year, which should be signed at the beginning of every year, no later than January 31.
  - Expected execution date: end of January each year, starting from January 2011.
  - Measure 1.4. Create and publish “Disciplinary Rules” for determining the types of disciplinary measures and procedures that can be undertaken in cases of violations of policies, procedures, and code of ethics for the purpose of enhancing the level of awareness about the issues and consequences of improper behaviour.
  - Expected execution date: end of September 2010.
  - Measure 1.5. For procurement of goods in excess of 6 Mio HRK (less than 1 Mio Euro), and for procurement of public works in excess of 12 Mio HRK, the bidders need to sign the “Integrity Statement”, in which they guarantee the fairness of the procedure, promise to refrain from any illegal activities (corruption, fraud, offering, giving or promising improper benefits that might influence the behaviour of employees). By signing the Integrity Statement, the bidders agree that the procedure be audited by independent experts, and accept the sanctions (penalties, termination of the contract) following the violation of rules.

- This measure implies ongoing execution, starting from the establishment of the action plan.
- Measure 1.7. Publishing the information on the organisation’s website, especially:
  - 1.7.3. Information related to public procurement procedures, in accordance with the Public Procurement Act, Annex 6, paragraph 2, item (a) (OG 110/2007, and 125/2008), including the announcement of public procurement, information about the tender and tendering documentation, information about the status of all ongoing public procurement procedures, and the notice on closed deals.
- This measure implies ongoing execution. The information about the public procurement should be published on the organisations’ website by September 2010.
- Objective 2. Creating preconditions for the prevention of corruption at all levels.
  - Measure 2.2. Appoint the “Ethics Commissioner”, who should be in charge of handling complaints from employees, citizens and other parties, with regard to unethical and possibly corruptive practices by the employees, and will promote ethical interpersonal relationships among employees.
  - Expected execution date: end of February 2010.
  - Measure 2.3. Establishment and / or improvement of the financial management and control system in accordance with the Act on Internal Financial Control System in Public Sector (OG Nr., 141/2006). It is necessary to ensure the ongoing implementation of all control mechanisms that would guarantee the control and supervision of business activities and management. This entails strengthening control mechanisms, identifying and minimising of the risk.
  - Expected execution date: because the implementation of this measure is administratively and functionally challenging, it is recommended that the preconditions (organisational, staff) for the establishment of the financial management and control systems would be in place by June 2010.
  - Measure 2.4. establishment and / or improvement of the internal audit in accordance with the Act on the Internal Financial Control System in Public Sector (OG, Nr. 141/2006). It is necessary to ensure the integrity of the audit process, and require that auditors and accountants perform their duties consistently and in accordance with the audit rules in cases of fraud and corruption.
  - Expected execution date: end of September 2010.
  - Measure 2.5. Establishment and / or improvement of the audit committees that supervise the financial reporting procedures, internal control systems, internal financial control systems, risk management systems and audit processes.
  - Expected execution date: end of September 2010.
  - Measure 2.7. Establishment of an efficient system for reporting irregularities by creating of the mechanisms that would allow prevention of irregularities, fraud and corruption by their early reporting. This entails establishing of the internal reporting system that will enable to

the employees for reporting of the sources of the problem of corruption, without facing of the risk of retaliation. It is also necessary to provide an e-mail address, and appoint a person responsible for maintaining the register of irregularities and dealing with irregularities and frauds by utilising control mechanisms at his or hers disposal.

- Expected execution date: end of May 2010.
- Objective 3. Affirmation of the “zero tolerance” for corruption breaches.
  - Measure 3.2. Establishment of the training plans.
  - Expected execution date: end of February, each year.

**2.4.4 *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?***

Yes.

**2.5 *Advocacy***

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

The described above shows that the great efforts have been undertaken by the Government and other stake holders, in order to improve legislative and institutional framework to prevent and sanction the frauds in tendering processes.

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

Croatian Competition Agency frequently provides advises to the Public Procurement authorities how to assess the different situations in connection to the bidding procedures, where the bid rigging and / or cartel cases could arise. Such advises are produced in a form of the expert opinions issued by the Croatian Competition Council, and are also frequently followed by the same authorities.

**2.5.3 *What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? 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 your jurisdiction and what have been the results?***

As already described above there are undertaken numerous steps from the side of the Government in order to improve institutional framework and adopt the necessary legislation in order to penalise and before that prevent felonies and 7 or frauds during the public procurement processes.

**2.5.4 *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?***

Yes.

**2.5.5 *Has your competition agency undertaken competition advocacy in this area?***

Yes, along with the regular advocacy efforts concerning antitrust and state aids situations. For example, after the adoption of the expert opinions on particular public procurement cases on the Council sessions, the Croatian Competition Agency launches the communication in a form of the press releases to its web site. Such communication later on appears in media (news papers, other broadcasting).

**2.5.6 *If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?***

The full jurisdiction in such cases goes to the State Attorneys. Agency would have only advisory role, upon the requested of relevant authorities.

## EL SALVADOR

### 1. El Salvador's experience

According to the Central Reserve Bank of El Salvador, for 2008 the current consumption expenses in the non financial public sector<sup>1</sup> totalled US\$2,350.8 million dollars, equivalent to 11% of the economic activity level measured by the Gross Internal Product.

The governmental acquisitions and purchases in El Salvador are ruled by Administrative Law principles and by public honesty and competition criteria. Said principles are contained in the Law for Acquisitions and Contracts of the Public Administration (in Spanish, Ley de Adquisiciones y Contrataciones de la Administración Pública), and in its regulation. The aforementioned legal framework regulates purchase processes insuring the compliance of transparency requirements, as well as the efficient distribution of the State's resources.

Bid rigging is an infringement of the Competition Law (CL) and consequently, the Competition Superintendence (CS) has recently carried out efforts to improve the institution's capacity to prevent, detect and eradicate such practice.

As part of its Competition Advocacy activities, the CS has prepared a manual containing basic information in order to provide the officials directly involved in governmental purchases, the necessary tools to identify alert signals of possible bid rigging. Simultaneously, the CS is carrying out a permanent program of presentations where the institution's personnel explain with more detail the contents of the aforementioned manual. It contains mainly, topics such as: what is bid rigging, the different ways this practice may be disguised and the detail of various conducts that might suggest the existence of bid rigging amongst the participants in a public tender.

With respect to this matter, the CS has developed a continuous communication channel with the procurement offices of the public institutions.

In 2009, the CS sanctioned four travel agencies for bid rigging in two public tenders carried out by two governmental institutions. The travel agencies had previously agreed on the commission prices to be charged for the issuance of airplane tickets, having filed identical economic bids. During the investigation, the CS did not find any valid economic explanation that could justify the identical bids, ergo, the Board of Directors of the CS found the travel agencies culpable of infringing Article 25 of the CL.

### 2. Corruption

The CS is responsible for cartel detection in all sectors of the Salvadoran economy. In that way, the institution examines public bids in order to detect two issues principally: (a) if the participants have arranged an agreement to fix or limit prices or other conditions in their proposals (bid rigging); or (b) if the terms of the bid designed by a public contractor reduce or limit competition in the bid procedure.

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<sup>1</sup> This amount includes both the ones carried out through competitive processes (public tenders or auctions) and those carried out through direct purchases.

Therefore, it is important to mention that the CS does not develop investigations to unveil corruption in the public sector, since there are other authorities in the country in charge for them (Country's Attorney General in charge of criminal prosecutions <sup>2</sup> and the Government Ethics Tribunal<sup>3</sup>). In this way, the competition agency has no power or incidence in this area.

However, during an investigation or analysis of bid procedures, the CS may discover certain conducts that, even though do not involve anticompetitive conducts or restrictions to competition, indicate a corruption activity from public authorities. In these cases, the CS must notify to the authorities that investigate corruption cases so they can initiate the legal actions necessary to penalise the responsible personnel.

Therefore, even though the CS does not formally investigate corruption cases during bid procedures, it has the duty of contribution with the proper authorities, especially since the elimination of corruption and an increase in transparency contributes to a more competitive environment that promotes efficiency and benefit consumers.

### **3. Fighting collusion and corruption**

As it was mentioned before, the CS is only responsible for investigating and fighting collusion in public procurement. However, the aforementioned does not mean that if the institution becomes aware of reasonable grounds of corruption, it is not liable for making the proper disclosure to the competent authorities.

In that sense, it is not possible to mention at this moment, examples of cases that involve both corruption and collusion in public procurement. The one case the CS filed for this infraction was already commented above and identified as the travel agencies investigation.

Regarding the level in which the collusion cases have developed, whether it has been locally, provincially or nationally it is important to mention that in El Salvador, the one case that has been cited as precedent on this matter occurred at the national level. However, there are many procurement processes that only involve local governments. In these cases, the Superintendence has not yet initiated an investigation, but it is possible that it will happen in the short or medium term.

On the topic of the methods and techniques for fighting corruption that would aid the fight against collusion, one of the most important issues on this matter is the communication and collaboration between the different procurement offices on the government, the country's Attorney General and the CS. It is vital that if one of the agencies senses that something is going wrong it requests the aid of the others so that the unification of efforts can provide for a successful investigation. Amongst other things, it is also imperative that the records and documentations presented by the participants of the bid are examined and shared between institutions so there is a guarantee of full access to information.

Since there is a clear differentiation between the processes for corruption and collusion, there is no limitation on whether individuals engaged in bribery can receive leniency. The conditions that must be

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<sup>2</sup> The Criminal Code establishes in Articles 325 to 334 that certain conducts constitute acts of corruption, such as: embezzlement, illegal negotiations and subornation. Such crimes are sanctioned by a Criminal Court with prison for the guilty.

<sup>3</sup> The Government Ethics Tribunal is an administrative authority that can impose fines or destitution to public authorities that commit any corruption conduct during a bid procedure.

satisfied for leniency qualification are listed in article 39 of the CL and they have no relationship with corruption.

#### **4. Advocacy**

On the issue of how regulatory or institutional conditions help facilitate bid rigging and corruption, it is imperative to mention that any flaw on transparency in the bidding procedure must be corrected by strengthening the regulatory and institutional framework. Therefore, it is most important to recognise the laws and institutions as the way to prevent and discourage collusion and corruption, either by providing elements that promote them or by establishing sanctions for transgressions.

In that way, competition authorities can execute relevant measures to improve efficiency in public procurement, which is done indirectly by reviewing the bidding processes for illegal conducts and providing for their elimination.

The CS is committed to prevent collusion in public procurement. Two approaches have been taken to achieve this goal. First, the agency is investigating cartels in this area having sanctioned one in 2009 that was mentioned before (travel agencies case); this action must deter others from committing such practice via the burden of high fines. Second, the institution has developed an intensive advocacy program to educate society on this matter, specifically publishing in 2009 a Guide to Detect and Prevent Bid Rigging aimed to the members of the procurement offices and to the public.

The CS believes that fighting against collusion and bid rigging in public procurement will contribute to diminish the risk of corruption, although the institution is aware that the latter is a complex problem that needs to be addressed from a numerous flanks.

APPENDIX



**Sanctioning procedure against the Salvadoran  
travel agencies: “Amate Travel”, “U-Travel”,  
“Inter-Tours”, “Agencia de Viajes Escamilla”,  
and “Hispana de Viajes”  
Bid Rigging in Public Procurement Processes**

Competition benefits consumers.



## Contents

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1. Anticompetitive Agreements amongst Competitors
2. Investigated Facts
3. Sanctioning Procedure
4. Analysis of the Agreements amongst Competitors pursuant to Competition Law
5. Analysis of the Investigated Facts
6. Final Decision

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Superintendencia de Competencia



## Anticompetitive Agreements amongst Competitors

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## Anticompetitive Agreements amongst Competitors

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Art. 25.- Anticompetitive practices among competitors are prohibited, these practices include the following, amongst others:

- a) Establish agreements to fix prices or other purchase or sales conditions under any form whatsoever;
- b) Fixing or limiting quantity output;
- c) Fix or limit prices at auctions or in any other form bidding private or public, national or international, with the exception of the joint bids submitted by economic agents that are clearly identified as such in the documents submitted by the bidders; and,
- d) Market allocation, either by territory, volume of sales or purchases, by type of good sold, customer or seller, or by any other means.

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Superintendencia de Competencia



## Investigated Facts

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## Investigated Facts

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The possible existence of an agreement adopted amongst the investigated economic agents in order to alter the competition conditions in the service rendered to issue airline tickets in certain governmental procurement procedures since 2006:

1. Ministry of Economy DR-CAFTA No. 03/2008;
2. Salvadoran Tourism Corporation (in Spanish, Corporación Salvadoreña de Turismo, "CORSATUR") No. 02/2008;
3. Ministry of Foreign Relations DR-CAFTA No. 03/2007;
4. Ministry of Foreign Relations No. 04/2007; and,
5. Ministry of Internal Affairs No. 03/2007.

Examine the alleged commission of anticompetitive practices described in Article 25 letters a), c), and d) of the Salvadoran Competition Law.

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Superintendencia de  
Competencia



## Sanctioning Procedure

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## Sanctioning Procedure

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**Feb/02/2009**

- The CS initiated ex-officio the formal investigation procedure and requested information to governmental institutions.

**Mar/04/2009**

- The investigated economic agents filed defense arguments.

**Mar/19/2009**

- The CS opened the probatory phase of the procedure for 20 business days, period during which the CS requested information to the investigated parties and to governmental institutions.

**Mar/30/2009**

- The CS issued, ex-officio, a resolution calling witnesses to testify and requesting information to public authorities.

**Apr/01/2009**

- Witnesses were interviewed.

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## Sanctioning Procedure

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**April/24/2009**

- Probatory phase ended.

**April/29/2009**

- Resolution for the confidentiality hearing was issued.

**May/05/2009**

- Confidentiality term, prior to the hearing, concluded.

**May/20/2009**

- Confidentiality resolution issued; file integrated and sent to BD.

**July/07/2009**

- The BD issued the final resolution.

**Aug/11/2009**

- The BD overruled review recourses and confirmed final resolution.

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Superintendencia de  
Competencia



## Analysis of Agreements amongst Competitors pursuant to Competition Law

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## Analysis of Agreements amongst Competitors pursuant to CL

Said agreements are analyzed pursuant to the “*per se*” rule. Evidence of the agreement’s existence is enough to determine the infringement.

- OCDE: “Damages Caused by Cartels and Imposing Effective Penalties”;
- AMERICAN BAR ASSOCIATION: “Antitrust Law Developments (Sixth)”;
- ICN: “Defining Hard Core Cartel Conduct. Effective Institutions, Effective Penalties”;
- SUPREME COURT (USA): United States v. McKesson & Robbins, Inc.; United States v. Elmore Roy Anderson;
- CNDC (Argentina): pharmaceutical oxygen; and,
- CS: wheat flour; PDBESA.

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## Analysis of the Investigated Practices

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## Analysis of the Investigated Practices

- A. Article 25 letter C) CL.  
 1. DR-CAFTA LA No. 03/2008 (Ministry of Economy) Public Procurement Process

Tender documents (economic bid format)

**ANEXO 5**

**CUADRO DE OFERTA BÁSICO**

Nº	SERVICIO	COSTO
11.	Costo por emisión de Boletos de ida y vuelta (costo por boleto NO por segmento) Tarifa de \$1 - \$500 Tarifa de \$ 501 - \$1,000 Tarifa mayor de \$1,000	
12.	Reconfirmación de vuelo/boleto y constancia de reservación.	
13.	Trámite de Boletos premio	
14.	Anulación de boletos	
15.	Re-emisión de boleto	
16.	Emisión de boleto contra orden de canje (MCO)	
17.	Trámite de Reembolso de boleto no utilizado	
18.	Trámite de Reembolso de boleto extraviado	
19.	Reservación de Irea	
20.	Servicio a domicilio dentro del área metropolitana	

**EL COSTO DEBE INCLUIR IVA.**  
**NOTA:** Cualquier otro costo adicional que aplica la empresa, deberá incluirlo en este cuadro.

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## Analysis of the Investigated Practices

SERVICES TO BE RENDERED	AMATE TRAVEL	AGENCIA DE VIAJES ESCAMILLA	U TRAVEL	INTER TOURS
Cost for issuing round trip tickets	US\$39.55	US\$39.55	US\$39.55	US\$39.55
Flight confirmations/ ticket and reservation voucher	Cost free	Cost free	Cost free	NA
Premium ticket procedure	Cost free	Cost free	Cost free	NA
Ticket annulment	Cost free	US\$39.55	Cost free (the same day)	NA
Ticket re-issuance	US\$39.55	US\$39.55	US\$39.55	US\$39.55
Issuance of ticket against exchange order (MCO)	US\$39.55	Cost free	US\$39.55	US\$39.55
Procedure for the reimbursement of non utilized tickets	Cost free	Cost free	Cost free	NA
Procedure for the reimbursement of lost tickets	Cost free	Cost free	Cost free	NA
Train reservation	Cost free	Cost free	Cost free	NA
Delivery service in the Metropolitan Area	Cost free	Cost free	Cost free	NA
<b>Total</b>	<b>US\$118.65</b>	<b>US\$118.65</b>	<b>US\$118.65</b>	<b>US\$118.65</b>

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## Analysis of the Investigated Practices

Witnesses' testimonies in the procedure:

U-TRAVEL: *"Asked if the identical service fee does not indicate anything to the company. Answers it is just a coincidence in calculation procedures, in the cost structure that one may have."*

AMATE TRAVEL: *"[The commission was calculated] on the basis of the 2003 experience, based on their clients' consumption in that account, that is how they arrived to the US\$35.00 + sales tax. In addition, there are many variables that affect their supply if calculated under the same principles, so their bids consider the fair cost and that is the way the calculations are made, on the basis prior experience with different institutions"*.

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## Analysis of the Investigated Practices

Witnesses' testimonies in the procedure:

**AGENCIA DE VIAJES ESCAMILLA:** *"He can talk about the calculations made by Escamilla. He speculates they have the same program with the airline. He can talk about Escamilla's costs. For him, it's very difficult to speculate if those people have the same costs as Escamilla's, if the airline has the same program".*

**INTER-TOURS:** *"The witness is asked again why, existing so many variables that influence in the preparation of the bids and being the companies so different, they all offer an identical charge to the cent. The witness answers he does not know how the others made their calculations but he analyzes the tender documents, sees where they are flying to, the services required, the number of them to be rendered, and then calculates his costs. He does not know the others' costs, but this is the way he calculates them".*

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## Analysis of the Investigated Practices

Even though each travel agency argued that the US\$39.55 commission was independently calculated based on their costs, the depositions of the four travel agencies' representatives did not explain how the calculations were made.

Average charged commissions

Travel agencies under investigation	To Private Sector	To Public Sector	Difference
Inter Tours	US\$34.52	US\$47.17	US\$12.65
Amate Travel	US\$13.42	US\$45.39	US\$31.97
U-Travel	US\$13.22	US\$24.75	US\$11.53
Agencia de Viajes Escamilla	US\$30.81	US\$68.75	US\$37.94

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## Analysis of the Investigated Practices

History of public procurement processes carried out by the Ministry of Economy

Number	Date	Winning agent	Adjudicated Commission
01/2005	Feb/02/2005	Maya	US\$15.00
01/2006	Aug/17/2006	Maya	US\$14.00
02/2007	Feb/01/2007	U-travel	US\$14.00
DR CAFTA LA 03/2008	Aug/12/2008	U-travel	US\$38.55

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## Analysis of the Investigated Practices

Structure information of the investigated agencies

Economic agent	Assets	Number of employees	Establishments
Amate Travel	US\$679,605.43	22	1
U-Travel	US\$2,094,406.26	35	1 and 2 mini establishments
Agencia de Viajes Escamilla	US\$1,699,372.00	5	1
Inter-Tours	US\$278,873.35	6	1

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## Analysis of the Investigated Practices

### Conclusion

The CS gathered evidence that indicated that the investigated agents committed the analyzed anticompetitive practice and said proof was corroborated by the CS' economic analysis carried out in similar cases, thus, the decision was issued in the aforementioned sense.

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## Analysis of the Investigated Practices

- A. Article 25 letter C) CL.  
 2. Public Procurement Procedure 02/2008 Salvadoran Tourism Corporation (in Spanish, Corporación Salvadoreña de Turismo, "CORSATUR")

Tender documents (economic bid format)

ANEXO V

**CUADRO DE OFERTA BÁSICO**  
**TARIFARIO DE SERVICIOS OFERTADOS**

No.	SERVICIOS DE SUMINISTRO DE BOLETOS AÉREOS	Costo US\$ (Tarifa IGA (Iva Incluido))
1	Emisión de boletos aéreos en general	
2	Reconfirmación de vuelo	
3	Servicio a domicilio: Dentro del área metropolitana	
4	Trámite de boleto extravío	
5	Anulación de boleto aéreo	
6	Reembolso de boleto no utilizado, en efectivo o en MCO emitido por la aerolínea, a favor de CORSATUR	
7	Envío de confirmación vía Internet, fax o teléfono	
8	Emisión de boletos fuera de horas laborales de la Agencia	
9	Emisión de boletos de Emergencia	
10	Emisión de boletos contra orden de pago (MCO)	
11	Asesorías a Pre-cheques	
12	Cobro de boletos propagados + IVA	
13	Reservación de auto/hotel	
14	Otros	

Competition benefits consumers.



## Analysis of the Investigated Practices

Services to supply airplane tickets	U-Travel	Amate Travel	Inter-Tours
Issuance of airplane tickets in general (US\$ fixed tariff, sales tax included)	US\$56.50	US\$56.50	US\$56.50
Flight confirmation	Cost free	Cost free	Cost free
Delivery service in the Metropolitan Area	Cost free	Cost free	Cost free
Procedure for lost ticket	Cost free	Cost free	Cost free
Ticket annulment (in the same day)	Cost free	Cost free	Cost free
Reimbursement of ticket not used, in cash or in MCO issued by the airline to CORSATUR	Cost free	Cost free	Cost free
Sending information via fax, Internet, or telephone	Cost free	Cost free	Cost free
Issuance of tickets in non-business hours	Cost free	Cost free	Cost free
Issuance of emergency tickets	Cost free	Cost free	Cost free
Ticket issuance against exchange order (MCO)	Cost free	Cost free	Cost free
Pre-checking guidance	Cost free	Cost free	Cost free
Pre paid tickets charges + sales tax	Cost free	Cost free	Cost free
Hotel/car reservations	Cost free	Cost free	Cost free
Other services	Cost free	Cost free	Cost free

Competition benefits consumers.



## Analysis of the Investigated Practices

Witnesses' testimonies in the procedure:

U-TRAVEL: *"Answers that the same variables that existed in that moment in the market, the commercial elements, the interest to have that account or not were the elements considered when bidding"*.

AMATE TRAVEL: *"AMATE TRAVEL based its bid in the experience with the account and they had worked with the institution years before (referring to the year 2003), hence, based on that element they made their cost calculations (...) The account's behavior was analyzed for that year, consequently, they already knew or calculated the services to be rendered pursuant to the contract and based on this they calculated the percentage"*.

Competition benefits consumers.



## Analysis of the Investigated Practices

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Witnesses' testimonies in the procedure:

INTER-TOURS: *"He can talk about his costs. Ask the others or analyze their cost system (...) He makes his calculations based on his costs. In his calculations, the cost was forty eight twenty five"*.

**Notwithstanding the fact that they argued that the US\$56.50 commission offered was independently calculated based on their costs, the depositions of the three travel agencies' representatives did not explain how they made their calculations"**.

Competition benefits consumers.



## Analysis of the Investigated Practices

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Conclusion

The CS gathered evidence that indicated that the investigated agents committed the analyzed anticompetitive practice and said proof was corroborated by the CS' economic analysis carried out in similar cases, ergo, the decision was issued in the aforementioned sense.

Competition benefits consumers.



## Final Decision

Competition benefits consumers.



## Final Decision

<p>Fines imposed for the agreement amongst competitors in the public procurement process DR-CAFTA LA No. 03/2008 carried out by the Ministry of Economy</p>
<ul style="list-style-type: none"> <li>• <b>AMATE TRAVEL:</b> 15 minimum monthly wages (US\$203.10), (US\$3,046.50)</li> <li>• <b>U-TRAVEL:</b> 15 minimum monthly wages (US\$3,046.50)</li> <li>• <b>INTER-TOURS:</b> 15 minimum monthly wages (US\$3,046.50)</li> <li>• <b>AGENCIA DE VIAJES ESCAMILLA:</b> 15 minimum monthly wages (US\$3,046.50)</li> </ul>

<p>Fines imposed for the agreement amongst competitors in the public procurement process No. 02/2008 carried out by CORSATUR</p>
<ul style="list-style-type: none"> <li>• <b>AMATE TRAVEL:</b> 15 minimum monthly wages (US\$203.10), (US\$3,046.50)</li> <li>• <b>U-TRAVEL:</b> 15 minimum monthly wages (US\$3,046.50)</li> <li>• <b>INTER-TOURS:</b> 15 minimum monthly wages (US\$3,046.50)</li> </ul>

<p>Communication to initiate the disqualification procedure</p>
<ul style="list-style-type: none"> <li>• Article 158 letter j) of the Public Administration Acquisition and Contracting Law (In Spanish, Ley de Adquisiciones y Contrataciones de la Administración Pública, "LACAP"): "The Institution will disqualify the contractor who commits any of the following conducts, from participating in administrative contracting procedures for a 5-year term: j) Having been sanctioned pursuant to Article 25 letter c) of the Competition Law".</li> <li>• Communicate this resolution to the Ministry of Economy and to the Minister of Tourism who chairs CORSATUR, for the respective effects.</li> </ul>

Competition benefits consumers.



**INTERNAL MARKET AND SERVICES DIRECTORATE GENERAL  
OF THE EUROPEAN COMMISSION**

This contribution only addresses the above issue specifically with regard to EU public procurement policy which falls under the responsibility of DG Internal Market and services. Other policy areas (criminal law, competition law) are not covered.

It must be highlighted that the EU public procurement directives only constitute a basic legal framework, which is implemented into national law by the EU Member States. Contracting authorities in the EU Member States do not apply the directives as such but the national rules transposing these directives. The implementing national law often contains additional rules and principles complementing those of the EU Directives, also with regard to measures to prevent and to fight corruption and collusion in public procurement. As the application of the rules is the primary responsibility of the EU Member States, questions on practical experience with the fight against corruption and collusion will not be dealt with by this contribution.

## **1. International Background**

The EU is party to the United Nations Convention against corruption.

Annex II of the Council decision on the conclusion, on behalf of the European Community, of the United Nations Convention against corruption sets out those actions which are in the competence of the EU.

Among several other actions "the Community points out that it has competence with regard to the proper functioning of the internal market, comprising an area without internal frontiers in which the free movement of goods, capital and services is ensured in accordance with the provisions of the Treaty establishing the European Community. For this purpose the Community has adopted measures to:

- *Ensure transparency and equal access of all candidates for public contracts and markets of Community relevance, thereby contributing to preventing corruption."*

## **2. The Role of the EU Public Procurement Directives in the Fight against Corruption**

Public procurement in the EU accounts for 17% of EU GDP (around €2,000 billion). The awarding of contracts with values above certain thresholds (representing around 3.25% of EU GDP) is governed by the EU public procurement Directives 2004/17/EC and 2004/18/EC.<sup>1</sup> The goal of these directives is to implement the principles of the EC Treaty:

- Freedom of movement of goods
- Freedom of establishment
- Freedom to provide services

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<sup>1</sup> Texts available under: [http://ec.europa.eu/internal\\_market/publicprocurement/legislation\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm).

- Equal treatment
- Non-discrimination
- Mutual recognition
- Proportionality
- Transparency

The directives are designed to ensure the effects of these principles and to guarantee the opening up of procurement to competition. They set out basic procedural requirements for the procurement of goods, services and works in the EU Member States in order to guarantee free and non-discriminatory access of all European undertakings to public contracts.

The main contribution of the EU public procurement directives themselves to the fight against corruption consists in strict obligations for transparency at several stages of the procedure (2.1). Furthermore, the directives provide for a special mandatory exclusion of tenderers convicted of corruption (2.2). A remedies directive to ensure that efficient legal review of procurement decisions is available in all Member States completes the picture (2.3).

### **2.1 *Transparency Requirements***

The strict transparency obligations throughout the public procurement procedure as set out by the EU public procurement directives are an important safeguard against corruption. Transparency is specifically requested in several provisions of the directive, such as the following:

- The relative weighting of the award criteria has to be published in the contract notice and in any case before the submission of tenders;
- Minimum levels of economic and technical capacity used as criteria for selection of suitable candidates have to be set and published in the contract notice;
- Criteria or rules for reducing the number of candidates in restricted or negotiated procedures have to be set and published.

### **2.2 *Exclusion of Tenderers Guilty of Corruption***

Article 45(1) of EU public procurement directive 2004/18/EC provides for an obligation to exclude candidates or tenderers who have been the subject of a conviction by a final judgement for certain crimes enumerated in the directive. Amongst these, a conviction for corruption is listed as an obligatory reason for exclusion.

Contracting authorities shall, where appropriate, ask candidates or tenderers to supply documents specified in Article 45 (3), as evidence that no reasons for exclusion apply: an extract of a judicial record or an equivalent document, a declaration on oath or a solemn declaration before a competent authority.

If doubts exist concerning the personal situation of candidates or tenderers, contracting authorities can apply to the competent authorities to obtain any necessary information. If the candidate or tenderer is established in a different country than the contracting authority, the latter may seek the co-operation of the competent authorities in the country of establishment.

If the documents specified in Article 45(3) are submitted, they have to be accepted as sufficient evidence of non-existence of the exclusion grounds under Article 45 (1).

The Directive explicitly leaves it to the Member States to specify implementing conditions for the rules of Article 45. However, Member States can only provide for derogation from the obligation to exclude the above indicated criminal participants if there are overriding requirements in the general interest.

### **2.3 *Efficient Legal Review***

Legal review procedures can help detect and sanction corruption in procurement procedures. The EU remedies directive 89/665/EEC, as amended by directive 2007/66/EC, which guarantees that efficient legal review procedures against illegal award decisions are available in all EU Member States, therefore contributes to the fight against corruption.

## **3. Collusion in Public Procurement**

The transparent and non-discriminatory procurement procedures set out by the EU public procurement rules not only prevent corruption but also favour new market entries, reduce or prevent market concentration and therefore create a market environment less conducive to anti-competitive behaviour.

The EU public procurement rules do however not contain any specific rules dealing with the issue of collusion / bid-rigging.

Collusion between bidders can lead to an exclusion of the undertakings in question from the current and later procurement procedures. The already quoted Article 45 of directive 2004/18/EC provides in its paragraph 2 that any economic operator may be excluded from participation in a contract where he has been convicted of an offence concerning his professional conduct (lit. c) or has been guilty of grave professional misconduct proven by any means (lit. d).

Again, the implementing conditions of this exclusion ground (which is, contrary to the exclusion grounds of Article 45 (1) not mandatory but optional) have to be determined by the EU Member States. Depending on Member States' definition of the notions "offence concerning his professional conduct" and "grave professional misconduct" in their implementation of Article 45 (2), collusion between bidders can thus constitute a reason for exclusion.

The fact that the EU rules do not specifically address the issue of collusion in public contracts is due to the fact that it is not in the first place the legal framework for the procedure that encourages or discourages collusion, but the way that the rules are applied in practice: The way in which the procedure is managed may have a decisive influence on the tenderers' compliance with competition laws.

The "design" of the tendering procedure can make an agreement between competitors more or less easy. For instance, "ascending" auctions enable undertakings to communicate in a covert way during the auction and to identify and immediately sanction any breaches of the cartel. By contrast, procedures with sealed-bids, and award to the highest/lowest bid make it more difficult for tenderers to form a cartel and render breaches of the cartel more advantageous. The choice of relevant and proportionate selection criteria is crucial. Awarding the contract to the lowest price can simplify the agreement between competitors, whilst when there are several award criteria, this becomes more complex. Very specific selection criteria may be a barrier to market access and, by discouraging the entry of new competitors, may enable undertakings present on the market to maintain existing agreements. Contracting authorities' stability and predictability of demand can make sharing of markets easier.

Certain tools in public procurement have to be handled with special care and on the basis of a good knowledge of the structure of the relevant market. Such tools are for instance the possibility to divide contracts into lots, subcontracting and the participation of temporary groups of undertakings. Especially in these cases, procurers' knowledge of market conditions, their awareness of cartels and of the effects of their own buying practices on short and long-term competition are extremely important to apply the rules in a manner that prevents collusion. For instance, when dividing a contract into lots, public authorities should if possible avoid creating lots which correspond, in quantity and content, to the number and activities of possibly interested market players, in order to avoid market sharing.

As the EU public procurement rules do not impose specific purchasing strategies, it is first and foremost the responsibility of contracting authorities to ensure that their procurement choices do not facilitate collusion among bidders, and the responsibility of Member States to help procurers in this task. We welcome initiatives to draft bid-rigging checklists in order to help procuring authorities detect bid-rigging and design procedures in a way that limits the risk of cartels, the sharing of best-practices among procurers and the dissemination of training manuals for public officials.

## FRANCE

### Introduction

In France, public procurement is governed by a whole raft of regulations set out in the Public Procurement Code: the procurement process and procedures are each organised at every stage (decision to put out to contract, choice of procedure, choice of bidder and contract performance), significantly restricting the purchaser's room for manoeuvre. In addition to rules that apply specifically to public procurement, there are rules governing the activities of public bodies and of their agents: general principles (principle of legality, concept of public interest), statutory provisions, ethical rules (impartiality, probity, discretion, etc.).

This raft of regulations seeks through information transparency and procedural integrity to safeguard both efficiency in public procurement, including the proper use of funds, and the principles of equality in public burden-sharing and free competition and should allow us to approach the optimum in competition, where one firm should gain no advantage over another other than by its own merits.

Yet, collusion and corruption still go on in public procurement. For instance the French Central Service for the Prevention of Corruption (SCPC) notes that "*These numerous controls are there as checks and balances designed to ensure the legality of the procurement process... yet, public procurement in France, as in most other countries, is fertile ground for public corruption*", hence "*the paradox of public procurement in France: on the one hand it is trammelled by red tape and controls while, on the other, public procurement contracts increasingly prime territory for anti-competitive practices.*"<sup>1</sup>

However, the paradox is only an apparent one and a closer analysis will provide a better understanding of the link between the distinct but closely related phenomena of collusion and corruption.

For instance, observers have noted that corruption is liable to spread wherever there is information asymmetry, which is often inherent in public procurement contracts: purchasers do not have a precise idea of their needs or of the characteristics of the product being proposed and call in a specialist, who takes on the position of intermediary agent/specifier, and acts as adviser to the purchaser or, purely and simply, as their authorised representative.<sup>2</sup>

This gives the intermediary agent/specifier power, a power that can potentially be corrupted and competition on the market concerned is likely to be hindered should the intermediary steer the choice of the public contracting authority not towards the best tender, but towards its own interests. From the bidder's point of view, corruption is a means of beating competing firms in order to win the contract.

However, corruption can also be the price that a number of firms colluding as a cartel have to pay in order to be able to operate the cartel and conceal its existence; in such cases, anti-competitive practice and corruption are very closely linked. Corruption offers solutions to a cartel's problems. The cartel has to guarantee that rents are shared out, ensure that all members play by the rules and discourage any potential

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<sup>1</sup> "L'audit de la corruption dans les marchés publics des collectivités publiques" Rapport annuel 2007.

<sup>2</sup> See "Corruption et pratiques anticoncurrentielles" by F. Jenny, in *Pratiques et contrôle de la corruption*, Montchrestien, 1997.

defectors from leaving. Corruption is the basis for the distribution of rents and a means of retaliation against defectors as well as creating barriers to entry

Cartels organise a semblance of competition, the aim of which is to secure excess profits for every member of the coalition and to protect the intermediary agent/specifier who is keen to avert any suspicion.<sup>3</sup> They must rig bidding so that the chosen bidder is as if it is the most competitive and other bids, termed “covering” bids, conceal the pre-arranged choice. Once in place on a market, one cartel naturally leads to another through a process of trade-offs and so that in exchange for submitting a cover bid each firm can take its turn at being the successful bidder for another public procurement contract.

The outcome of such concerted action in cartels involving corruption is excessive for public procurement costs, costs which are ultimately passed on to the taxpayer; the seriousness of this problem is therefore a recurring cause for concern. In cases in which the loss to the government purchaser has been estimated, the figures for excess costs put down to the absence of competition range from 15 percent to 30 percent.

In Competition Authority litigation, the number of cases involving cartels in government procurement contracts shows how frequent collusive practices are, chiefly by means of communications between firms. Yet the fines imposed on the firms involved in such practices can be very large and may even be accompanied by a criminal conviction for those involved.

Since bribery of a procurement official and collusion between bidding firms in government procurement often go hand in hand, a combination of both criminal and administrative enforcement is necessary (1). To this end, the Competition Authority and the criminal courts make use of whatever instruments they have at their disposal for the prevention of collusion and corruption in public procurement (2) and interaction and two-way procedural channels between these bodies should help make for more effective enforcement(3).

## **1. Instruments to Prevent Collusion and Corruption in Public Procurement**

### ***1.1 Competition Law, a Weapon against Collusion and Corruption***

Competition law sanctions collusive practices in public procurement; it can play a role in both deterrence and enforcement as well as making a useful contribution to the official rules on public procurement, under which failure to comply is sanctioned by rendering contracts null and void, by bringing liability proceedings and imposing criminal sanctions.

In the field of public procurement, the Competition Authority, the successor to the Competition Council, looks chiefly at the practices of bidders and leaves scrutiny of the behaviour of government procurement officials to the competent administrative, financial or criminal jurisdictions.

That said, irrespective of their ultimate administrative or even criminal liability, contracting authorities which have actively abetted the operation of a cartel through facilitation and which themselves conduct an economic activity on a market can be sanctioned for cartels in exactly the same way as firms (Decision 05-D-61 of 9 November 2005). Those assisting contracting authorities and any other professional aiding and abetting a cartel may also be held liable for that cartel. This is what happened to a company providing assistance to the contracting authority in case 07-D-15 of 9 May 2007 concerning practices relating to public procurement contracts for schools in the Île de France, which was upheld by the

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<sup>3</sup> See “*Corruption et pratiques anticoncurrentielles : une première réflexion à partir d’une étude de cas*”, Jean Cartier –Bresson, Petites Affiches, 1 July 1999.

Paris Court of Appeal on 3 July 2008 (Eiffage), (see also the judgment of the Court of First Instance of the European Communities, 8 July 2008, Treuhand AG).

While the Competition Authority is competent to assess the practices used by firms to distort competition under the rules of competition law, it is not competent to assess the lawfulness of a call for tender or the delegation of a public service, which can be examined only by the competent administrative review judge.

Actually, the administrative courts, whose role is to review the lawfulness of action taken by the administration, are no strangers to litigation on anti-competitive practices, with public entities stepping up their economic activities

It is the job of administrative review judges to review action taken by the administration, which is required to comply with the legal framework within which that action should be implemented. In point of fact, competition law and provisions on anticompetitive practices in particular all form part of the whole body of law: the rules of competition apply to the public authorities not only when they are providing economic services, but also when they are overseeing the organisation of those services.

In this capacity, an administrative judge hearing an appeal brought on *ultra vires* grounds contesting an act that is separable from a contract, or following referral by the Prefect for contracts put out to tender by local authorities and their public agencies, has the power to review the lawfulness of that act in the light of competition law and to order its annulment. This is a mechanism that enables a review of the choice of bid packages, for instance, or decisions to turn down or accept a tender application by a group or consortium on the grounds that its formation would infringe competition rules. These are mechanisms that can prevent the risk of cartel agreements arising from the procurement authority's choice of modalities in public procurement procedures.

Although administrative jurisdictions are unable to impose a sanction, they are still a crucial mechanism of intervention in this area.

## **1.2 Competition Authority Practice in Cases of Collusion in Public Procurement**

An analysis of the decision-making practice of, first, the Competition Council, then the Competition Authority clearly shows that collusion in public procurement can affect the whole of government, including central government, local and regional authorities and the social security administration, and that it is the construction and civil works sector of the market that is the most affected. These practices generate a cost for the public and do real damage to the economy, which is why the Authority is working hard to prosecute and sanction this type of behaviour.

Each year between 16 and 28 percent of the sanctions imposed by the Authority in its litigation capacity are in cases involving public procurement, or an average of 13 cases per year from 2004 to 2008.

*Information exchanges*, on a more or less formal and organised basis is the first (and sometimes the only) step in setting up a cartel and it can seriously undermine the fairness of a call for tender and distort the free operation of competition. They may also be the only signs of a cartel agreement, since proof of market sharing may be lacking.

Only recently, the Competition Authority stressed that “on several occasions the Competition Council had pointed out that in public procurement contracts subject to tender, firms are deemed to have entered into an cartel agreement once proof is brought either that they have co-ordinated their bids or that they

exchanged information prior to the date on which the outcome of the tender process is known or could be known.”<sup>4</sup>

While certain practices may clearly be aimed at price fixing for the tenders to be submitted or at pre-designating the future contractor by ensuring that it appears to be the cheapest bidder, it is nonetheless true that “*simply exchanging information on any competitors there may be, their name, size, personnel or equipment availability, their interest or lack of interest in the contract in question, or the prices they are thinking of proposing, is also detrimental to free competition because it limits the independence of tenders.*”<sup>5</sup>

The practice of *cover bids* (simulating competition by submitting bids deliberately designed so as not to be selected, hence ensuring that the contract will be awarded to the bid that they are covering) and *market sharing agreements* are the most successful, often related, forms of anti-competitive practice. In the case of complex invitations to tender, in particular, a cartel agreement is not feasible without *organised concerted action*, which requires meetings and trade-offs. It is accepted that proof can be constituted by a body of evidence, no one item of which taken singly would be proof by itself, but which is serious, accurate, and consistent enough when taken cumulatively to establish that such practice has taken place.

One case on an extraordinarily large scale warrants mention under this heading.

In a 2006 Decision regarding practices in the civil engineering sector in the Île-de-France Region, the Competition Council fined 34 construction firms EUR 48 million, for widespread cartels in public procurement contracts in the Île-de-France, a decision upheld by the Court of Appeal and the *Cour de Cassation*, France’s highest appellate court.<sup>6</sup>

From 1991 to 1997, the leading firms in the sector had colluded to share out contracts for civil engineering works among themselves or their subsidiaries in the Île-de-France and had involved several other firms into the bargain. In all, invitations to tender for around 40 contracts were distorted. Under this widespread cartel, the major firms in the sector shared future work out among the companies in their group through “round tables” at which the managers of the firms met to express their interest in future contracts and see to it that the planned share-outs were adhered to. The share out of these contracts operated over a long period and was based on a very sophisticated allocation system; it was done by exchanging a steady flow of information and the practice of cover bidding. Adherence to the basis for the distribution of shares was ensured by keeping accounts of advances and delays for each company and by a system of compensation that might take the form of the payment of sums of money, the provision of sub-contract work officially or unofficially or the formation of jointly owned companies.

However, firms can also reach an agreement not to respond to an invitation to tender, in which case the *exchanges of information are aimed at abstaining from submitting a tender*. For instance, the Council fined five companies marketing implantable cardiac defibrillators a total of EUR 2.6 million for agreeing

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<sup>4</sup> Decision no. 09-D-18 of 2 June 2009 concerning the practice of setting up a temporary RTM-Veolia consortium with a view to its becoming a bidder for a delegated public service contract from the Urban Community of Marseille Provence Metropolis (CUMPM) for the operation of a tramway network in the city of Marseille and Decision no.09-D-34 of 18 November 2009 concerning civil works contracts for electricity and public lighting in Corsica.

<sup>5</sup> Decision no. 09-D-25 of 29 July 2009 concerning the practices of firms specialising in railway construction work (the outcome on an appeal before the Paris Court of Appeal is pending).

<sup>6</sup> Decision 06-D-07 of 21 March regarding practices in the civil engineering sector in the Île-de-France region, Paris Court of Appeal, order of 24 June 2008 (France Travaux), *Cour de Cassation*, order of 13 October 2009.

not to respond to a nation-wide invitation to tender launched in 2001 by 17 hospital centres which had grouped together to purchase their defibrillators over 2 years in order to secure the best price and terms of service.<sup>7</sup> The firms in question had met together several times, right from the announcement of the plan to issue a joint call for tender to two weeks prior to the deadline for submitting tenders, and had devised a joint strategy which was to abstain from replying to the invitation to tender and instead write to the contracting authority to raise technical points, each of them explaining why it had not taken up the invitation to tender. This cartel agreement caused the failure of the new joint purchasing procedure and deterred its future use for medical devices. This decision was upheld by the Court of Appeal.<sup>8</sup>

A point to note is that the Council had repeatedly reminded contracting authorities of the need to be vigilant and of their role in fostering competition, particularly in invitations to groupings and the subdivision of tenders into packages: they always have the option of rejecting a tender from a grouping if they so much as suspect that its aim is anti-competitive and “can always split up the contract proposed and draft the tender regulations to cover packages so that the largest number of firms can compete on an individual basis and so that they reserve the option to reject bids from grouping of firms in principle, in accordance with criteria which remain at their own discretion.”<sup>9</sup>

The procurement authority is also responsible for seeing that the bidders all have equal access to the information available (particularly where a contract renewal or delegation is involved, so that the incumbent firm does not have too great a comparative advantage over other competitors). It is responsible for drafting the terms and conditions so that it does not give certain firms an advantage, primarily if it selects technical specifications which give their products or services an advantage<sup>10</sup> or has unclear tender regulations, which could lend themselves to discrimination among competitors.<sup>11</sup>

Administrative courts confirm that contracting authorities, local authority purchasers and other procurement bodies bear special responsibility for preventing cartel agreements between firms. They must set aside bids that they know to be the result of anti-competitive practices by bidders and, more generally, ensure effective compliance with the rules of free competition.<sup>12</sup>

Although it is not up to contracting authorities to take the place of competition authorities and the courts in establishing that unlawful practices are going on or to sanction them, they still have several ways of contributing to the prevention of cartels: they can prevent cartel agreements through their policies on invitations to tender, detect firms that have exchanged information and inform the Competition Authority, in liaison with government competition watchdog agents.

However, it should be stressed that, according to established practice in issuing decisions, the behaviour or inexperience of a contracting authority which issues an invitation to tender, even where it may facilitate the improper practices of firms, cannot frustrate the enforcement of competition law.

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<sup>7</sup> Decision 07-D-49 of 19 December 2007.

<sup>8</sup> Judgment of 8 April 2009.

<sup>9</sup> Decision 05-D-19, 05-D-26 and 05-D-70.

<sup>10</sup> Decision 92-D-62 of the Competition Council; Paris Court of Appeal, 7 May 1997 and *Cour de cassation*, 18 May 1999: Biwater case.

<sup>11</sup> Decision 03-MC-01.

<sup>12</sup> Judgment of 6 February 2003 of the Bastia *Tribunal administratif*, judgment of the *CE*, 28 April 2003, Fédération nationale des géomètres experts.

For instance, in a recent decision on the practices employed in the school and intercity coach transport sector in the Pyrénées-Orientales, the Competition Authority pointed out that “*according to case law, the practices employed by the contracting authority in issuing an invitation to tender, even if they facilitate improper practices, cannot frustrate the enforcement of the provisions of (...) Article L. 420-1 of the Commercial Code, if it is established that companies have conducted practices tending to distort the free play of competition (Commercial Chamber of the Cour de Cassation, 12 January 1993, SA Sogea.)*”<sup>13</sup>

The transport companies which had been accused of taking part in anti-competitive concerted action by forming one consortium for each package in order to share out the school transport market in the *Département* among themselves, had attempted to put forward the role played by the Principal, which had allegedly suggested that consortia should be set up to respond to the invitation to tender.

### **1.3 Tools for Criminal Prosecution in Public Procurement**

#### **1.3.1 Specific Offences: Anti-competitive Practices and Favouritism**

##### *Article L. 420-6 of the Criminal Code*

Prior to 1986, all cartel agreements and abuses of dominant position were punishable by a prison sentence of up to 4 years.<sup>14</sup> The responsibility for the scrutiny and sanctioning such practices rested with the criminal courts. The Ordinance of 1 December 1986<sup>15</sup> largely decriminalised competition law, resulting in fewer criminal liability cases for anti-competitive practices. Henceforward, Article L. 420-6 of the Commercial Code provides for “*4 years imprisonment and a fine of EUR 75 000 for any natural person who fraudulently takes a personal and decisive part in the conception, organisation or implementation of the practices referred to in Articles L. 420-1 and L. 420-2*”.

The ability to hold natural persons criminally liable is an indispensable adjunct to the powers of the Competition Authority, which itself has the power to sanction only legal persons.

However, criminal sanctions for this offence are still very common;<sup>16</sup> the fact that the practice has to be fraudulent in nature, which excludes straightforward negligence on the part of the person being prosecuted, for instance, actually makes it quite difficult to assess the facts of the case. This explains why convictions for this offence are handed down mainly for cartel agreements in public procurement contracts and when there is an accompanying charge of corruption, for instance, which makes it easier to establish the fraudulent nature of the offence.

The different elements that constitute a criminal offence are largely based on the same practices as the administrative offences punishable by the Competition Authority: the practices referred to in Articles L.420-1 (cartel) and L. 420-2 (abuse of dominant position) of the Commercial Code have to be established.

<sup>13</sup> Decision 09-D-03 (appeal brought before the Paris Appeals Court, case pending).

<sup>14</sup> Ordinances no.45-1483 and 45-1484 of 30 June 1945.

<sup>15</sup> Ordinance no. 86-1243, 1 December 1986.

<sup>16</sup> Nevertheless, over the past 8 years, for practices liable to criminal sanctions in public procurement (whether for 420-6 or favouritism), 22 cases per year on average are “referred” to prosecutors by the DGCCRF; given an average dismissal rate of 40 percent, that makes 13 different cases in the public procurement sector ruled on each year by criminal courts (the total number of criminal cases in the public procurement sector is actually higher than that as the procedure provided for under Article 40 of the CPP can be instigated by any civil servant).

A point to note is that this offence is sometimes the key to prosecution for other criminal offences (corruption, favouritism, defalcation, etc.) given that cartel agreements in public procurement are often linked to such offences and often require “the passive or active complicity of administrative bodies which are capable of detecting, or at the very least suspecting, cartels”<sup>17</sup>.

### 1.3.2 *Favouritism as an Offence*

The offence of “granting unfair advantage”, more widely known as “favouritism”, instituted in 1991<sup>18</sup> and punishable under Article 432-14 of the Criminal Code, currently accounts for the bulk of criminal litigation in the public procurement sector.

This is a criminal offence specific to public procurement law which serves to sanction breaches of competition law, particularly by public procurement officials.

Under the terms of this Article : *“An offence punishable by two years' imprisonment and a fine of EUR 30 000 is committed by any person holding public authority or discharging a public service mission or holding a public electoral mandate or acting as a representative, administrator or agent of the State, territorial bodies, public corporations, mixed economy companies of national interest discharging a public service mission and local mixed economy companies, or any person acting on behalf of any of the above-mentioned bodies, who obtains or attempts to obtain for others an unjustified advantage by an act breaching the statutory or regulatory provisions designed to ensure freedom of access and equality for candidates in respect of tenders for public service and delegated public services.”*

It applies, for instance, to granting privileged information to one bidder for the contract,<sup>19</sup> failing to divide the contract into packages (letting an entire contract when its lack of uniformity would have justified subdivision into packages, if competitive tendering was organised in such a way that the successful bidder was the only bidder in a position to tender for the contract),<sup>20</sup> inserting technical clauses into the conditions of contract which only one company can meet, to reissuing invitations to tender or declaring no bidder successful with the aim of enabling a particular bidder to secure the contract.<sup>21</sup>

Moreover, as well as constituting an offence under the legislation on favouritism the same practices may also constitute a breach of competition law.

Economic operators which have benefited from an offence under the legislation on favouritism or anti-competitive practices may also be prosecuted as an accessory after the fact to the offence of favouritism or to the offence referred to in L. 420-6 of the Commercial Code. A charge of complicity in these offences may also be brought against persons not charged with the predicate offence.

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<sup>17</sup> Jean Cartier –Bresson, “*Corruption et pratiques anticoncurrentielles : une première réflexion à partir d’une étude de cas*”, Petites Affiches, 1 July 1999.

<sup>18</sup> Law no. 91-3 of 3 January 1991.

<sup>19</sup> *Cass. crim.*, 23 May 2007, no. 06-87.898.

<sup>20</sup> *Cass. crim.*, 20 May 2009, no. 08-87.354.

<sup>21</sup> *Id* note 23.

### 1.3.3 Corruption as an Offence

Furthermore, corruption is traditionally punishable under the Criminal Code as passive corruption, influence peddling<sup>22</sup> and active corruption, which are all offences.<sup>23</sup>

There are two sides to the crime of corruption: the first is the passive corruption of the person being bribed, who holds the power and accepts or solicits a gift or advantage of any kind in return for carrying out a service that is part of his/her mission for the benefit of the person offering the bribe; the second is the active corruption of the person offering a gift or advantage in exchange for services rendered by the civil servant, elected representative, manager, etc. One of the forms that the deal between the person accepting the bribe and the person offering may take is under-the-table payments to speed up the procedure for securing a public contract. The main distinction between this and the offence of favouritism is the notion of payment for services rendered

Influence peddling has a different purpose; the perpetrator is supposed to improperly use his/her real or supposed influence in order to secure a contract; such persons introduce themselves as the intermediary between the potential beneficiary and the victim of the improper behaviour. When a private individual takes the initiative and asks a person who has influence to make improper use of it, this is termed active peddling; when the person with influence takes the initiative, this is termed passive peddling.

With the very heavy sanctions risked, the sanctions for corruption and influence peddling are the stiffest penalties in the enforcement arsenal in the public procurement field.

There are also numerous other offences, chiefly financial, under ordinary law which can sometimes be applicable to breaches of competition law in public procurement: the unlawful taking of interest (Article 432-12 of the Criminal Code), breach of trust (Article 314-1 of the Criminal Code), fraud (Article 313-1 of the Criminal Code), misappropriation of funds (Articles L. 242-6 and L. 242-30 of the Commercial Code),

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<sup>22</sup> Article 432-11 of the Criminal Code: *“The direct or indirect request or acceptance without right and at any time of offers, promises, donations, gifts or advantages, when done by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate, is punished by ten years' imprisonment and a fine of EUR 150 000 where it is committed either:*

*1° to carry out or abstain from carrying out an act relating to his office, duty, or mandate, or facilitated by his office, duty or mandate;*

*2° or to abuse his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision.”*

<sup>23</sup> Article 433-1 of the Criminal Code: *“Unlawfully proffering, at any time, directly or indirectly, any offer, promise, donation, gift or reward, in order to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate:*

*1° to carry out or abstain from carrying out an act pertaining to his office, duty, or mandate, or facilitated by his office, duty or mandate;*

*2° or to abuse his real or alleged influence with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or the government;*

*is punishable by ten years' imprisonment and a fine of EUR 150 000.*

*The same penalties apply to yielding before any person holding public authority, discharging a public service mission, or vested with a public electoral mandate who, unlawfully, at any time, directly or indirectly solicits offers, promises, donations, gifts or rewards to carry out or to abstain from carrying out any act specified under 1°, or to abuse his influence under the conditions specified under 2° above.”*

forgery (Article 441-1 of the Criminal Code) or the subornation of witnesses (Article 434-15 of the Criminal Code), etc.

While a complex cartel may sometimes involve a mix of several criminal offences, breaches of competition law in public procurement do not always constitute offences under criminal law with the result that criminal law can only be applied on a case-by-case basis.

## **2. Interaction of Collusion Prevention and Corruption Prevention**

### **2.1 *Île de France High Schools Case***

In a 2007 decision on practices employed in public procurement contracts for high schools in the Île de France,<sup>24</sup> the Council sanctioned a widespread cartel which shared out contracts for the region's high school renovation programme between the major French construction and civil engineering groups and their subsidiaries. The case involved 88 contracts with civil engineering firms over the period 1989 to 1997 in seven successive waves and a total of FF 10 billion.

This widespread cartel was formed right at the launch of the construction programme through meetings to allocate shares, direct contacts and the exchange of information between firms. It operated for 7 years under the aegis of Patrimoine Ingénierie, consultant to the contracting authority and always used the exact same operating method. Each of the firms, all pre-selected, either ensured that it would obtain the contract by letting its "competitors" know which contracts it had chosen and for what price, or ensured that it did not obtain the contract by submitting a bid that was deliberately higher (a cover bid). The smooth operation of this general share-out of contracts was ensured by Patrimoine Ingénierie, which gave the firms advance information about upcoming operations and afterwards ensured that the correct firm was indeed awarded the contract.

The Council stated, when handing down this decision, that the fact that the firms could show that this practice would not have had an anti-competitive impact (such as an increase in prices) in no way exonerated them from liability since, to impose a sanction, all that was required was to demonstrate that the aim of the agreement was anti-competitive, nor did the fact that the contracting authority was behind the arrangement or had actively participated in its operation, since the liability of the instigator and ring-leader did not absolve those who went along with the scheme, unless they could demonstrate duress.

Underlining the extreme gravity of the firms' behaviour and the particularly serious damage done to the economy, the Council imposed exemplary sanctions amounting to 5 percent of the turnover of the firms concerned – i.e. the maximum authorised by the legislation applicable at the time.

Alongside the Council proceedings, this case led to criminal proceedings and sanctions which illustrated, on an extraordinary scale, how the practices of collusion, favouritism and corruption could be closely interwoven and how, together, they had been instrumental in setting up a system of funding for political parties.

It appeared that the Regional Executive and its representatives had encouraged the cartel agreement between the subsidiaries of the leading civil engineering groups with a view to sharing contracts for work on high schools in the Île de France "fairly" between them and had demanded, in return, that the firms

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<sup>24</sup> Decision 07-D-15 of 9 May 2007 concerning practices employed in public procurement contracts for high schools in the Île de France- Court of Appeal, 3 July 2008, Eiffage- *Cour de cassation*, 13 October 2009, Société Spie.

provide kickbacks to finance the political parties represented at Region level, whose members sat on the Committee for Invitations to Tender.

This fraudulent scheme had operated at the price of breaching the rules of the Public Procurement Code (CPP), the rules on competition and criminal law.

It had been able to operate for a number of years chiefly because of the involvement of the consultancy firm, Patrimoine Ingénierie, (practices relating to the offence of favouritism made this latter firm the winning bidder for 170 contracting authority consultancy contracts out of the 214 let by the Regional Council), whose very broad brief (analysis of tender documentation drafted by the contracting authority and tender submissions, finalisation of contracts and organisation of contract performance, etc.) reflected “*the intent of the (Regional Council) to have (it as) a permanent assistant and to delegate to it a substantial share of its prerogatives so as to make it the (...) lynchpin of the fraudulent scheme.*”<sup>25</sup>

Under the outward semblance of legality, the criminal courts had also noted, contrary to the rules applicable to public procurement contracts, that there had been systematic recourse to a special procedure for civil engineering contracts, which permitted restricted invitations to tender, as well as anomalies in the operation of the Committee for Invitations to Tender, which was found to have employed corrupt practices which had been a contributing factor to the entire scheme.

Firms that had benefited from public procurement contracts had taken concerted action and had obtained from the Office of the Regional Executive of the Île de France and the aforementioned mentioned consultancy privileged information on the provisional estimates for each operation, the names of other selected bidders or consortia and the prices they proposed, which had enabled them to align their bids accordingly, although remaining within the parameters of a broader share-out between the major groups in the sector, imposed by the Regional Executive itself. The aim of favouritism in this case was to operate a cartel among the affiliate firms of the big civil engineering and construction groups with a view to sharing public procurement between them.

Accordingly, the Court of Appeal found that the political parties had required an undertaking from firms to pay them a percentage of the price of the contracts obtained, as a condition of access to public procurement contracts.

It also found that the “cartel organised among the firms, with the assent of the contracting authority, had given the members of the Regional Executive and political parties greater powers to influence those firms, which felt that they “owed” the financial contributions that they were being asked to pay”, thereby establishing the intent behind the pact as constituting corruption and influence peddling.

The executives and directors of the firms were convicted on charges of fraud, misappropriation of funds, corruption and illicit agreements to distort or restrict the free interplay of competition, the regional public officials and the Regional Council’s delegate on charges of favouritism and breaches of the rules on free and equal access to public procurement contracts, lastly, the treasurers, fund collectors and elected representatives of political parties were found guilty of being accomplices and accessories to corruption and influence peddling.

A point to note is that when hearing this case, the *Cour de Cassation* stated that to be an accessory to corruption one did not have to have personally profited from non disclosure and upheld the conviction of a director of one civil engineering firm, pointing out that a cover bid that purported to be a competitive bid in

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<sup>25</sup> Judgment, Paris Court of Appeal, 27 February 2007.

order to make another bidder seem cheaper, was indeed of a nature to hinder the free interplay of competition and likely to artificially inflate prices.<sup>26</sup>

## 2.2 *The Seine-Maritime Asphalt Case*

The Seine-Maritime asphalt case is emblematic of a situation involving collusion and corruption in the public procurement sector, both in that the practices in question went on for such a long time, almost 10 years, and in the overcosts to the community, which amounted to more than EUR 24.8 million over the period 1992 to 1998 (or a little more than 10 percent of the contract total) according to a conservative estimate.

In the late 1980s, the Seine-Maritime General Council decided to launch a vast programme to renovate 2 500 km of its road network. The contract required the pouring of 200 000 to 350 000 tonnes of asphalt and had an annual budget of EUR 23 to 38 millions.

On 14 March 1994, following information given by a plaintiff firm, the Ministry of the Economy requested the General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) to conduct an enquiry into road works, particularly the supply of asphalt, in the Seine-Maritime Department.

With the authorisation of the presidents of the Rouen and Dieppe regional courts (*Tribunaux de grande instance*), the DGCCRF served warrants on the firms; it then proceeded to seize documents and interview senior company managers.

A report of the enquiry giving an account of the procedures and presenting the evidence gathered was then drafted.

After examining the case, the Competition Council convicted several civil engineering companies, most of them subsidiaries of large groups, on 15 December 2005. The Council fined the companies -- which had formed consortia to set up asphalt plants and respond to invitations to tender -- a total of EUR 33.66 million for breaches of the regulations on concerted action, cartels or coalitions, the aim or potential effect of which was to prevent, restrict or distort the free interplay of competition on a market.

The conviction was upheld and an appeal on a point of law was dismissed.

At the same time, an action was brought in order to establish any potential criminal liability of the natural persons who had fraudulently taken a personal and decisive part in the organisation of this cartel.

### 2.3 The asphalt market in Seine-Maritime

Professionals use two types of plants to manufacture asphalt. In both cases, these plants, which can have an impact on the environment, can only be established with authorisation by the prefect.

- A *portable plant*, used to provide a continuous flow of asphalt, is suitable for a specific work project that will use all of its production and which must therefore be large enough to make it cost-effective to install this type of plant.
- For an investment ranging between one and a half and four and a half million euros, a *fixed plant* can be used, which can store different qualities of asphalt and supply a variety of customers at

<sup>26</sup> *Cass. Crim.*, judgment of 20 February 2008.

work sites requiring lower tonnages than a mobile plant. This type of plant met the needs of the *Département* of Seine-Maritime, which signed a variety of contracts for asphalt involving multiannual purchase orders that consolidated orders of varying size across different geographical locations.

In its judgment of 11 September 2008, the Court of Rouen also pointed out that the costs of manufacturing and transporting asphalt accounted for 80 % and 10 % respectively of the cost of the work, which gave a “significant advantage” to civil engineering companies that were shareholders in plants, where they could source their supply at special rates.

#### **2.4 *The Collusive Behaviour of Asphalt Companies***

In the 1990s, these civil engineering companies had agreed on a scheme for apportioning the tonnages of asphalt for the roads of Seine-Maritime for all contracts. They exchanged information on the tonnages delivered to ensure that everyone respected their quota and to correct any imbalance, if necessary by subcontracting.

The members of the cartel met regularly when the *Département* issued calls for tenders in order to determine which consortia of bidders would be awarded each package, while their competitors merely made cover bids; they then met again when the programmes of work were published at the beginning of the year in order to divide up the work among themselves according to the respective tonnages agreed for each of them.

They submitted their bids in consortia that lacked any economic or financial justification. These consortia distorted prices, which were no longer set through the free play of the market since the cover bids necessarily misled the contracting authority about the reality and extent of competition on the asphalt market.

These companies even went so far as to scheme against competitors who might disturb the cartel, for example by setting up bogus associations for the protection of the environment to prevent the construction of a rival asphalt plant.

These practices were able to continue for some time because of the support provided by government officials who enabled this system to survive through the action they took.

Two government officials in the *Département*'s infrastructure directorate had noticed that the same packages were awarded to the same consortia and that the prices of bids were the same from one call for tenders to another.

On this basis, they had concluded that there was a cartel agreement.

However, they did not do anything to prevent these consortia and did not alert elected officials, who nevertheless relied on them heavily because of their technical knowledge. They even went as far as to consolidate the cartel by their actions, firstly by requiring a deposit covering 100 % of the contract, which placed at a disadvantage small companies that might compete with the already established major companies, and secondly by including a clause requiring prospective bidders to have an operational plant at the date when they submitted their bids. Given the very short time between the publication of the call for tenders and the deadline for submitting bids, this requirement, of limited interest, could not be met by any bidder that did already not have a fixed plant in the *Département*.

These actions therefore favoured the companies that had been awarded the previous contracts, which already had asphalt plants. Consequently, there was a barrier to market entry of a contractual nature, which had been included in the specifications of the call for tenders.

Certain officials received benefits at the expense of civil engineering companies.

These two officials benefitted from having asphalt surfacing laid on their property free of charge. They were also given holiday trips for themselves and their families, the free loan of a car and payment for the hours of flight time required to maintain a valid pilot's licence.

## **2.5 Compensation for Damage**

The Competition Council considered that the loss to the economy was the result of the long duration of the practices and the higher prices charged in the absence of competition during this period. According to a low estimate, it was calculated that the public purchaser overpaid, between 1992 and 1998, approximately three and a half million euros annually, and a 16.45 % overcharge was estimated in 1998 alone, i.e. 4.95 million euros.

The Competition Council is not able to compensate victims for the damage sustained. They must therefore gain redress in the courts.

The public purchaser therefore initiated civil proceedings in the *Tribunal de Grande Instance* against the natural persons responsible in the companies and the two officials in its procurement department. Eleven natural persons and seven companies were subsequently ordered to pay a total amount of 4.95 million euros in compensation for the material losses sustained.

With regard to non-material damage, the court awarded the public purchaser symbolic damages of one euro to be paid by both of the public officials involved.

## **2.6 Criminal Convictions**

The natural persons convicted of playing a key personal role in organising the cartel were given suspended sentences of up to 18 months imprisonment and a 40 000 euro fine, for a total of 144 months of imprisonment with suspended sentences and 269 000 euros in fines. This system of criminal convictions reinforces the system of sanctions against anti-competitive practices in France.

This cartel agreement between companies in public procurement contracts lasted for years thanks to the support of public officials who had technical knowledge and a privileged position in advising elected officials as to the choice of bidders.

This example highlights the close relationship between the anti-competitive practices of companies and the development of practices that are criminally punishable as forms of corruption. The continuation of an anti-competitive practice over a number of years is obviously facilitated by the presence of accomplices inside the procurement department.

The role played by accomplices can guide investigation officials in a programme aimed at detecting potential anti-competitive practices.

It is always difficult to detect the existence of a cartel without special information that makes it possible to target a specific procurement department in order to analyse carefully the results of calls for tenders. However, it may be easier to look for whether any "compensation" is being provided to accomplices by companies involved in a cartel.

In the case studied, this compensation took the form of services rendered by outside providers that billed their customers for these services. In such cases, a systematic search on the basis of copies of these bills can target the corporate customers of these providers that are regularly awarded public procurement contracts. For some of these services, the individual recipients can be identified for security-related reasons – this is the case for travel and vehicle rental services. At this stage, the investigators need only to search whether public procurement officials and even elected officials are on these lists of recipients.

The final stage of this specific targeting consists of identifying the procurement department to which these recipients of services belong, which makes it possible to look for any signs of anti-competitive practices in the results of calls for tender and then obtain search warrants to collect evidence of the suspected practices.

Thus far, this method has been implemented on an experimental basis. The initial results have been inconclusive. Nevertheless, this type of search should be continued, for the detection of anti-competitive practices through specific targeting can never be successful without perseverance.

This case of asphalt provision in the *Département* of Seine-Maritime might have been prevented if the public procurement department had been careful to change regularly the officials assigned to these sensitive positions, since keeping officials in these jobs for many years creates a close relationship with companies that can facilitate practices of passive corruption by the officials involved.

### **3. The Interaction Between the Criminal and Administrative Procedures**

#### **3.1 *The Communication of Documents from Criminal Cases to the Competition Authority and the Use of these Documents as the Basis for Charges Brought***

Under Article L.463-5 of the Commercial Code: “Investigating authorities and courts may forward to the Competition Authority, at its request, court records, investigation reports and other documents from criminal proceedings having a direct relationship with matters that have been referred to the Authority.”

The Competition Council has used this procedure on a number of occasions, under the supervision of the Paris Court of Appeal and the *Cour de Cassation*, which interpreted the terms of Article L.463-5 flexibly, thereby ensuring that it is genuinely effective.

Three cases concerning respectively public roadwork in Seine-Maritime, public procurement in Île-de-France and high schools in Île-de-France, which involved cartel agreements in the field of public procurement, illustrate quite clearly how the coercive power of the criminal procedure (searches, wiretapping, police custody, etc.) can be used by the Competition Authority in the most serious cases in which the natural persons behind cartel agreements have been identified.

By a decision of 15 December 2005, the Competition Council imposed a fine of 33.6 million euros on 6 civil engineering companies specialised in asphalt provision for having engaged in a complex and ongoing cartel in various contracts for *public road work in Seine-Maritime* from 1992 to 1998.<sup>27</sup>

These companies had reached an agreement on a scheme for apportioning the tonnages of asphalt for all contracts with the central government and General Council and had regularly exchanged information on prices before submitting bids. The main evidence on which the Competition Council based its analysis was derived from the criminal proceedings being held at the same time.

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<sup>27</sup> Decision 05-D-69 of 15 December 2005 concerning anti-competitive practices detected in the road work sector in Seine-Maritime.

The Court of Appeal and the *Cour de cassation* each rejected the requests for annulment and the appeals lodged against this decision.<sup>28</sup>

Regarding whether it is valid to use documents from criminal proceedings and whether the Competition Council can base its accusation on such documents, the *Cour de cassation* confirmed that documents from the criminal file could be validly be used as evidence against parties, without the “equality of arms” principle being compromised. Although the companies argued that, since they were not all involved in the criminal proceedings and therefore did not have access to the criminal file, they were unable to ensure that any exonerating documents might not have been removed by the Council’s *rapporteur*, the Court considered that the parties’ rights had been sufficiently protected by the fact that the charges were based on documents from criminal proceedings for which a list had been compiled, all of which had been cited and included in the file and made available to be consulted and challenged by the parties.

It was also considered permissible for the *rapporteur* to go to the office of the investigating magistrate and consult the entire criminal file under this magistrate’s supervision, without violating the confidentiality of the investigation or the rights of the defence, since all of the incriminating evidence selected was contained in the file.

In the case of the *cartel in public procurement in Île-de-France*,<sup>29</sup> the Competition Council took up this case on its own initiative in follow up to criminal proceedings brought against a number of natural persons in 1994, and which had concluded with dismissal of the case in November 2002 because the statute of limitations had expired. The Council based its decision to impose sanctions on the evidence and documents transmitted to it by the investigating magistrate.

The *Cour de cassation* specified that the tie established between the criminal and administrative procedure was limited to recognising that any interruption of the statute of limitations for the former also applied to the statute of limitations for the latter, but that these two procedures, which concerned different types of persons – natural persons for the former and legal persons for the latter – and pursued different objectives, remained clearly separate. This being the case, the continuation of the administrative procedure and the running of the statute of limitations for administrative action were in no way affected by the fact that the criminal procedure had been dismissed on 26 November 2002 by the investigating magistrate, who had ruled that the statute of limitations had expired following the decision by the Versailles Court of Appeal to annul two counts of the indictment.

It was also on documents drawn from criminal proceedings that the Council based its decision concerning the *high schools of Île-de-France* mentioned above.<sup>30</sup>

In the case of public procurement in Île-de-France and the case of the high schools of Île-de-France, the appeals to the *Cour de cassation* were aimed at challenging Article L. 463-5 in the light of Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms, on grounds that this procedure violated the “equality of arms” principle.

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<sup>28</sup> Judgment of the Paris Court of Appeal of 30 January 2007 Le Foll TP, Judgment *Cass. Com.*, 15 January 2008, Colas Île de France (D 05-D-69).

<sup>29</sup> Decision 06-D-07 of 21 March 2006 on practices used in the public works sector in the Île-de-France Region, Judgment of Paris Court of Appeal, Judgment of 24 June 2008 (firm *France Travaux*), *C. Cass.* com, Judgment of 13 October 2009.

<sup>30</sup> Decision 07-D-15 of 9 May 2007 on practices used in public procurement concerning the high schools of Île-de-France- Court of Appeal, 3 July 2008, Eiffage- *Cour de cassation*, 13 October 2009, firm Spie.

In its two judgments the *Cour de cassation* rejected this analysis and broadly approved that of the Court of Appeal and the Competition Council. Firstly, it considered that “*the fact that, under Article L. 463-5 of the Commercial Code, the Council alone is entitled, acting at the request of the rapporteur vested with the investigative powers conferred upon him by Article L. 450-1 of said Code, to request that the investigating magistrate, who alone may decide to grant or deny this request, communicate court records or investigation reports directly related to matters that the Council is considering, is not in itself contrary to the principle of equality of arms and impartiality stemming from Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms.*”

Secondly, it considered that “since, after they were notified of the charges, the companies involved had had the opportunity to debate before the Council and then before the Paris Court of Appeal both the conditions under which elements of the criminal investigation were communicated, the legality of which can be challenged by the persons concerned, and the content of all the documents drawn from the criminal file that the investigating magistrate allowed to be communicated to the *rapporteur*, and to present any documents that they considered useful, the judgment was correct in indicating that the provisions of Article L. 463-5 of the Commercial Code are not contrary to Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms”.

Regarding the methods used to communicate the documents of criminal proceedings, the Court pointed out that no particular form was specified by the text.

### **3.2 *The Influence of the Competition Authority on the Criminal Procedure***

#### **3.2.1 *The Authority’s Opinions***

The Competition Council – now the Competition Authority – advises the criminal courts on practices in the cases that they hear, under Article L. 462-3 of the Commercial Code. Consequently, since 1986, the Council has responded to 46 requests for opinions from all courts (civil and criminal).

Since the core of the criminal offence is constituted, as was shown earlier, by practices of cartels and abuse of dominant position defined by the Commercial Code, this “bridge” is welcome, even though the Authority’s opinion does not bind the court, which does, however, take it into account in practice.

#### **3.2.2 *Provision of Information by the Competition Authority to Criminal Courts; Transmission of Information to the Public Prosecutor***

The second paragraph of Article L.462-6 of the Commercial Code specifies that when the facts appear to warrant the application of Article L.420-6, the Authority shall send the file to the public prosecutor.

The Council has made a moderate use of this provision, having sent ten files to the public prosecutor since 1994, although the frequency has increased somewhat since 2000. Most of these cases involve cartel agreements in public procurement or price cartels.

For example, in a decision of 3 December 2008, the Council imposed sanctions on companies for having submitted separate bids at the time of tenders for a number of public contracts for maintenance work involving joinery and locksmith work, although these companies belonged to the same group and prepared their bids in a centralised manner. Having learned that the chief executive of the two companies involved, because of his lengthy experience with public procurement, was perfectly well informed of the applicable rules of competition, which he had deliberately ignored, the Council decided that the acts could

be considered as criminal under the provisions of Article L. 420-6 of the Commercial Code and sent the entire file to the public prosecutor at the *Tribunal de Grande Instance* of Créteil.<sup>31</sup>

The action taken subsequently on the basis of this information is up to the public prosecutor concerned. Nevertheless, the fact that it can forward a file to the public prosecutor's office gives the Authority a strong tool of dissuasion because of the publicity generated, and enables it to stigmatise the most serious practices and make its views known, even though it is up to the public prosecutor to decide whether the case should be prosecuted and the courts are not bound by the Authority's decisions.

In recent years, lawmakers have shown their determination to improve the effectiveness of this procedure and of criminal prosecution more generally by ensuring better co-ordination with the administrative procedure; for example, they passed legislation to ensure that acts that interrupt the statute of limitations for the Authority also do so for public action to prosecute the offense covered by Article L.420-6 of the Commercial Code,<sup>32</sup> and they then introduced a reciprocal rule in Article L. 462-7.<sup>33</sup>

By doing so, the lawmakers put an end to what legal theory and practitioners presented as an obstacle to the implementation of Article L. 420-6 and criminal prosecution, for example in cases in which the statute of limitations for the practices constituting the criminal offence had already expired when the file was transmitted to the public prosecutor.

In addition, the general rules of the Code of Criminal Procedure concerning the communication of documents applies to documents held by the Competition Authority: the public prosecutor, the judicial police officer or the investigating magistrate may require that any documents of interest to their enquiry or investigation be handed over to them.<sup>34</sup>

### 3.2.3 *Co-ordination of Criminal and Administrative Action in the Case of Leniency Programmes*

Although criminal sanctions for natural persons can be a major tool of dissuasion and enforcement against the most serious offences, they must be reconciled and co-ordinated with the action of authorities such as the Competition Authority that impose administrative sanctions on companies.

For example, when a clemency programme was introduced, it did not immediately lead to better co-ordination between the two categories of action. As a result, the exemption from sanctions that the Competition Authorities can grant to companies under the leniency programme does not guarantee natural persons immunity from sanctions in a criminal court, which can discourage them from using the leniency procedure.

Admittedly, the consequences of this situation should not be overstated since there is in fact no known case of anyone undergoing criminal prosecution after their company had requested leniency from the Council. In addition, the practice of the Council, and now of the Authority, has been not to transmit to the public prosecutor those files in which the persons covered by leniency programmes seem to be liable to criminal prosecution.

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<sup>31</sup> Decision 08-D-29 of 3 December 2008 concerning practices detected in the sector of public contracts for maintenance work involving joinery, metalworking and locksmith work.

<sup>32</sup> Law n°2001-420 of 15 May 2001, paragraph 3 of Article L. 420-6.

<sup>33</sup> Ordinance n°2008-1161 of 13 November 2008.

<sup>34</sup> Articles 60-1 and 99-3 of the Code of Criminal Procedure.

Nevertheless, as this situation is not satisfactory, a bill is being drafted aimed at enabling the managers of companies who have provided key evidence enabling their companies to qualify for a leniency programme to then be eligible for a provision by which the criminal court will cancel their sentence or reduce it by half.

Public procurement remains a high-risk sector both with regard to the rules of competition and the possible corruption of public officials.

### **3.3 *The Role and Activities of the Central Corruption Prevention Service (Service Central de Prévention de la Corruption, SCPC)***

The *sector of government contracting*, and of *public procurement* more generally, has always and everywhere been the sector of predilection for corruption and anti-competitive practices.

According to some estimates, in the construction and civil engineering sector, the amounts misappropriated are in the range of 3% to 5% of public contracts in Western Europe.

Paradoxically, the fact that there are particularly precise procedures and regulations and sometimes exacting administrative controls does not always make it possible to guarantee transparency, competition or the equal treatment of bidders, etc.

What is more, the people behind fraudulent schemes often have *sufficient technical knowledge* and advice to make it appear that their operations are in compliance with the legislation and procedures.

At the same time, the risk factors have not disappeared and are even on the rise.

The high level of complexity of legislation and the frequent changes that have characterised it in recent years are creating *additional risks* of unintentional irregularities, but also of deliberate acts of non-compliance.

Beyond the legal aspects, *public procurement and its environment* are undergoing profound changes and are increasingly frequently out of step with traditional administrative practices.

On the one hand, public procurement has both expanded and become more complex; with the trend towards the *liberalisation* of the economy combined with the broader responsibilities given to local and regional governments, areas that were previously governed in a sovereign and centralised manner have now shifted to the contractual and private sphere, as has happened, for example, with telephone services, rail transport, gas and electricity supply, etc., and with the new sectors developing through Internet.

At the same time, *changes* have affected the economic, social and policy environment of public procurement. At the national level, the most significant changes concern the *modernisation* of public spending and the easing of central government controls. The opening up of borders and the development of international trade have also given rise to new risks that the national legislative and regulatory framework often finds it difficult to take into account.

Lastly, technological changes, such as Internet, create new opportunities but also invariably lead to the emergence of new “grey areas”<sup>35</sup>.

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<sup>35</sup> For example, the piracy of unprotected data.

At the same time that it develops and becomes more complex, public procurement itself is tending to become an activity fraught with risk.

Even before the principle of the *accountability* of public procurement officials was affirmed by reformers in 2006, there was an underlying trend in recent years towards increasingly holding public procurement authorities liable both in court cases and through complaints to administrative bodies.

Public procurement has not escaped from the trend towards litigation that now affects all activities of governments at all levels. It is striking to see that it is now occurring *increasingly earlier* in the procedure, as unsuccessful competitors and adversely affected citizens are increasingly willing to seek redress against decision-makers suspected of having failed to carry out their procurement duties properly. This is why pre-contract referral arrangements are now a full-fledged component of public procurement disputes. The *Conseil d'Etat* has itself contributed to increasing this trend by broadening the channels of appeal open to claimants<sup>36</sup>.

Another recent development, which emerged in the 1990s, is the “*criminalisation of public procurement law*.”<sup>37</sup> Even though this development is largely due to the creation of the offence of favouritism and should not be overstated<sup>38</sup>, it shows that there is a trend towards greater legal risk in public procurement activities; depending on the seriousness of their misjudgement, any elected or public official involved in any capacity in the public procurement chain will be able to be held criminally liable. This explains the feeling of uncertainty, insecurity, instability and even of “loneliness<sup>39</sup>” that is now experienced by many public procurement officials, not to mention the obvious risk of manipulation.

This being the case, steps should be taken to strengthen the systems aimed at preventing any problematic developments that may affect procurement practices.

Enforcement policy now seems to have reached its limits,<sup>40</sup> and in many countries most of the cases of corruption punished in courts involve public procurement.

In France, the *means of enforcement* are wide ranging. They apply to both natural and legal persons and can be used to punish any lack of integrity in public procurement in France or abroad.

The legal treatment of public procurement has admittedly undergone some major developments in recent years and has to some extent contributed to preventing these practices, in particular through the introduction of the offence of favouritism.

The existing prevention systems are only of limited effectiveness, and until now this prevention has mainly been ensured through various forms of *monitoring* that are carried out at each stage of the procedure:

- Internal monitoring: managerial oversight, inspections, specialised commissions, etc.

<sup>36</sup> Its most recent case law (*CE Assemblée 16 juillet 2007, Société Tropic Travaux Signalisation*) gives unsuccessful competitors the possibility of requesting the cancellation of a contract after it has been concluded.

<sup>37</sup> To use the title of the doctoral thesis of Catherine Prébissy Schnall (LGDJ 2001).

<sup>38</sup> The author of this thesis only counted 60 convictions for favouritism between 1991 and 2001.

<sup>39</sup> Cf. Article on public procurement in the SCPC's report for 2005.

<sup>40</sup> For example, the number of convictions for favouritism remains virtually stable (at between 25 and 50 convictions per year).

- External monitoring:<sup>41</sup> review of legality, government audits, judicial review, etc.

These different types of monitoring act as safeguards to ensure the regularity of the public procurement process, and they can, if used properly, help to detect certain cases of fraud.

However, as currently organised, they also have certain limitations that can reduce their effectiveness.

The initial limitation resides in the fact that these forms of monitoring, whether internal or external, are rarely conducted systematically. This is the case for the review of legality carried out by the prefecture's services, which only covers a small portion of the contracts awarded by local and regional governments; for understandable reasons, this cannot always be carried out under optimum conditions due to a lack of time and quite often a lack of resources and sometimes of available skills. Here, a *technical expertise factor* combined with the *volume factor* adds to the difficulty of this monitoring.

Even more importantly, these forms of monitoring have until now been designed as *means of monitoring compliance* – compliance with laws and regulations, procedures, budget rules, etc. In this kind of system, any misconduct by a manager is only detected if an action or behaviour formally fails to comply with a standard. However, fraud and corruption sometimes take a form that it is difficult to reduce to a specific, immediate breach of a rule or principle, and that nothing in the various stages of the procurement process would make it possible to detect. In other words, administrative activity and the compliance with rules that it entails leave a certain leeway, a degree of freedom that defrauders do not hesitate to use if they have the technical skill required and are bold enough to do so.

This priority given to formal compliance also has the effect of narrowing the focus of the officials performing the monitoring, and can lead, at least initially, to neglecting certain types of behaviour and irregularities that can undermine the entire procedure.

### **3.4 The Need to Strengthen Prevention Mechanism**

The effort to prevent infringements of the rules of integrity and competition, and fraud in public procurement more generally, must adopt a *proactive approach*, i.e. one based on *forward thinking* in order to define and implement a *system of organisation* and *working methods* aimed at preventing fraud.

This approach has three components:

- Raising the awareness of public procurement actors;
- Developing detection mechanisms;
- Devising investigation methodologies.

#### **3.4.1 Raising the awareness of public procurement actors:**

This component must pursue the following objectives:

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<sup>41</sup> Mention should be made in this regard of the system of “competition watch” in public procurement that consists of assigning officials from the Directorate for Competition, Consumption and Fraud Prevention (some 150 officials nationwide) to work alongside staff in public procurement departments; this system, unique in an OECD country, is an effective means of ensuring both prevention (through advice given to public procurement officials) and enforcement (most cases of favouritism reported to criminal courts were detected through this system).

- To remind officials of the need to *comply with rules and procedures*, but also of the legal consequences if they fail to do so;
- To set up a system for *reporting information* to managers and monitoring bodies;
- To ensure the promotion of *good practices*.

This awareness raising can be carried out in *various ways*:

- Through training and/or communication initiatives;
- In a more advanced stage, through a *code of professional behaviour or ethics* aimed at:
  - Defining the *department's position* with regard to conflicts of interest, appropriate contacts with suppliers and confidentiality of information;
  - Setting *standards of behaviour* (declaration of conflicts of interest, mobility requirement, etc.);
  - Specifying the *measures that will be taken* if these standards are not upheld.

#### 3.4.2 *Developing Detection Mechanisms*

The use of audit-based methods to identify corrupt or anticompetitive practices can fill gaps in existing forms of monitoring, through a renewed approach to public procurement that would no longer be focused exclusively on ensuring the proper functioning of the procurement process, but on *identifying and explaining any anomalies detected in this process*.

Normally, a fraud or corruption audit comprises four phases:

- A *specific targeting of objectives*: expectations, scope, tools (mapping of risks, IT systems, commercial management and accounting, etc.);
- An *analysis of the existing situation*, through documentary analysis, interviews, etc. It is at this stage that certain indicators of any risks of corruption can be identified;
- A *diagnostic phase*, focusing on assessing the strengths and weaknesses of the organisation and its functioning, the division of tasks and responsibilities;
- A *recommendation phase*: preventive measures, support strategy, good practices, etc. During this stage, *cases may be referred to the prosecuting authorities*.

The SCPC, in its 2007 report, presented a *proposal for a methodological guide for an audit to detect corruption in public procurement* intended for public procurement departments within the various levels of government.

#### 3.4.3 *Devising an Investigation Methodology*

This investigation methodology is an extension of the detection methodology described earlier.

It is aimed at helping decision-makers to identify and trace the path of corruption or fraud in public procurement within their administration. Like the audit, it is a tool for *internal monitoring* (by mayors and monitoring officials in local and regional governments) and external monitoring (by auditors, outside officials or departments of the Ministry of Financial Affairs). Similarly, if the investigation brings to light a suspected infraction, the decision-maker may use Article 40 of the Code of Criminal Procedure to bring the case to the attention of the judicial authorities. The judicial phase will make it possible to carry out more in-depth investigations, involving measures such as the confiscation of hard disks or software (to extract data on suppliers, purchasers, etc.), hearings, policy custody, searches, etc.

In its 2008 report, the SCPC presented the different stages of this methodology and a computerised analysis of fraud in public procurement, a complementary tool made available to investigators in order to facilitate their work of analysing information and gathering evidence on corruption.

#### **4. Conclusion**

Cartel agreements in public procurement often rely on the active complicity of public procurement officials, in the form of corruption. However, different authorities are responsible for enforcing the laws punishing the criminal offence of corruption and anti-competitive practices.

The steps taken to improve the co-ordination of criminal and administrative enforcement efforts and the greater severity of sanctions in recent years show that there is a new awareness of the interaction between these mechanisms and a determination to dissuade these kinds of behaviour as effectively as possible.

In addition, as the Central Corruption Prevention Service recently pointed out in proposing an investigation methodology for identifying corruption in public procurement: "*It seems desirable that public decision-makers should themselves be able to identify and trace the path of corruption or fraud in their administrations, in sufficiently effective and secure conditions to be able to report it.*"<sup>42</sup>

In this regard, the publication of the Competition Authority's decisions imposing sanctions in the field of public procurement, their broad coverage in the specialised press and the provision of information about these decisions to public procurement officials can only contribute to disseminating a competition

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<sup>42</sup> 2008 Report by the Central Corruption Prevention Service "Investigation in public procurement".

## FRANCE

### Introduction

En France, les marchés publics reposent sur une réglementation abondante, détaillée dans le code des marchés publics : la procédure et la mise en œuvre des achats sont organisées à chacune de leurs étapes (décision de passer un marché, choix de la procédure, choix du titulaire, exécution du marché), restreignant significativement les marges de manœuvre de l'acheteur. Aux règles propres à la commande publique s'ajoutent les règles qui régissent l'activité des collectivités publiques et celle de leurs agents : principes généraux (principe de légalité, notion d'intérêt général), dispositions statutaires, règles déontologiques (désintéressement, probité, discrétion...).

Ce foisonnement de règles, dont l'objectif est d'assurer, par la transparence de l'information et l'intégrité des procédures, tant l'efficacité de la commande publique et la bonne utilisation des deniers publics, que l'égalité des citoyens devant les charges publiques et la libre concurrence, devrait permettre de s'approcher de l'optimum concurrentiel, aucune entreprise ne devant être avantagée pour des raisons autres que ses mérites propres.

Pourtant, collusion et corruption continuent d'exister dans les marchés publics. Ainsi, le Service central de lutte contre la corruption observe-t-il que « *Ces multiples contrôles constituent autant de garde-fous destinés à garantir la régularité du processus d'achat... ... pourtant, les marchés publics restent, en France comme dans la plupart des pays, le support privilégié de la corruption publique* », d'où la « *situation paradoxale qui est faite aux marchés publics en France : d'un côté, la commande publique se caractérise par la lourdeur de la réglementation et des contrôles, de l'autre, on constate que les marchés publics restent plus que jamais le lieu de prédilection de pratiques déviantes* »<sup>1</sup>.

Ce paradoxe n'est cependant qu'apparent et l'analyser permet de mieux comprendre le lien entre ces phénomènes distincts mais étroitement liés que sont collusion et corruption.

Il a ainsi pu être observé que la corruption était susceptible de se développer sous l'effet d'une asymétrie d'information souvent propre aux marchés publics : le demandeur n'a pas une connaissance précise de ses besoins ou des caractéristiques du produit qui lui est offert et fait appel à un spécialiste, en position d'intermédiaire prescripteur, par qui il est conseillé ou qui devient purement et simplement son mandataire.<sup>2</sup>

Le prescripteur détient alors un pouvoir potentiellement corrompible et la concurrence sur le marché concerné est susceptible d'être entravée, l'intermédiaire orientant le choix du demandeur public non pas vers l'offre la plus performante mais en fonction de son propre intérêt. Du point de vue de l'offreur, la corruption est le moyen d'évincer les entreprises concurrentes pour l'obtention du marché.

Mais la corruption peut aussi constituer le prix à payer par plusieurs entreprises membres d'une entente pour pouvoir faire fonctionner et dissimuler cette dernière ; en ce cas, pratique anticoncurrentielle et corruption sont particulièrement liées. La corruption apporte des solutions aux problèmes des cartels. Le

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<sup>1</sup> « L'audit de la corruption dans les marchés publics des collectivités publiques » Rapport annuel 2007.

<sup>2</sup> Voir « corruption et pratiques anticoncurrentielles » par F. Jenny, in Pratiques et contrôle de la corruption, Montchrestien, 1997.

cartel doit en effet garantir le partage des rentes, s'assurer du respect des règles par tous ses membres et dissuader d'éventuels déviants de sortir du cartel. La corruption fournit des clés de répartition des rentes, des moyens de rétorsion contre les déviants et crée des barrières à l'entrée.

L'entente organise un simulacre de concurrence qui vise la réalisation de surprofits pour chaque membre de la coalition et la protection du prescripteur qui cherche à échapper au soupçon<sup>3</sup>. Il s'agit alors de faire en sorte que l'offreur choisi apparaisse comme le plus compétitif, et que d'autres offres, dites de « couverture » dissimulent le choix préétabli. Mise en place sur un marché, une entente mène naturellement à une autre par un processus de compensation et pour que chaque entreprise effectuant une offre de complaisance, puisse à son tour, en contrepartie, bénéficier d'un contrat sur un autre marché public.

Il résulte de ces ententes concertées dans un contexte de corruption un surcoût de la commande publique qui se répercute finalement sur les contribuables ; la gravité de ce phénomène est donc un sujet de préoccupation récurrent. Dans les affaires où le préjudice de l'acheteur public a été estimé, le surcoût estimé dû à l'absence de concurrence varie de 15 % et 30 %.

Dans le contentieux de l'Autorité de concurrence, le nombre d'affaires relatives à des ententes dans le cadre de marchés publics démontre la fréquence des pratiques collusives, notamment par échanges d'informations. Pourtant, les amendes infligées aux entreprises y participant peuvent être très lourdes voire assorties d'une condamnation pénale pour les personnes impliquées.

La fréquente coexistence de la corruption de l'acheteur et des collusions entre entreprises soumissionnaires dans les affaires de marchés publics rend nécessaire le cumul de la répression pénale et administrative (1). A cet effet, l'Autorité de la concurrence et les juridictions pénales mettent en œuvre les instruments de lutte contre la collusion et la corruption dans les marchés publics dont elles disposent (2) et les interactions et passerelles procédurales entre ces instances doivent permettre d'accroître l'efficacité de la répression (3).

## **1. Les instruments de lutte contre la collusion et la corruption dans les marchés publics**

### ***1.1 Le droit de la concurrence, arme contre la collusion et la corruption***

Le droit de la concurrence sanctionne les pratiques d'entente en matière de marchés publics ; il peut jouer un rôle à la fois dissuasif et répressif et prendre une place utile entre les règles formelles relatives aux marchés publics, dont le non-respect est sanctionné par la nullité des contrats, les actions en responsabilité, et la sanction pénale.

Dans le domaine de la commande publique, l'Autorité de la concurrence, qui a succédé au Conseil de la concurrence, s'intéresse presque exclusivement aux pratiques des offreurs et laisse aux juridictions administratives, financières ou pénales le soin d'examiner les comportements des demandeurs publics.

Toutefois, indépendamment de leur éventuelle responsabilité administrative, voire pénale, les maîtres d'ouvrage qui ont activement contribué à la mise en œuvre d'une entente par fourniture de moyens et qui exercent une activité économique sur un marché peuvent être sanctionnés pour entente anticoncurrentielle au même titre que les entreprises (décision 05-D-61 du 9 novembre 2005). Des assistants au maître d'ouvrage ou tout professionnel apportant son aide à la commission de l'entente pourraient aussi être retenus comme responsables de l'entente. Tel a été le cas d'une société d'assistance à la maîtrise d'ouvrage

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<sup>3</sup> Voir « *Corruption et pratiques anticoncurrentielles : une première réflexion à partir d'une étude de cas* », Jean Cartier –Bresson, Petites Affiches, 1<sup>er</sup> juillet 1999.

dans l'affaire 07-D-15 du 9 mai 2007, relative à des pratiques mises en œuvre dans les marchés publics relatifs aux lycées d'Île de France confirmée par l'arrêt de la Cour d'appel de Paris du 3 juillet 2008 (Eiffage) (voir aussi arrêt du TPICE, 8 juillet 2008, Treuhand AG) .

Si l'Autorité de la concurrence est compétente pour apprécier, au regard des règles du droit de la concurrence, les pratiques mises en œuvre par des entreprises visant à fausser la consultation, elle ne l'est pas pour apprécier la légalité d'un appel d'offres, ou d'une délégation de service public, dont seul le juge administratif compétent peut être saisi.

En effet, les juridictions administratives, dont le rôle consiste à contrôler la légalité des actes administratifs, ne sont pas exclues du contentieux des pratiques anticoncurrentielles, eu égard à l'intensification des interventions économiques des personnes publiques.

Les juges administratifs ont vocation à contrôler l'action administrative, qui doit respecter le cadre légal dans lequel elle doit être mise en œuvre ; or le droit de la concurrence et en particulier les dispositions relatives aux pratiques anticoncurrentielles font partie du bloc de légalité : les règles de concurrence s'imposent aux pouvoirs publics non seulement quand ils assurent des prestations économiques mais également quand ils en supervisent l'organisation.

A ce titre, le juge administratif saisi d'un recours pour excès de pouvoir à l'encontre d'un acte détachable d'un contrat ou par le biais d'un déféré préfectoral pour les marchés des collectivités territoriales et de leurs établissements publics, peut contrôler la légalité de celui-ci au regard du droit de la concurrence et en prononcer l'annulation. C'est par ce mécanisme que peut être contrôlé, par exemple, l'allotissement retenu, une décision de refus ou d'acceptation de la candidature d'un groupement au motif que sa constitution violerait des règles de concurrence. Il s'agit donc de mécanismes qui permettent de prévenir les risques d'ententes du fait des choix du pouvoir adjudicateur dans les modalités des procédures de passation des marchés publics.

Même si la juridiction administrative ne peut prononcer de sanction, elle constitue donc un rouage essentiel d'intervention dans ce domaine.

## ***1.2 La pratique de l'Autorité de la concurrence s'agissant de la collusion dans les marchés publics***

L'analyse de la pratique décisionnelle du Conseil puis de l'Autorité de la concurrence permet de constater qu'en matière d'entente dans les marchés publics toutes les administrations publiques peuvent être concernées, administration centrale de l'État, collectivités territoriales, administrations de sécurité sociale, et que c'est le secteur des marchés relatifs à la construction et aux travaux publics qui est le plus affecté ; ces pratiques engendrent un coût pour la collectivité et un réel dommage à l'économie, c'est pourquoi l'Autorité s'attelle à poursuivre et à sanctionner avec détermination ce type de comportement.

Ainsi, chaque année, entre 16 et 28 % des sanctions prononcées par l'Autorité, au titre de ses fonctions contentieuses, concernent des affaires de marchés publics, soit une moyenne de 13 affaires par an entre 2004 et 2008.

Les *échanges d'information*, plus ou moins formalisés et organisés, constituent la première (et parfois la seule) phase de la mise en œuvre d'une entente et peuvent gravement perturber la loyauté d'un appel d'offres et fausser le jeu de la concurrence. Ils peuvent aussi constituer les seuls indices d'ententes, les preuves d'une répartition de marchés faisant défaut.

Récemment encore, l'Autorité de la concurrence soulignait qu'« à de multiples reprises, le Conseil de la concurrence a rappelé qu'en matière de marchés publics sur appel d'offres, il est établi que des entreprises ont conclu une entente dès lors que la preuve est rapportée, soit qu'elles sont convenues de

coordonner leurs offres, soit qu'elles ont échangé des informations antérieurement à la date où le résultat de l'appel d'offres est connu ou peut l'être »<sup>4</sup>.

Si certaines pratiques peuvent clairement avoir pour objet de fixer des niveaux de prix auxquels seront faites les soumissions ou de désigner à l'avance le futur titulaire du marché en le faisant apparaître comme le moins disant, il n'en demeure pas moins que « *de simples échanges d'informations portant sur l'existence de compétiteurs, leur nom, leur importance, leur disponibilité en personnel ou en matériel, leur intérêt ou leur absence d'intérêt pour le marché considéré, ou les prix qu'ils envisagent de proposer, altèrent également le libre jeu de la concurrence en limitant l'indépendance des offres* »<sup>5</sup>.

Les pratiques *d'offres de couverture* (simulation de concurrence par la présentation d'offres rédigées de telle sorte qu'elles ne seront pas sélectionnées au profit de l'offre qui doit être couverte) *et les accords de répartition des marchés* constituent les formes les plus abouties, souvent liées, de comportements anticoncurrentiels. En particulier, dans le cas des appels d'offres complexes, l'entente n'est pas réalisable sans une *concertation organisée* nécessitant réunions et arbitrages. Il est admis que la preuve soit rapportée par un faisceau d'indices, éléments non susceptibles de constituer une preuve à eux seuls, mais dont la gravité, la précision, l'accumulation et la concordance permettent de considérer la pratique comme établie.

Une affaire d'envergure exceptionnelle peut être signalée à ce titre.

Dans une décision de 2006 relative à des pratiques mises en œuvre dans le secteur des travaux publics dans la région Île-de-France le Conseil de la concurrence a sanctionné, à hauteur de 48 millions d'euros, 34 entreprises de BTP pour entente généralisée sur les marchés publics d'Île-de-France, décision confirmée par la Cour d'appel et la Cour de cassation<sup>6</sup>.

De 1991 à 1997, les principales entreprises du secteur se sont entendues pour répartir les marchés de travaux publics d'Île-de-France, entre elles ou entre leurs filiales, entraînant avec elles de nombreuses autres entreprises. Au total, ce sont les appels d'offres d'une quarantaine de marchés qui ont été faussés. Dans le cadre de cette entente générale, les grandes entreprises du secteur répartissaient les travaux à venir entre les sociétés de leur groupe en procédant à des "tours de table", réunions au cours desquelles les responsables des entreprises se réunissaient, exprimaient leurs vœux pour les chantiers futurs, et veillaient au respect des attributions prévues. Le partage des marchés a fonctionné sur une longue période et reposait sur un système très élaboré de répartition ; sa mise en œuvre s'est traduite par un courant habituel d'échanges d'informations et par la pratique d'offres de couverture. Le respect de la clé de répartition était garanti par la comptabilisation des avances et retards de chaque entreprise et par un système de compensations qui pouvaient consister dans le versement de sommes d'argent, l'octroi de travaux en sous-traitance officielle ou occulte ou encore par la constitution de sociétés en participation.

Mais, les entreprises peuvent aussi s'entendre pour ne pas répondre à un appel d'offres, les *échanges d'information visant alors à s'abstenir de soumissionner*. Le Conseil a ainsi sanctionné, à hauteur de 2,6

<sup>4</sup> Décision n° 09-D-18 du 2 juin 2009 relative aux pratiques mises en œuvre à l'occasion de la constitution du groupement momentanée d'entreprises RTM-Veolia en vue de sa candidature à la délégation de service public de la CUMPM pour l'exploitation du réseau de tramway de la ville de Marseille et Décision n°09-D-34 du 18 novembre 2009 relative à des marchés de travaux publics d'électricité et d'éclairage public en Corse.

<sup>5</sup> Décision n° 09-D-25 du 29 juillet 2009 relative à des pratiques d'entreprises spécialisées dans les travaux de voies ferrées (décision ayant fait l'objet d'un appel devant la Cour d'appel de Paris, affaire pendante).

<sup>6</sup> Décision 06-D-07 du 21 mars 2006 relative à des pratiques mises en œuvre dans le secteur des travaux publics dans la région Île-de-France, Cour d'appel de Paris, arrêt du 24 juin 2008 (société France Travaux), Cour de cassation, arrêt du 13 octobre 2009.

millions d'euros, cinq entreprises commercialisant des défibrillateurs cardiaques implantables pour s'être entendues afin de ne pas répondre à un appel d'offres national lancé en 2001 par dix-sept centres hospitaliers qui s'étaient regroupés pour acheter leurs défibrillateurs sur deux ans, afin de bénéficier de meilleures conditions de prix et de service.<sup>7</sup> Les entreprises s'étaient réunies à plusieurs reprises, dès l'annonce du projet d'appel d'offres groupé et jusqu'à deux semaines avant la date limite de dépôt des offres et avaient défini leur stratégie commune consistant à ne pas répondre à l'appel d'offres, à écrire au maître d'ouvrage pour soulever des points techniques, et à expliquer individuellement leur absence de réponse. L'entente a mis en échec la nouvelle procédure d'achats groupés et l'a découragée pour l'avenir, concernant les dispositifs médicaux. Cette décision a été confirmée par la Cour d'appel<sup>8</sup>.

Il convient de noter que le Conseil a, à plusieurs reprises, rappelé la vigilance nécessaire des maîtres d'ouvrage, et leur rôle dans l'animation de la concurrence, notamment dans l'appel au groupement et dans la constitution des lots : ils ont toujours la faculté de refuser l'offre d'un groupement sur le seul soupçon que son objet serait anticoncurrentiel et ont « toujours la possibilité de diviser le marché offert et de fixer le règlement des appels d'offres en constituant des lots tels que le plus grand nombre d'entreprises puissent individuellement y concourir, et en se ménageant la possibilité de refuser a priori, selon des critères dont ils sont juges, que les entreprises se groupent »<sup>9</sup>.

Le pouvoir adjudicateur a aussi la charge de veiller à l'égal accès des soumissionnaires aux informations disponibles (notamment en cas de renouvellement d'un marché ou d'une délégation, afin que l'entreprise sortante ne dispose pas d'un avantage comparatif trop important par rapport aux concurrents), à rédiger le cahier de charges de façon à ce qu'elle n'avantage pas certaines entreprises, notamment par le choix de spécifications techniques qui avantagent leurs produits ou services<sup>10</sup> ou encore le manque de clarté du règlement de consultation se prêtant à une discrimination entre concurrents<sup>11</sup>.

Les juridictions administratives confirment que maîtres d'ouvrage, collectivités acheteuses ou autres entités adjudicatrices ont une responsabilité particulière dans la prévention des ententes entre entreprises. Ils doivent écarter les offres dont ils savent qu'elles résultent de pratiques anticoncurrentielles des soumissionnaires et de façon plus générale, veiller à ce que les règles de libre concurrence soient effectivement respectées<sup>12</sup>.

Ainsi, bien qu'il ne revienne pas aux maîtres d'ouvrage de se substituer aux autorités de concurrence et aux juridictions pour établir l'existence de pratiques illicites et les sanctionner, ils peuvent contribuer à la lutte contre les ententes de plusieurs façons : en prévenant les ententes par leur politique d'appels d'offres, en détectant les entreprises qui ont échangé des informations et en saisissant l'Autorité de la concurrence, en liaison avec les agents de l'État chargés de veille concurrentielle ».

Il faut toutefois souligner que, selon la pratique décisionnelle constante, le comportement, ou l'inexpérience, du maître de l'ouvrage, à l'occasion d'un appel d'offres, même s'il est susceptible de

<sup>7</sup> Décision 07-D-49 du 19 décembre 2007.

<sup>8</sup> Arrêt du 8 avril 2009.

<sup>9</sup> Décisions 05-D-19, 05-D-26 et 05-D-70.

<sup>10</sup> Décision du Conseil de la concurrence 92-D-62 ; Cour d'appel de Paris, 7 mai 1997 et Cour de cassation, 18 mai 1999 : affaire Biwater.

<sup>11</sup> Décision 03-MC-01.

<sup>12</sup> Arrêt du 6 février 2003 du Tribunal administratif de Bastia, arrêt du CE, 28 avril 2003, Fédération nationale des géomètres experts.

faciliter les pratiques irrégulières des entreprises, ne peut faire échec à l'application des règles de concurrence.

Ainsi, dans une récente décision relative à des pratiques mises en œuvre dans le secteur du transport scolaire et interurbain par autocar dans le département des Pyrénées-Orientales, l'Autorité de la concurrence a relevé que « *selon la jurisprudence, les pratiques utilisées par le maître de l'ouvrage à l'occasion d'un appel d'offres, même si elles facilitent les pratiques irrégulières des entreprises, ne peuvent pas faire échec à l'application des dispositions de (...) l'article L. 420-1 du code de commerce, dès lors que sont établies à l'encontre des sociétés des pratiques tendant à fausser le jeu de la concurrence (chambre commerciale de la Cour de cassation, 12 janvier 1993, SA Sogea)* ». <sup>13</sup>

Les sociétés de transport auxquelles il était reproché d'avoir pris part à la concertation anticoncurrentielle, en utilisant la constitution d'un seul groupement par lot pour procéder à une répartition du marché des transports scolaires du département, avaient en effet tenté de mettre en avant le rôle joué par le donneur d'ordre, qui aurait lui-même suggéré la formation de groupements pour répondre à l'appel d'offres.

### **1.3 Les outils de la répression pénale en matière de marchés publics**

#### **1.3.1 Les délits spécifiques : délit de pratiques anticoncurrentielles et favoritisme**

##### *L'article L. 420-6 du code pénal*

Avant 1986 tout fait d'entente ou d'abus de position dominante était puni d'un emprisonnement pouvant aller jusqu'à quatre ans.<sup>14</sup> La compétence pour contrôler et sanctionner ces pratiques relevait donc des tribunaux répressifs. L'ordonnance du 1<sup>er</sup> décembre 1986<sup>15</sup> a procédé à une large dépenalisation du droit de la concurrence et a marginalisé les hypothèses de mise en jeu de la responsabilité pénale en cas de mise en œuvre de pratiques anticoncurrentielles. Désormais, l'article L. 420-6 du code de commerce dispose: « *Est puni d'un emprisonnement de quatre ans et d'une amende de 75000 euros le fait, pour toute personne physique de prendre frauduleusement une part personnelle et déterminante dans la conception, l'organisation ou la mise en œuvre de pratiques visées aux articles L. 420-1 et L. 420-2* ».

Cette possibilité d'incrimination des personnes physiques constitue un complément indispensable des pouvoirs de l'Autorité de la concurrence, qui, elle, ne peut sanctionner que les personnes morales.

Cependant les sanctions pénales à ce titre sont encore très fréquentes<sup>16</sup> ; le caractère frauduleux de la pratique, qui exclut par exemple la simple négligence de la personne poursuivie, rend en effet l'appréciation des faits délicate, ce qui explique que les condamnations à ce titre soient prononcées

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<sup>13</sup> Décision 09-D-03 (décision ayant fait l'objet d'un appel devant la Cour d'appel de Paris, affaire pendante).

<sup>14</sup> Ordonnances n°45-1483 et n° 45-1484 du 30 juin 1945.

<sup>15</sup> Ordonnance n°86-1243, 1<sup>er</sup> décembre 1986.

<sup>16</sup> Néanmoins, sur les huit dernières années, concernant des pratiques pénalement sanctionnables dans la commande publique (indifféremment 420-6 ou favoritisme), les parquets sont « saisis » en moyenne par la DGCCRF de 22 affaires par an ; compte-tenu d'un taux moyen de classement de 40 %, ce sont plus de 13 affaires différentes dans le domaine de la commande publique qui sont jugées chaque année par les tribunaux de l'ordre pénal, (le nombre total des affaires pénales dans la commande publique est des les faits supérieur dans la mesure où la procédure de l'article 40 du CPP peut être initiée par tout fonctionnaire).

principalement dans les cas de cartels en matière de marchés publics et lorsque les faits dénoncés s'accompagnent par exemple de corruption, le caractère frauduleux étant alors aisé à démontrer.

Les éléments constitutifs de l'infraction pénale reposent en grande partie sur les mêmes pratiques que les infractions administratives que réprime l'Autorité : il faut caractériser les pratiques visées aux articles L.420-1 (entente) et L. 420-2 (abus de position dominante) du code de commerce.

Il est à noter que cette infraction sert parfois de clé d'entrée pour la poursuite d'autres infractions pénales (corruption, favoritisme, abus de biens sociaux ...), les ententes dans les marchés publics étant souvent liées à ces infractions et nécessitant souvent « la passivité ou la complicité active des organes administratifs qui sont capables de détecter les ententes ou tout du moins les subodorent »<sup>17</sup>.

### 1.3.2 Le délit de favoritisme

Le délit d'« octroi d'avantage injustifié », plus connu sous le nom de « favoritisme », institué en 1991<sup>18</sup> et réprimé par l'article 432-14 du code pénal, forme aujourd'hui l'essentiel du contentieux pénal des marchés publics.

Il s'agit d'une infraction pénale spécifique au droit de la commande publique, susceptible de sanctionner des atteintes au droit de la concurrence, en particulier par les acheteurs publics.

Aux termes de cet article : « Est puni de deux ans d'emprisonnement et de 30000 euros d'amende le fait par une personne dépositaire de l'autorité publique ou chargée d'une mission de service public ou investie d'un mandat électif public ou exerçant les fonctions de représentant, administrateur ou agent de l'État, des collectivités territoriales, des établissements publics, des sociétés d'économie mixte d'intérêt national chargées d'une mission de service public et des sociétés d'économie mixte locales ou par toute personne agissant pour le compte de l'une de celles susmentionnées de procurer ou de tenter de procurer à autrui un avantage injustifié par un acte contraire aux dispositions législatives ou réglementaires ayant pour objet de garantir la liberté d'accès et l'égalité des candidats dans les marchés publics et les délégations de service public. »

Il en va ainsi par exemple, de l'octroi d'informations privilégiées accordées à un candidat au marché<sup>19</sup>, du défaut d'allotissement (passation d'un marché global, alors que l'hétérogénéité des fournitures aurait justifié l'allotissement, dès lors que la mise en concurrence a été organisée de telle manière que la société adjudicataire était seule en mesure de répondre au marché)<sup>20</sup>, de l'insertion dans un cahier des charges de clauses techniques qui ne peuvent être satisfaites que par une seule entreprise ou le fait de procéder à des reconsultations ou déclarations d'infirmité dans le but de permettre à un candidat déterminé d'être attributaire d'un marché<sup>21</sup>.

Ces pratiques relevant du délit de favoritisme peuvent d'ailleurs constituer parallèlement une violation du droit de la concurrence.

<sup>17</sup> Jean Cartier-Bresson, « *Corruption et pratiques anticoncurrentielles : une première réflexion à partir d'une étude de cas* », Petites Affiches, 1<sup>er</sup> juillet 1999.

<sup>18</sup> Loi n°91-3 du 3 janvier 1991.

<sup>19</sup> Cass. crim., 23 mai 2007, n° 06-87.898.

<sup>20</sup> Cass. crim., 20 mai 2009, n° 08-87.354.

<sup>21</sup> Id note23.

Les opérateurs économiques ayant bénéficié du délit de favoritisme ou des pratiques anticoncurrentielles peuvent en outre être poursuivis de recel de délit de favoritisme ou pour recel de l'infraction prévue à l'article L. 420-6 du code de commerce. Le chef de complicité de ces délits peut également être retenu à l'encontre de personnes qui ne seraient pas visées par le délit principal.

### 1.3.3 Le délit de corruption

Par ailleurs, la corruption est traditionnellement réprimée par le code pénal à travers les délits de corruption passive et de trafic d'influence<sup>22</sup> et de corruption active<sup>23</sup>.

La corruption est ainsi un délit à deux facettes : d'une part, la corruption passive du corrompu qui est celui qui détient le pouvoir et accepte ou sollicite un don ou un avantage quelconque en contrepartie d'un acte entrant dans sa mission et qu'il accomplit favorablement pour le corrupteur et, d'autre part, la corruption active du corrupteur qui est celui qui remet ou propose le don ou l'avantage en échange du service rendu par le fonctionnaire, l'élu ou le gestionnaire vénal. Le pacte passé entre le corrompu et le corrupteur prend notamment la forme d'une rémunération sous forme de pots-de-vin qui permet de faire accélérer une procédure pour obtenir un marché public. Cette notion de contrepartie entre deux personnes différencie principalement ce délit du délit de favoritisme.

Le trafic d'influence a une finalité différente ; son auteur est supposé abuser de son influence réelle ou supposée en vue de faire obtenir un contrat ; il se présente donc comme un intermédiaire entre le bénéficiaire potentiel et le destinataire de cet abus. On parle de trafic actif lorsque l'initiative est prise par un particulier qui demande à la personne influente d'en abuser et de trafic passif lorsque l'initiative est prise par la personne influente.

<sup>22</sup> Article 432-11 du code pénal : « Est puni de dix ans d'emprisonnement et de 150 000 euros d'amende le fait, par une personne dépositaire de l'autorité publique, chargée d'une mission de service public, ou investie d'un mandat électif public, de solliciter ou d'agréer, sans droit, à tout moment, directement ou indirectement, des offres, des promesses, des dons, des présents ou des avantages quelconques pour elle-même ou pour autrui :

1° Soit pour accomplir ou s'abstenir d'accomplir un acte de sa fonction, de sa mission ou de son mandat ou facilité par sa fonction, sa mission ou son mandat ;

2° Soit pour abuser de son influence réelle ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés ou toute autre décision favorable. »

<sup>23</sup> Article 433-1 du code pénal : « Est puni de dix ans d'emprisonnement et de 150 000 euros d'amende le fait, par quiconque, de proposer, sans droit, à tout moment, directement ou indirectement, des offres, des promesses, des dons, des présents ou des avantages quelconques à une personne dépositaire de l'autorité publique, chargée d'une mission de service public ou investie d'un mandat électif public, pour elle-même ou pour autrui, afin :

1° Soit qu'elle accomplisse ou s'abstienne d'accomplir un acte de sa fonction, de sa mission ou de son mandat, ou facilité par sa fonction, sa mission ou son mandat ;

2° Soit qu'elle abuse de son influence réelle ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés ou toute autre décision favorable.

Est puni des mêmes peines le fait de céder à une personne dépositaire de l'autorité publique, chargée d'une mission de service public ou investie d'un mandat électif public qui sollicite, sans droit, à tout moment, directement ou indirectement, des offres, des promesses, des dons, des présents ou des avantages quelconques, pour elle-même ou pour autrui, afin d'accomplir ou de s'abstenir d'accomplir un acte visé au 1° ou d'abuser de son influence dans les conditions visées au 2° »

Les sanctions encourues, très lourdes, font de la corruption et du trafic d'influence l'arsenal répressif le plus grave en matière de commande publique.

Par ailleurs, il existe de nombreux autres délits, notamment financiers de droit commun, dans le champ d'application desquels peuvent parfois entrer les atteintes au droit de la concurrence dans les marchés publics : la prise illégale d'intérêt (article 432-12 du code pénal), l'abus de confiance (article 314-1 du code pénal), l'escroquerie (article 313-1 du code pénal), l'abus de biens sociaux (articles L. 242-6 et L. 242-30 du code de commerce), le faux en écriture publique (article 441-1 du code pénal) ou la subornation de témoins (article 434-15 du code pénal)...

Si une entente complexe peut parfois impliquer la combinaison de plusieurs infractions pénales, les violations du droit de la concurrence dans les marchés publics ne recourent pas systématiquement les éléments constitutifs de ces délits pénaux, si bien que l'application du droit pénal ne peut se faire qu'au cas par cas.

## **2. L'articulation de la lutte contre la collusion et contre la corruption**

### **2.1 *L'affaire des lycées d'Île de France***

Dans une décision de 2007 relative à des pratiques mises en œuvre dans les marchés publics relatifs aux lycées d'Île de France<sup>24</sup>, le Conseil a sanctionné une entente générale de répartition des marchés entre les grands groupes du BTP et leurs filiales, concernant le programme de rénovation des lycées d'Île de France, portant sur 88 marchés d'entreprises de travaux publics passés de 1989 à 1997 en sept vagues successives pour un montant total de 10 milliards de francs.

Cette entente générale a été conclue dès le lancement du programme de construction par le biais de réunions de répartition, de contacts directs entre les entreprises ou d'échanges d'informations ; elle a fonctionné pendant 7 ans sous l'égide de Patrimoine Ingénierie, assistant du maître d'ouvrage, selon un mode opératoire toujours identique : chaque entreprise, présélectionnée, faisait en sorte, soit d'obtenir l'attribution du marché en indiquant à ses « concurrents » les marchés sur lesquels ses choix s'étaient portés et en leur communiquant ses prix, soit d'y renoncer en déposant une offre de prix délibérément majorée (offre de couverture). La bonne exécution de ce partage général des marchés était garantie par Patrimoine Ingénierie, qui, en amont, donnait des informations aux entreprises sur les opérations à venir, et, en aval, veillait à ce que l'entreprise pressentie obtienne bien le marché.

Le Conseil a énoncé aussi, à l'occasion de cette décision, que n'exonère pas les entreprises de leur responsabilité le fait de démontrer que la pratique n'aurait pas eu d'effets anticoncurrentiels (comme une hausse de prix), puisque qu'il suffit pour prononcer une sanction de démontrer que l'accord avait un objet anticoncurrentiel, ni que le maître de l'ouvrage était à l'origine de l'entente et a participé activement à sa mise en œuvre, puisque la responsabilité de l'incitateur et du meneur n'exclut pas celle des suiveurs, sauf à démontrer une contrainte irrésistible.

Soulignant l'extrême gravité du comportement des entreprises et le dommage particulièrement grave causé à l'économie, le Conseil a prononcé des sanctions exemplaires, à hauteur de 5 % du chiffre d'affaires des intéressées - soit le maximum autorisé par la législation alors applicable.

<sup>24</sup> Décision 07-D-15 du 9 mai 2007 relative à des pratiques mises en œuvre dans les marchés publics relatifs aux lycées d'Île de France- Cour d'appel, 3 juillet 2008, Eiffage- Cour de cassation, 13 octobre 2009, société Spie.

Parallèlement à la procédure suivie devant le Conseil de la concurrence, cette affaire a donné lieu à des poursuites et à des condamnations pénales; elle a montré, dans une ampleur exceptionnelle, comment peuvent s'imbriquer les pratiques de collusion, de favoritisme et de corruption, le tout ayant contribué à la mise en place d'un système de financement de partis politiques.

Il est ainsi apparu que l'exécutif régional et ses représentants avaient favorisé l'entente entre les filiales des grands groupes de travaux publics en vue d'une répartition « équitable » entre elles des marchés des lycées d'Île de France, et avaient exigé en contrepartie des entreprises qu'elles financent, par des rétrocessions de prix, les partis politiques représentés à la Région et dont les membres siégeaient notamment à la commission d'appels d'offres.

Ce dispositif frauduleux a ainsi fonctionné au prix de violations des règles du code des marchés publics, des règles de concurrence et de la législation pénale.

Il a pu opérer pendant plusieurs années notamment par l'intervention du bureau d'études Patrimoine Ingénierie (cette société étant elle-même attributaire, par des procédés relevant du délit de favoritisme, de 170 marchés d'assistance à maîtrise d'ouvrage sur les 214 conclus par le conseil régional), dont la mission très étendue (analyse des dossiers d'appels d'offres établis par le maître d'œuvre et des candidatures, mise au point des marchés et organisation de leur exécution...) traduisait « *la volonté du (conseil régional) d'(en) faire son assistant permanent et de lui déléguer une part importante de ses prérogatives pour en faire (...) le pivot du dispositif frauduleux.* »<sup>25</sup>

Sous une apparente régularité formelle, les juridictions pénales ont en outre constaté un recours systématique, contraire aux règles relatives aux marchés publics, à la procédure particulière du marché d'entreprise de travaux publics, qui permet des appels d'offres restreints, ainsi que des anomalies du fonctionnement de la commission des appels d'offres au sein de laquelle ont été constatées des pratiques de corruption qui ont contribué à l'ensemble du dispositif.

Les entreprises bénéficiaires des marchés publics se sont concertées et ont obtenu, du cabinet de l'exécutif régional d'Île de France et du bureau d'études précité, des informations privilégiées sur les estimations prévisionnelles de chaque opération, les noms et les prix des autres candidats ou groupements retenus lors de la sélection, ce qui a permis un alignement des offres, et ce dans le cadre d'une règle de répartition plus large entre les grands groupes du secteur imposée par l'exécutif de la région lui-même. Le délit de favoritisme visait donc à garantir la mise en œuvre de l'entente entre les entreprises affiliées aux grands groupes du BTP en vue de se répartir la commande publique.

La Cour d'appel a ainsi jugé que les partis politiques ont imposé aux entreprises, comme condition de leur accès à la commande publique, l'engagement de leur rétrocéder un pourcentage du prix des marchés obtenus.

Elle a conclu également que « l'entente organisée entre les entreprises, avec l'accord du maître de l'ouvrage, renforçait le pouvoir d'influence des membres de l'exécutif régional et des partis politiques sur les entreprises qui se sentaient « redevables » des contributions financières qui leur étaient réclamées », caractérisant le pacte de volonté constituant le délit de corruption et de trafic d'influence.

Les cadres et dirigeants de ces entreprises ont été condamnés des chefs d'abus de confiance ou d'abus de biens sociaux, de corruption et d'ententes illicites pour fausser ou restreindre le jeu de la concurrence, les fonctionnaires territoriaux et le délégataire du conseil régional pour favoritisme et atteinte à la liberté et

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<sup>25</sup> Arrêt Cour d'appel de Paris 27 février 2007.

à l'égalité d'accès dans les marchés publics, enfin, les trésoriers, collecteurs de fonds et élus des partis politiques pour complicité et recel de corruption et de trafic d'influence.

On peut noter que la Cour de cassation a notamment précisé, à l'occasion de l'examen de cette affaire, que le recel de corruption n'exige pas que le receleur ait tiré un profit personnel des choses recelées, et a justifié la décision de condamnation d'un dirigeant d'une entreprise de travaux public en relevant qu'une offre de couverture simulant une proposition concurrente pour faire apparaître une autre entreprise comme mieux-disante est bien de nature à entraver le libre jeu de la concurrence et susceptible de provoquer une hausse artificielle des prix.<sup>26</sup>

## **2.2 L'affaire des enrobés bitumeux du département de Seine-Maritime**

L'affaire des enrobés bitumeux du département de Seine-Maritime est emblématique d'une situation de collusion et de corruption dans les marchés publics, tant par la durée des pratiques en cause, près de dix années, que par le montant du surcoût pour la collectivité qui s'est élevé, selon une hypothèse basse, à plus de 24,8 millions d'euros de 1992 à 1998 (soit un peu plus de 10 % du montant du marché).

A la fin des années 1980, le Conseil général de Seine-Maritime a décidé de lancer un vaste programme de rénovation de son réseau routier portant sur 2 500 km de routes. Le marché nécessitait l'épandage de 200 000 à 350 000 tonnes d'enrobés pour un budget annuel de 23 à 38 millions d'euros.

Le 14 mars 1994, grâce à des informations communiquées par une entreprise plaignante, le ministre de l'Économie demandait à la Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF) une enquête sur la situation des travaux routiers, notamment la fourniture d'enrobés bitumineux, dans le département de Seine-Maritime.

Sur autorisation des présidents des Tribunaux de grande instance (TGI) de Rouen et Dieppe, la DGCCRF est intervenue dans les entreprises avec des pouvoirs de perquisition ; elle a procédé à des saisies de documents et des auditions de responsables des sociétés.

Un rapport d'enquête relatant le déroulement de la procédure et présentant les éléments probants recueillis a ensuite été rédigé.

Saisi du dossier, le Conseil de la concurrence a condamné, le 15 décembre 2005, plusieurs sociétés de travaux publics, filiales pour la plupart de grands groupes. Le Conseil a ainsi sanctionné ces entreprises qui s'étaient regroupées pour constituer des centrales de fabrication d'enrobés bitumineux et répondre aux appels d'offres pour infractions à la réglementation sur les actions concertées, ententes ou coalitions lorsqu'elles ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur un marché, pour un montant total de 33,66 millions d'euros.

Cette condamnation a été confirmée en appel et le recours en cassation a été rejeté.

Parallèlement, une action a été entreprise afin rechercher d'éventuelles responsabilités pénales de la part des personnes physiques ayant pris une part personnelle frauduleuse et déterminante dans l'organisation de cette entente.

<sup>26</sup> Cass. Crim, arrêt du 20 février 2008.

### 2.3 *Le marché des enrobés en Seine-Maritime*

Pour la fabrication des enrobés, les professionnels utilisent deux types de centrale. Dans les deux cas, la création de ces centrales qui peuvent engendrer des répercussions sur l'environnement requiert une autorisation préfectorale.

- La *centrale mobile*, utilisée à flux continu, est adaptée à un chantier ponctuel qui monopolise sa production et qui doit donc être suffisamment important pour rentabiliser son installation
- Pour un investissement compris entre un million et demi et quatre millions et demi d'euros, l'utilisation d'une *centrale fixe* autorise le stockage d'enrobés de qualités différentes, l'approvisionnement de clients multiples, pour des chantiers mettant en œuvre des tonnages moindres que la centrale mobile. Ce type de centrale était adapté aux demandes du département de Seine-Maritime, lequel recourait, pour la mise en œuvre des enrobés, à des marchés fractionnés à bons de commande pluriannuels, regroupant des commandes d'importance variée et géographiquement dispersées.

Dans son jugement du 11 septembre 2008, le tribunal de Rouen note par ailleurs que les coûts de fabrication et de transport des enrobés représentent respectivement 80 % et 10 % du montant des travaux, ce qui permet aux entreprises de travaux publics actionnaires de centrales où elles peuvent s'approvisionner à un tarif privilégié, de jouir d'un « avantage non négligeable ».

### 2.4 *Le comportement collusif des entreprises d'enrobés bitumeux*

Dans la décennie 1990, ces entreprises de travaux publics s'étaient entendues sur une clé de répartition des tonnages d'enrobés destinés aux routes de Seine-Maritime, pour l'exécution de l'ensemble des marchés. Elles échangeaient des informations sur les tonnages mis en œuvre de façon à s'assurer que chacune respecte son quota et rétablir tout déséquilibre, le cas échéant en recourant à la sous-traitance.

Les membres de l'entente se rencontraient régulièrement lors des appels d'offres du département afin de déterminer les groupements attributaires de chaque lot, leurs concurrents se contentant de faire des offres de couverture ; lors de la publication des programmes de travaux en début d'année afin de se répartir les chantiers en fonction des tonnages auxquels chacun pouvait prétendre.

Elles concouraient en groupements dépourvus de justification économique ou financière. Ces groupements faussaient les prix, lesquels n'étaient plus fixés par le libre jeu du marché dès lors que les offres de couverture trompaient nécessairement le maître d'ouvrage sur la réalité et l'étendue de la concurrence sur le marché des enrobés.

Elles allaient même jusqu'à intriguer contre les concurrents susceptibles de perturber l'entente, constituant, par exemple, des pseudo-associations de défense de l'environnement pour empêcher la construction d'une centrale d'enrobés rivale.

Ces pratiques ont perduré grâce au soutien de fonctionnaires qui par leurs actions ont pérennisé le système en place.

Deux fonctionnaires en poste à la direction départementale des infrastructures avaient constaté que les mêmes lots étaient attribués aux mêmes groupements et que les prix étaient reconduits d'un appel d'offres à l'autre.

Ils en avaient conclu qu'une entente existait.

Or, ils ne se sont pas opposés aux groupements et n'ont pas alerté les élus, auprès desquels ils avaient pourtant un poids prépondérant du fait de leurs connaissances techniques. Ils sont même allés jusqu'à pérenniser l'entente par leurs actions : en premier lieu, en exigeant une caution couvrant 100 % du marché ce qui défavorisait les petites entreprises susceptibles de venir concurrencer les majors déjà en place et en second lieu, en insérant une clause exigeant des candidats la possession d'une centrale opérationnelle à la date de remise des offres. Compte tenu des délais très courts entre la publication et la remise des offres, cette clause, à l'intérêt restreint, rendait impossible son respect pour tout candidat ne disposant pas d'une centrale fixe dans le département.

Ces actions ont ainsi favorisé les sociétés attributaires des marchés précédents, déjà en possession de centrales d'enrobés. Il y avait donc une barrière à l'entrée sur le marché d'ordre contractuel, insérée dans le cahier des charges des appels d'offres.

Des fonctionnaires ont bénéficié d'avantages au préjudice d'entreprises de travaux publics.

Ces deux fonctionnaires ont bénéficié, de la réalisation de travaux de recouvrement d'enrobés bitumeux à titre gratuit dans leur propriété. Ils se sont vus également offrir des voyages d'agrément pour eux-mêmes et leur famille, d'un prêt gratuit de véhicule et le financement d'heures de vol nécessaires au maintien d'une qualification.

## **2.5 La réparation des préjudices**

Le Conseil de la concurrence a considéré que le dommage à l'économie résultait de la durée importante des pratiques et de la majoration des prix, hors concurrence, pendant cette période. Selon une hypothèse basse, l'acheteur public aurait été victime, de 1992 à 1998, d'un surcoût annuel de l'ordre de trois millions et demi d'euros, sur la seule année 1998 un surcoût de 16,45 % a été estimé, soit 4,95 millions d'euros.

Le Conseil de la concurrence n'a pas la possibilité d'indemniser les victimes de leur préjudice. Celles-ci doivent donc obtenir réparation devant une juridiction de l'ordre judiciaire.

L'acheteur public s'est donc constitué partie civile devant le tribunal de grande instance, à l'encontre des personnes physiques responsables des entreprises et des deux fonctionnaires de son service achat. Onze personnes physiques et sept sociétés ont ainsi été condamnées solidairement à réparer le préjudice matériel pour un montant de 4,95 millions d'euros.

Au titre du préjudice moral, le tribunal a accordé à l'acheteur public un euro symbolique que devront verser solidairement les deux fonctionnaires territoriaux. .

## **2.6 La condamnation pénale**

Les personnes physiques ayant pris une part personnelle frauduleuse et déterminante dans l'organisation de l'entente ont été condamnées à des peines allant jusqu'à 18 mois de prison avec sursis et 40 000 euros d'amende soit au total 144 mois de prison avec sursis et 269 000 euros d'amendes. Ce système de condamnation pénale renforce le dispositif de sanction des pratiques anticoncurrentielles en France.

Cette pratique d'entente entre entreprises dans le cadre d'un marché public a perduré pendant des années et ce, grâce à l'appui de fonctionnaires en place qui bénéficiaient des connaissances techniques et d'une position privilégiée afin de conseiller les élus dans le choix des candidats.

Cet exemple est révélateur de la relation étroite qui peut exister entre la pratique anticoncurrentielle des entreprises et le développement de pratiques pénalement sanctionnables qui sont assimilables à de la corruption. La poursuite d'une pratique anticoncurrentielle sur plusieurs années est à l'évidence facilitée par la présence de complices au sein du service acheteur.

Ce constat peut guider les services de contrôle dans un programme de détection ciblé de pratiques anticoncurrentielles potentielles.

Il est toujours difficile de détecter l'existence d'une entente sans information particulière permettant de cibler un service d'achat spécifique afin d'analyser avec attention les résultats aux appels d'offres. En revanche, il peut être plus aisé de rechercher l'existence des « compensations offertes » par les entreprises parties à l'entente à leurs complices.

Dans le cas étudié, ces compensations se matérialisaient sous la forme de services rendus par des prestataires extérieurs qui facturaient leurs interventions. Dès lors, une recherche systématique à partir des doubles de factures permet de cibler chez ces prestataires les entreprises clientes habituellement présentes dans la commande publique. Selon les prestations, les bénéficiaires individuels sont identifiés pour des questions tenant à la sécurité ; il en est ainsi des prestations de voyage ou de la location de véhicules. Il suffit à ce stade de rechercher dans ces listes de bénéficiaires la présence éventuelle de fonctionnaires des services achats, voire d'élus.

La dernière étape de ce ciblage particulier consiste à identifier les services d'achat auxquels ces bénéficiaires de prestations appartiennent, ce qui permet de rechercher l'existence d'indices de pratiques anticoncurrentielles dans les résultats d'appels d'offres et ainsi obtenir des autorisations de perquisition aux fins d'établir les preuves des pratiques suspectées.

A ce jour, cette méthode a été mise en œuvre à titre expérimental. Les premiers résultats n'ont pas été concluants. Toutefois, ce type de recherche doit être poursuivi ; la détection de pratiques anticoncurrentielles à partir d'un ciblage spécifique n'est jamais couronnée de succès sans persévérance.

Cette affaire des enrobés bitumeux du département de Seine-Maritime aurait pu être évitée si l'acheteur public avait pris le soin de changer régulièrement les fonctionnaires en place sur ces postes sensibles. En effet, le maintien d'agents à ces postes pendant des années suscite une proximité avec les entreprises qui peut faciliter des pratiques de corruption passive de ces derniers.

### **3. L'interaction entre la procédure pénale et la procédure administrative**

#### **3.1 *La communication de pièces pénales à l'Autorité de la concurrence et le fondement des griefs sur des pièces pénales***

Aux termes de l'article L.463-5 du code de commerce : « Les juridictions d'instruction et de jugement peuvent communiquer à l'Autorité de la concurrence, sur sa demande, les procès-verbaux, rapports d'enquête ou autres pièces de l'instruction pénale ayant un lien direct avec des faits dont l'Autorité est saisie ».

Le Conseil de la Concurrence a appliqué cette procédure à plusieurs reprises, sous le contrôle de la Cour d'appel de Paris et de la Cour de Cassation, qui ont interprété avec souplesse les termes de l'article L.463-5, lui conférant ainsi une véritable efficacité.

Trois affaires relatives aux travaux publics routiers en Seine-Maritime, aux marchés publics d'Île-de-France et aux lycées d'Île de France, qui portent sur des ententes en matière de marchés publics, sont à cet égard particulièrement représentatives de ce que le caractère coercitif de la procédure pénale (par les

perquisitions, écoutes, garde à vue...) peut être mis au service de l'Autorité de la concurrence dans les cas les plus graves où sont identifiées les personnes physiques à l'origine des cartels.

Par une décision du 15 décembre 2005, le Conseil de la concurrence a sanctionné, à hauteur de 33, 6 millions d'euros, 6 entreprises de BTP spécialisées dans la fourniture d'enrobés bitumineux pour s'être livrées à une entente complexe et continue, lors de la passation de divers marchés de *travaux publics routiers en Seine-Maritime*, de 1992 à 1998<sup>27</sup>.

Ces entreprises s'étaient entendues sur une clé de répartition des tonnages d'enrobés bitumineux pour l'exécution de l'ensemble des marchés de l'État et du Conseil général et avaient échangé régulièrement des informations relatives aux prix, antérieurement au dépôt des offres. Les principaux indices sur lesquels s'est fondé le Conseil de la concurrence résultaient notamment de la procédure pénale parallèlement ouverte.

La Cour d'appel et la Cour de cassation ont rejeté respectivement les recours en annulation et les pourvois contre cette décision.<sup>28</sup>

S'agissant de l'opposabilité des pièces issues de la procédure pénale et de la faculté, pour le Conseil de la concurrence, de fonder son accusation sur des pièces pénales, la Cour de cassation a confirmé que les pièces issues du dossier pénal pouvaient être valablement opposées aux parties, sans que le principe d'égalité des armes ne soit compromis. Alors que les entreprises faisaient valoir que n'étant pas toutes concernées par la procédure pénale et n'ayant donc pas toutes accès au dossier pénal, elles étaient dans l'incapacité de s'assurer que des pièces éventuellement à décharge n'avaient pas été écartées par le rapporteur, la Cour a estimé que les droits des parties avaient été suffisamment protégés par le fait que les griefs étaient fondés sur des pièces pénales dont il avait été dressé inventaire, qui avaient toutes été citées, versées au dossier et soumises à la consultation et à la contradiction des parties.

Il a été admis, en outre, que le rapporteur ait pu se rendre dans le cabinet du juge d'instruction, et, éventuellement consulter l'entier dossier pénal sous le contrôle du juge, sans violer ni le secret de l'instruction, ni les droits de la défense, dans la mesure où tous les éléments retenus à charge figuraient au dossier.

Dans l'affaire *d'entente dans les marchés publics d'Île-de-France*<sup>29</sup> le Conseil de la concurrence s'était autosaisi dans le prolongement d'une procédure pénale, dirigée contre plusieurs personnes physiques, ouverte en 1994, et qui s'est terminée par un non-lieu en novembre 2002 en raison de la prescription de l'action publique. C'est sur la base des pièces et documents qui lui ont été transmis par le juge d'instruction que le Conseil a fondé sa décision de sanction.

La Cour de cassation précise que le lien établi entre la procédure pénale et la procédure administrative se limite à la reconnaissance d'un effet interruptif de prescription des actes de l'une à la prescription de

<sup>27</sup> Décision 05-D-69 du 15 décembre 2005 relative à des pratiques anticoncurrentielles relevées dans le secteur des travaux routiers en Seine-Maritime.

<sup>28</sup> Arrêt Cour d'appel de Paris du 30 janvier 2007 Le Foll TP, arrêt Cass. Com, 15 janvier 2008, Colas Île de France (D 05-D-69).

<sup>29</sup> Décision 06-D-07 du 21 mars 2006 relative à des pratiques mises en œuvre dans le secteur des travaux publics dans la région Île-de-France, arrêt C. App de Paris, arrêt du 24 juin 2008 (société France Travaux), C. Cass. com, arrêt du 13 octobre 2009.

l'autre mais que ces deux procédures, visant des personnes distinctes, physiques d'un côté, morale de l'autre et poursuivant des fins différentes demeurent clairement distinctes. Dès lors, n'est d'aucun effet sur la poursuite de la procédure administrative et donc sur le cours du délai de prescription de l'action administrative le fait que la procédure pénale se soit achevée par une ordonnance de non-lieu, rendue le 26 novembre 2002 par le magistrat instructeur constatant la prescription de l'action publique par suite de l'annulation, par la Cour d'appel de Versailles, de deux actes de la procédure d'instruction.

C'est également sur des pièces tirées de la procédure pénale que le Conseil a fondé sa décision déjà évoquée plus haut sur les lycées d'Île de France.<sup>30</sup>

Dans l'affaire des marchés publics d'Île-de-France et dans celle des lycées d'Île de France, les pourvois devant la Cour de cassation ont visé à remettre en cause l'article L. 463-5 au regard de l'article 6 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, au motif que cette procédure violerait le principe d'égalité des armes.

Dans ses deux arrêts la Cour de cassation a écarté cette analyse et validé pour l'essentiel celle de la Cour d'appel et du Conseil de la concurrence. En premier lieu, elle a jugé que « *le fait que la faculté de demander à la juridiction d'instruction, qui seule peut en décider, communication des procès-verbaux ou rapports d'enquête ayant un lien direct avec des faits dont le Conseil est saisi, n'appartient, aux termes de l'article L. 463-5 du code de commerce, qu'au Conseil, qui met ainsi en œuvre la demande du rapporteur investi des pouvoirs d'enquête que lui confèrent l'article L. 450-1 du même code, n'est pas, en lui-même, contraire aux principes d'égalité des armes et d'impartialité résultant de l'article 6 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales* ».

En second lieu, elle a jugé « les entreprises mises en cause disposant, après la notification des griefs, de la possibilité de débattre contradictoirement, devant le Conseil puis devant la cour d'appel de Paris, tant des conditions de la communication d'éléments de l'instruction pénale, pièces dont la régularité peut être contestée par les personnes concernées, que du contenu de l'intégralité des pièces issues du dossier pénal dont le juge d'instruction a autorisé la communication au rapporteur, et de présenter toutes pièces qu'elles estiment utiles, c'est à juste titre que l'arrêt retient que les dispositions de l'article L. 463-5 du code de commerce ne sont pas contraires à l'article 6 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales »

En ce qui concerne les modalités de la communication des pièces pénales, la Cour a rappelé qu'aucune forme particulière n'est imposée par le texte.

### **3.2 L'influence de l'Autorité de la concurrence sur la procédure pénale**

#### **3.2.1 Les avis de l'Autorité**

Le Conseil, devenu l'Autorité, donne son avis aux juridictions pénales sur les pratiques dont celles-ci sont saisies, en vertu de l'article L. 462-3 du code de commerce. Depuis 1986, le Conseil a ainsi traité quarante-six demandes d'avis, toutes juridictions confondues (civiles et pénales).

Le cœur de l'infraction pénale étant, comme on l'a vu plus haut, constitué par des pratiques d'entente et d'abus de position dominante définies par le code de commerce, cette « passerelle » est bienvenue, même si l'avis de l'Autorité ne lie pas la juridiction, qui, en pratique cependant en tient compte.

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<sup>30</sup> Décision 07-D-15 du 9 mai 2007 relative à des pratiques mises en œuvre dans les marchés publics relatifs aux lycées d'Île de France- Cour d'appel, 3 juillet 2008, Eiffage- Cour de cassation, 13 octobre 2009, société Spie.

### 3.2.2 *L'information du juge pénal par l'Autorité de la concurrence : les transmissions au parquet*

Le deuxième alinéa de l'article L.462-6 du code de commerce dispose que lorsque les faits lui paraissent de nature à justifier l'application de l'article L.420-6, l'Autorité adresse le dossier au procureur de la République, cette transmission interrompant la prescription de l'action publique.

Le Conseil a fait une application modérée de cette disposition, dix dossiers ayant été communiqués au parquet depuis 1994, avec cependant, une certaine intensification depuis 2000. La plupart de ces affaires sont relatives à des ententes dans les marchés publics ou à des cartels sur les prix.

Ainsi dans une décision du 3 décembre 2008, le Conseil a sanctionné des sociétés pour avoir déposé des offres distinctes lors de la passation de plusieurs marchés publics d'entretien en menuiserie et serrurerie, alors que ces sociétés faisaient partie du même groupe et élaboraient leurs offres de manière centralisée. Ayant relevé que le président des deux sociétés en cause, par sa longue fréquentation des marchés publics, était parfaitement informé des règles de concurrence applicables, qu'il avait donc sciemment méconnues, le Conseil a décidé que ces faits étaient susceptibles de recevoir une qualification pénale en vertu des dispositions de l'article L. 420-6 du code de commerce et a transmis l'ensemble du dossier au procureur de la République près le tribunal de grande instance de Créteil.<sup>31</sup>

Les suites données à ces transmissions dépendent du parquet concerné. Néanmoins la transmission d'un dossier au parquet fournit à l'Autorité un outil de dissuasion fort par la publicité qui en est donnée, et lui permet de fortement stigmatiser les pratiques les plus graves et de faire connaître son analyse, quand bien même le parquet dispose de l'opportunité des poursuites et que le juge n'est pas lié par les décisions de l'Autorité.

Le législateur a affiché ces dernières années sa volonté de renforcer l'efficacité de cette procédure, et plus généralement celle de la répression pénale en l'articulant mieux avec la procédure administrative ; il a ainsi prévu que les actes interruptifs de prescription devant l'Autorité sont également interruptifs de la prescription de l'action publique pour la poursuite du délit de l'article L.420-6 du code de commerce<sup>32</sup> puis institué une règle réciproque à l'article L. 462-7.<sup>33</sup>

Ce faisant, le législateur mettait un terme à ce que la doctrine et les praticiens présentaient comme un obstacle à la mise en œuvre de l'article L. 420-6 et à la répression pénale, dans l'hypothèse par exemple où les pratiques à la base du délit pénal étaient déjà prescrites au moment de la transmission du dossier au Parquet.

Par ailleurs les règles générales du code de procédure pénale relatives aux communications de pièces s'appliquent aux pièces détenues par l'Autorité de la concurrence : le procureur de la République, l'officier de police judiciaire ou le juge d'instruction peut requérir la remise de tout document susceptible d'intéresser l'enquête ou l'instruction.<sup>34</sup>

<sup>31</sup> Décision 08-D-29 du 3 décembre 2008 relative à des pratiques relevées dans le secteur des marchés publics d'entretien de menuiserie métallerie serrurerie.

<sup>32</sup> Loi n°2001-420 du 15 mai 2001, alinéa 3 de l'article L. 420-6.

<sup>33</sup> Ordonnance n°2008-1161 du 13 novembre 2008.

<sup>34</sup> Articles 60-1 et 99-3 du code de procédure pénale.

### 3.2.3 *L'articulation des actions pénale et administrative en cas de programme de clémence*

Si l'existence de sanctions pénales pour les personnes physiques peut constituer un outil majeur de dissuasion et de répression des infractions les plus graves, celles-ci doivent cependant être conciliées et articulées avec l'action des autorités qui, comme l'Autorité de la concurrence, imposent des sanctions administratives aux entreprises.

Or, l'introduction d'un programme de clémence n'a pas conduit immédiatement à une évolution de l'articulation entre les deux catégories d'actions. Ainsi, les exonérations de sanctions que l'Autorité de la concurrence peut accorder aux entreprises au titre du programme de clémence ne garantissent pas aux personnes physiques une immunité de sanction devant le juge pénal, ce qui peut dissuader le recours à la procédure de clémence.

Certes, il convient de relativiser les conséquences de cette situation puisque de fait aucun cas de poursuite pénale après sollicitation de la clémence devant le Conseil n'a été signalé. En outre la pratique du Conseil, puis de l'Autorité, a été de ne pas transmettre au procureur de la République les dossiers dans lesquels le ou les bénéficiaires de la clémence paraissent susceptibles de faire l'objet de sanctions pénales.

Pour autant, cette situation n'étant pas satisfaisante, un projet de loi est en cours de rédaction, visant à permettre au responsable de l'entreprise ayant apporté des éléments déterminants permettant à son entreprise de bénéficier d'un programme de clémence de bénéficier à son tour devant le juge pénal d'une disposition le dispensant de peine ou réduisant de moitié la peine encourue.

Les marchés publics restent un secteur à risques élevés tant au regard des règles de la concurrence que des atteintes à la probité.

### 3.3 *Le rôle et l'action du Service Central de Prévention de la Corruption (SCPC)*

Le secteur des marchés publics, et plus généralement de la *commande publique*, est, de manière constante et quasi universelle, le secteur de prédilection de la corruption et des pratiques anticoncurrentielles.

Selon certaines estimations, dans le secteur du Bâtiment-Travaux publics, les sommes détournées représenteraient de l'ordre de 3 à 5 % des marchés publics en Europe occidentale.

De façon paradoxale, l'existence de procédures et de réglementations particulièrement précises et de contrôles administratifs parfois tatillonnés, ne permettent pas toujours de garantir la transparence, la concurrence et l'égalité de traitement des candidats...

Bien plus, les instigateurs des montages frauduleux disposent souvent d'une *technicité suffisante* et des conseils pour donner à leurs opérations une apparente conformité aux textes et aux procédures.

Dans le même temps, les facteurs de risques n'ont pas disparu et ont même tendance à s'accroître.

La très grande complexité de la réglementation et l'instabilité qui la caractérise depuis quelques années créent des *risques supplémentaires* d'irrégularités involontaires, voire de déviances délibérées.

Au-delà des aspects juridiques, *la commande publique et son environnement* connaissent eux-mêmes de profondes mutations et se trouvent de plus en plus souvent en décalage avec les pratiques administratives traditionnelles.

D'une part, on constate que l'achat public s'est à la fois étendu et complexifié : le mouvement de *libéralisation* de l'économie conjugué à l'extension des compétences des collectivités territoriales a fait basculer dans le champ contractuel et dans la sphère privée des domaines qui auparavant étaient régis selon un mode régalien et centralisé : c'est le cas, par exemple, des secteurs de la téléphonie, du transport ferroviaire, de la fourniture de gaz et d'électricité...des secteurs nouveaux sont entrés dans la sphère d'Internet par exemple.

Parallèlement, des *mutations* ont affecté son environnement économique, social et politique. Au plan national, les évolutions les plus marquantes concernent la *modernisation* de la dépense publique et l'allègement des contrôles de l'État. L'ouverture des frontières et le développement des échanges internationaux fait également apparaître de nouveaux risques que le cadre législatif et réglementaire national peine souvent à prendre en compte.

Enfin, les évolutions technologiques, tel que Internet, créent de nouvelles opportunités mais suscitent également et à juste titre de nouvelles « zones grises »<sup>35</sup>.

En même temps qu'elle se complexifie et se développe, l'activité d'achat public tend elle-même à devenir une activité à risques.

Avant même que le principe de *responsabilisation* des acheteurs n'ait été affirmé par les réformateurs de 2006, une tendance lourde de ces dernières années a été celle de l'engagement plus fréquent de la responsabilité des acheteurs publics devant les tribunaux judiciaires comme devant les juridictions administratives.

La commande publique n'échappe pas au mouvement de « juridiciarisation » qui affecte aujourd'hui l'ensemble des activités de l'État et des collectivités territoriales. Il est frappant de constater qu'elle intervient *de plus en plus tôt* dans la procédure : les concurrents évincés et les citoyens lésés hésitent de moins en moins à demander des comptes aux décideurs soupçonnés d'avoir failli dans leur fonction d'achat. C'est ainsi que le référé précontractuel occupe aujourd'hui une place à part entière dans le contentieux des marchés publics. Le Conseil d'État a lui-même contribué à alimenter ce mouvement en élargissant les voies de recours ouvertes aux requérants<sup>36</sup>.

Un phénomène récent, apparu dans les années 1990, est aussi celui de la « *pénalisation du droit des marchés publics*<sup>37</sup> ». Même si ce phénomène tient beaucoup à la création du délit de favoritisme et doit être relativisé<sup>38</sup>, il témoigne d'une tendance à l'aggravation du risque juridique lié aux activités d'acheteur public: selon son plus ou moins grand degré de maladresse, l' élu ou l'agent public intervenu, à un titre ou à un autre, dans la chaîne de l'achat public pourra voir sa responsabilité engagée au plan pénal...Cela explique le sentiment d'incertitude, d'insécurité, d'instabilité, voire de « solitude »<sup>39</sup> qui est aujourd'hui ressenti par de nombreux acheteurs publics, sans parler du risque évident de manipulations...

Dans ce contexte, un renforcement des dispositifs destinés à prévenir les dérives susceptibles d'affecter le processus d'achat est souhaitable.

<sup>35</sup> Par exemple, le piratage de données non protégées.

<sup>36</sup> Sa jurisprudence la plus récente (CE Assemblée 16 juillet 2007, Société Tropic Travaux Signalisation) ouvre la possibilité aux concurrents évincés de demander l'annulation d'un marché après qu'il ait été conclu.

<sup>37</sup> Pour reprendre l'intitulé de la thèse de doctorat de Madame Catherine Prébissy Schnall (LGDJ 2001).

<sup>38</sup> L'auteur de la thèse précitée recense seulement 60 condamnations pour favoritisme entre 1991 et 2001.

<sup>39</sup> Cf. article sur la commande publique dans le Rapport du SCPC pour l'année 2005.

La politique répressive semble aujourd'hui avoir atteint ses limites<sup>40</sup> : dans de nombreux pays, la plupart des affaires de corruption sanctionnées par les tribunaux interviennent à l'occasion de la passation de marchés publics.

En France, *l'arsenal répressif* est particulièrement étoffé. Il s'applique aux personnes physiques comme aux personnes morales, et permet de sanctionner l'ensemble des atteintes à l'intégrité commises à l'occasion de la passation d'un marché public en France et à l'étranger.

Le traitement judiciaire des marchés publics a certes connu, ces dernières années, d'importants développements, et a, dans une certaine mesure, contribué à juguler ces pratiques, notamment à travers le délit de favoritisme.

Les dispositifs de prévention déjà existants n'ont qu'une efficacité limitée : cette prévention s'exerce, jusqu'à présent, principalement à travers des *contrôles* qui s'exercent à chacune des étapes de la procédure :

- contrôles internes : contrôle hiérarchique, inspections, commissions spécialisées...
- contrôles externes<sup>41</sup> : contrôle de légalité, du comptable public, juridictionnels...

Ces multiples contrôles constituent autant de garde-fous destinés à garantir la régularité du processus d'achat... Ils peuvent, pour peu qu'ils soient correctement effectués, contribuer à mettre à jour certaines fraudes.

Mais ils se heurtent aussi, dans leur configuration actuelle, à des *limites* qui peuvent en freiner l'efficacité.

La première limite réside dans le fait que ces contrôles, qu'ils soient internes ou externes, sont rarement exercés de manière systématique. Ainsi en est-il du contrôle de légalité exercé par les services préfectoraux : ce contrôle ne s'exerce que sur une faible partie des marchés des collectivités territoriales, et on conçoit aisément qu'il ne puisse pas toujours être effectué dans de bonnes conditions, faute de temps, et bien souvent faute de moyens et parfois de compétences disponibles : *l'effet technicité*, qui se cumule avec *l'effet volume*, ajoute à la difficulté des contrôles.

Bien plus, ces contrôles ont, jusqu'à présent, été conçus comme des *contrôles de conformité*, conformité aux textes, aux procédures, aux règles budgétaires... Dans ce dispositif, la faute éventuelle du gestionnaire ne se perçoit que par un acte ou un comportement qui ne correspond pas formellement à la norme. Or, la fraude et la corruption revêtent parfois des formes qu'il est difficile de ramener à la violation précise et immédiate d'une règle et d'un principe, et que rien dans le déroulement du processus d'achat ne permettrait de laisser supposer. Autrement dit, l'activité administrative et le respect des prescriptions qu'elle implique laissent subsister un *jeu*, une marge de liberté que n'hésitent pas à s'approprier les fraudeurs pour peu qu'ils disposent de la technicité et de l'audace nécessaires.

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<sup>40</sup> On observe par exemple une quasi stabilisation du nombre des condamnations prononcées pour favoritisme (entre 25 et 50 condamnations par an).

<sup>41</sup> On peut citer à ce stade le dispositif de veille concurrentielle dans la commande publique qui consiste à positionner aux côtés des acheteurs publics des agents de la concurrence de la consommation et de la répression des fraudes (au nombre de 150 sur tout le territoire national) ; ce dispositif inédit pour un pays de l'OCDE permet d'agir avec efficacité à la fois au titre de la prévention (conseil à l'acheteur public) et au titre de la sanction (la majeure partie des affaires de favoritisme portées à la connaissance du juge pénal ont été détectées grâce à ce dispositif).

Par ailleurs, cette priorité donnée au formalisme a pour effet de réduire le champ de vision des contrôleurs. Elle conduit, au moins dans un premier temps, à négliger certains comportements ou certaines déviations qui pourtant sont de nature à pervertir l'ensemble d'une procédure.

### 3.4 *Les mécanismes de prévention doivent être renforcés*

La lutte contre les atteintes aux règles de probité et de concurrence, et plus généralement la fraude dans les marchés publics, doit s'inscrire dans une *démarche « proactive »*, c'est-à-dire une démarche qui, à partir d'une *réflexion en amont*, conduit à définir et mettre en œuvre une *organisation* et des *méthodes de travail* destinées à éviter des situations de fraude.

Cette démarche comporte trois volets :

- la sensibilisation des acteurs de la commande publique ;
- le développement de mécanismes de détection ;
- l'élaboration de méthodologies d'investigation

#### 3.4.1 *La sensibilisation des acteurs de la commande publique :*

Elle doit avoir pour objectifs de:

- rappeler aux agents le *respect des règles et procédures*, mais aussi les conséquences juridiques qui s'attachent à leur non-respect;
- mettre en place un système de *remontée d'informations* (reporting) vers la hiérarchie et les corps de contrôle;
- d'assurer la promotion des *bonnes pratiques*.

Cette sensibilisation peut s'effectuer selon *différentes modalités* :

- actions de formation et/ou de communication ;
- à un stade plus élaboré, à travers un *code de déontologie ou d'éthique* destiné à:
- Afficher la *position du service* face aux conflits d'intérêts, sollicitations des fournisseurs, à la confidentialité de l'information;
- Donner des *normes de comportements* (déclaration des conflits d'intérêts, obligation de mobilité...);
- Indiquer les *mesures applicables* en cas de violation.

#### 3.4.2 *Le développement de mécanisme de détection*

Les méthodes dérivées de *l'audit* et leur application à l'identification des pratiques corruptrices ou anticoncurrentielles sont susceptibles de combler les lacunes des contrôles existants, par une approche renouvelée de la commande publique, qui ne serait plus exclusivement centrée sur le bon déroulement du

processus d'achat, mais sur *l'identification et l'explicitation des anomalies constatées à l'occasion de ce processus.*

De façon classique, un audit de fraude ou de corruption comporte quatre phases :

- Un *cadrage précis des objectifs*: attentes, périmètres, outils (cartographie des risques, systèmes informatiques, gestion commerciale et comptabilité...);
- Une *analyse de l'existant*, au moyen de l'analyse documentaire, des entretiens...C'est à ce stade que certains indicateurs de présence des risques de corruption peuvent être identifiés ;
- Une *phase de diagnostic*, qui porte sur l'évaluation des points forts et des points faibles de l'organisation et de son fonctionnement, la répartition des tâches et des responsabilités;
- Une phase de formulation de *recommandations*: mesures conservatoires, stratégie d'accompagnement, bonnes pratiques... Cette étape peut déboucher sur la constitution de *plaintes au plan pénal*

Le SCPC a, dans son rapport 2007, explicité une *proposition de guide méthodologique de l'audit de la corruption dans les marchés publics* destiné aux acheteurs des collectivités publiques.

### 3.4.3 *L'élaboration d'une méthodologie d'investigation*

Cette méthodologie d'investigation s'inscrit dans le prolongement de la méthodologie de détection développé précédemment.

Elle est destinée à aider les décideurs publics à identifier et à établir le chemin de la corruption ou de la fraude dans les marchés publics au sein de leurs collectivités. Elle constitue, comme l'audit, un outil de *contrôle interne* (maires ou contrôleurs des collectivités) ou de *contrôle externe* (commissaires aux comptes, contrôles externes ou services du ministère des finances). De la même façon, cette investigation peut, lorsqu'une suspicion d'infraction existe, conduire le décideur à utiliser l'article 40 du code de procédure pénale pour saisir l'autorité judiciaire. La phase judiciaire permettra, quant à elle, d'entreprendre des investigations plus approfondies, telles que la saisie des disques durs ou des logiciels (extraction des données fournisseurs, acheteurs...), les auditions, gardes à vue, perquisitions...

Le SCPC a, dans son rapport pour 2008, présenté les différentes étapes de cette méthodologie ainsi qu'une analyse informatisée des fraudes dans les marchés publics, outil complémentaire mis à disposition des enquêteurs afin de faciliter leur travail d'analyse des informations et de collecte des preuves de la corruption.

## **4. Conclusion**

L'existence des ententes dans les marchés publics rend souvent nécessaire la complicité active des acheteurs, sous forme de corruption. Cependant la répression de l'infraction pénale de corruption et celle de la pratique anticoncurrentielle relèvent d'autorités différentes.

L'amélioration de la coordination de la lutte pénale et de la lutte administrative et la sévérité accrue des sanctions au cours des dernières années marquent la prise de conscience de l'imbrication de ces mécanismes et la volonté de dissuader le plus efficacement possible ces comportements.

Par ailleurs, comme l'a relevé récemment le Service central de lutte contre la corruption en proposant une méthodologie d'investigation susceptible d'identifier la présence de corruption dans les marchés

publics « *il apparaît souhaitable que les décideurs publics soient eux-mêmes en mesure d'identifier et d'établir le chemin de la corruption ou de la fraude au sein de leurs collectivités, et ce dans des conditions d'efficacité et de sécurité suffisantes pour être en mesure d'en faire le signalement.* »<sup>42</sup>

A cet égard, la publication des décisions de sanctions de l'Autorité de la concurrence dans le domaine de la commande publique, leur médiatisation dans la presse spécialisée et l'information des acheteurs publics ne pourra que contribuer à la diffusion auprès de ces derniers d'une culture de concurrence pouvant les inciter à se comporter en tant qu'acteur du marché à part entière.

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<sup>42</sup> Rapport 2008 du Service central de lutte contre la corruption « L'investigation dans les marchés publics. »



## GABON

### 1. Competitiveness as a Corollary of Free Competition

The economy in general and consumers in particular have much to gain from healthy competition in the market because, first, it enables enterprises to operate efficiently and, second, it offers consumers a wider selection of better-priced goods.

From the economic standpoint, competition is a mechanism that allows price formation in a market merely through the interplay of supply and demand.

The rationale behind free competition in Gabon is that freedom of competition is the best way – but not the only way – to ensure economic progress. This is the theory of competition as a means to end, in which competition is simply a tool used to meet a number of objectives: economic progress, but also the protection of consumers and, in particular, wage-earners.

However, when competing for larger market shares, enterprises at times adopt uncompetitive behaviour which hinders the free play of competition.

Some enterprises use corruption to obtain a competitive advantage, rather than allowing the free play of competition. This involves “offering, giving, accepting or requesting, directly, anything of value with a view to unduly influencing the actions of a party”.

This leads to collusion, or “arrangements between two or more parties to achieve an undue aim, and notably to unduly influence the actions of another party”.

There is more than one level of corruption; in the course of daily activities, it is known as minor corruption, while in the establishment, the public sector or decision-making bodies it is treated as major corruption. Systemic corruption involves both minor and major corruption, and constitutes the greatest barrier to efficiency in the field of development.

There are substantial differences between the private and the public sector, since private enterprise is generally subject to competition.

### 2. Indicators of Suspected Corruption in Respect of Competition

#### 2.1 *Bid-rigging*

The purpose of a bidding process is to promote impartiality and ensure the lowest prices, but bid-rigging calls into question the whole process of competitive bidding. It can take several forms:

At the pre-award stage: it may involve bid suppression, or bogus tenders, i.e. collusion between bidders so that the same enterprise is often or always successful, while the same competitors continually fail to win contracts.

Frequency of open or restricted calls for bids, which are said to have failed and are eventually negotiated.

A fall in tendered prices when a bid is submitted by a new or unfamiliar bidder.

An abnormally long lead time between the award of a contract to a particular firm and the actual signature of the contract or service order (suspected corruption).

Existence of links between the decision-maker (or person in the same department) and the successful bidder (suspected unlawful conflict of interest).

Bid rotation: competitors arrange to take turns at winning contracts; the others submit higher bids, then one firm withdraws what would or could have been a successful bid and is subsequently employed as a sub-contractor by the successful bidder.

At the post-award stage: substitution of poorer-quality goods/services than those specified in the contract; fraudulent invoices (bogus, duplicate or overcharged) for undelivered goods/services or before payment is authorized; invoicing more than the price bid, and making numerous amendments to the contract.

### 3. Effects of Corruption on the Economy

	In Microeconomic Terms	In Macroeconomic Terms
Private sector	<ul style="list-style-type: none"> <li>Ineffective and inefficient project-execution</li> <li>Private investment undermined by distorted competition</li> <li>Corporate relocations</li> <li>Poorly distributed talent, propensity of firms to look for activities that produce guaranteed income rather than productive activities</li> </ul>	<ul style="list-style-type: none"> <li>Long-term decline in investment</li> <li>Decline in competitiveness</li> <li>Decline in economic growth</li> <li>Decline in private savings</li> <li>Capital flight</li> <li>Rise in unemployment</li> </ul>
Public sector	<ul style="list-style-type: none"> <li>Government inefficiency</li> <li>Distorted sectoral priorities (Health and Education lose out to sectors such as Defence)</li> <li>Decline in tax revenue</li> </ul>	<ul style="list-style-type: none"> <li>Rise in inequalities</li> <li>Rise in inflation</li> <li>Decline in public revenue</li> <li>Rise in public debt</li> <li>Decline in the balance of payments</li> <li>Rise in poverty</li> <li>Worsening of budget deficits</li> <li>Payments in arrears</li> </ul>

### 4. Avenues to be Explored

#### 4.1 Gabon's Experience

There is a vital need, in the new economic environment that the authorities intend to set up, for Gabon to become an "emerging" economy. Some major incentives should be introduced to combat corruption with effective solutions. The legal framework has been in place since the adoption of Act No. 002/2003 of 7 May 2003 introducing a regime to prevent and curb illicit enrichment in the Republic of Gabon, and Act No. 003/2003 of 7 May 2003 establishing the CNLEI (*Commission nationale de lutte contre l'enrichissement illicite*), an Independent Government Authority (AAI), to "enable it effectively to exercise its functions "free of any influence". Although Act No. 20/2005 of 3 January 2006 reaffirms that an AAI acts on behalf of the State in particularly sensitive fields without reporting to any member of Government, it must be said that much of the work done by the CNLEI since its inception has been confined to preventative measures, since no dossier has yet reached the judicial phase resulting in legal sanctions that could serve as an example in the fight against corruption.

Amongst the definitions set out in this legislation, illicit enrichment is described as follows: "...for any public servant, the act of making or endeavouring to make personal profit or obtain any advantage.... through an illicit practice in respect of expropriation, or of obtaining contracts, concessions or import/export licences".

Initiatives to ensure that the CNLEI operates optimally and effectively are under way.

#### **4.2. *Other Possible Solutions***

In addition to political stability, the fight against corruption requires solid and effective public institutions.

It is still crucial to raise the awareness of business leaders about the importance of ethics as a decisive key to competitiveness which highlights the reality of their situation and hence the economic performance of their enterprise.

Higher moral standards in public life require new, exemplary measures to curb acts of corruption.

Collaboration between competition regulators and the judicial authorities is more than vital to build capacity in the fight against corruption. This is because the institutions set up by Governments are often targeted at "any public servant" whereas competition is being distorted by corruption; there is a need for joint initiatives; the competition authorities should institute proceedings against economic operators guilty of corruption and introduce effective disincentives. This would discourage such practices, the ultimate aim being to make competitiveness the sole criterion in the bidding process.



## GABON

### 1. La compétitivité, corollaire de libre concurrence

L'économie en général et les consommateurs en particulier ont beaucoup à gagner d'une concurrence saine sur le marché ; en effet, d'abord elle permet aux entreprises d'opérer efficacement et ensuite, elle offre aux consommateurs un plus grand choix de produits à des meilleurs prix.

Sous son aspect économique, la concurrence apparaît comme un mécanisme permettant, sur un marché déterminé, la formation des prix par le simple jeu de l'offre et de la demande.

Le fondement de la libre concurrence au Gabon est de considérer que la liberté de la concurrence est le moyen privilégié d'assurer le progrès économique mais qu'il n'est pas le seul, c'est la théorie de la concurrence - moyen. Elle fait de la concurrence un simple instrument d'intervention au service d'objectifs multiples : progrès économique, protection des consommateurs, et des salariés notamment.

Cependant, en se faisant concurrence en vue d'acquiescer des plus grandes parts de marché, les entreprises adoptent parfois des comportements anticoncurrentiels qui entravent le libre jeu de la concurrence et font obstacle au libre jeu de la concurrence.

Il arrive que les entreprises utilisent la corruption afin d'obtenir des avantages concurrentiels au lieu de laisser la concurrence se jouer librement. Il s'agit « d'offrir, de donner, d'agréer ou de solliciter, directement, toute chose ayant une valeur dans le but d'influencer indûment les actions d'une partie ».

Ceci conduit à des collusions, c'est-à-dire le fait d'« un arrangement entre deux ou plusieurs parties pour atteindre un but indu, notamment influencer indûment les actions d'une autre partie ».

Il existe différents niveaux de corruption, celle qui intervient dans les différentes activités quotidiennes, c'est la petite corruption, celle qui existe au sein de l'Institution ou dans le secteur public ou au niveau des instances décisionnelles, c'est la grande corruption. La corruption systémique se produit lorsqu'il y a à la fois petite et grande corruption, elle constitue le plus grand obstacle à l'efficacité en matière de développement.

Il existe des différences majeures entre les secteurs privés et le secteur public, en effet, l'entreprise privée, elle, est généralement soumise à la concurrence.

### 2. Les indicateurs de soupçon de corruption dans la concurrence

#### 2.1 La manipulation d'appels d'offres

Le processus d'appel d'offres vise à promouvoir l'impartialité et à assurer que les prix les plus faibles sont obtenus, la manipulation des offres remet en cause ce procédé de promotion de la concurrence. Elle se manifeste de plusieurs manières :

Lors de la phase avant attribution : elle peut consister en une suppression des enchères : les offres factices - accords entre soumissionnaires avec pour conséquence que la même entreprise commerciale gagne souvent/toujours les appels d'offres, les mêmes sociétés concurrentes soumissionnent continuellement en présentant des offres jamais retenues.

Fréquence des procédures d'appels d'offres ou restreints déclarées infructueuses et se concluant par une procédure négociée.

Les prix offerts diminuent quand un nouveau ou inhabituel offreur soumet une offre.

Allongement anormal des délais entre la désignation du titulaire du contrat et la signature effective du contrat ou de l'ordre de service (soupçon de corruption).

Existence de liens entre le décideur (ou personne de son service) avec le titulaire du marché (soupçon de prise illégale d'intérêts).

La rotation des offres : les concurrents s'arrangent pour remporter les contrats à tour de rôle, les autres soumettant des offres élevées une société retire son offre, gagnante ou potentiellement gagnante, et est contractée à posteriori avec l'adjudicataire en sous traitance.

Au cours de la phase après attribution : substitution des produits ou qualité inférieure des services prévus dans les spécifications contractuelles ; facturation frauduleuse (fausse, dupliquée ou surfacturée) de biens ou services non délivrés ou avant d'être autorisés pour paiement ; facturation plus chère que le prix qui avait été offert, ainsi que de multiples amendements apportés au contrat.

### 3. Les effets de la corruption sur l'économie

	<b>Sur le plan microéconomique</b>	<b>Sur le plan macroéconomique</b>
Secteur privé	Exécution inefficace et inefficente des projets Nuisance à l'investissement privé à cause de la distorsion introduite dans la concurrence Délocalisation des entreprises Mauvaise répartition des talents, propension des entreprises à rechercher des activités de rentes plutôt que des activités productives	Baisse des investissements à long terme Baisse de la compétitivité Baisse de la croissance économique Baisse de l'épargne privée Fuite des capitaux Hausse du chômage
Secteur public	Inefficacité de l'Administration Fausses priorités sectorielles (les secteurs de la santé et de l'éducation sont relégués au second plan par rapport à des secteurs comme la Défense) Baisse des impôts et taxes prélevés	Accroissement des inégalités Accroissement de l'inflation baisse des recettes publiques hausse de la dette publique détérioration de la balance des paiements augmentation de la pauvreté accroissement des déficits budgétaires apparition des arriérés de paiement

### 4. Les pistes de réflexion

#### 4.1 L'expérience du Gabon

La nécessité est vitale dans le nouveau contexte économique que les autorités entendent mettre en place pour faire du Gabon un pays « émergent ». Des mesures de stimulations très importantes doivent être mises en œuvre afin de lutter contre la corruption par des solutions efficaces. En effet, bien que le cadre juridique existe depuis par l'adoption de la loi 002/2003 du 7 mai 2003 instituant un régime de prévention et de répression de l'enrichissement illicite en République Gabonaise ainsi que la loi 003/2003 du 7 mai 2003 qui met en place la CNLEI qui est une Autorité Administrative Indépendante (AAI) afin de « lui permettre d'exercer efficacement ses fonctions à l'abri de toute influence ». Bien que la loi n°20/2005 du 03 janvier 2006 ait réaffirmé qu'une AAI agit au nom de l'État dans des domaines particulièrement sensibles, sans pour autant relever de l'autorité d'un membre du Gouvernement, force est de constater que depuis sa mise en place, l'essentiel des activités de la CNLEI est réservée aux mesures de prévention aucun

dossier n'a encore connu un épilogue judiciaire aboutissant sur des sanctions judiciaires devant servir d'exemple dans la lutte contre la corruption.

Ces textes définissent entre autres, l'enrichissement illicite comme le fait de « ...le fait pour tout dépositaire de l'État, de réaliser ou de tenter de réaliser des profits personnels ou d'obtenir tout avantage... au moyen d'une pratique illicite en matière d'expropriation, d'obtention de marché, de concession, ou de permis d'exportation ou d'importation... ».

Des actions visant un fonctionnement efficace et optimal de la structure sont entrain d'être entreprises.

#### **4.2      *Les autres solutions envisageables***

La lutte contre la corruption a besoin, en plus de stabilité politique, d'institutions publiques solides et efficaces.

Il demeure primordial de sensibiliser les chefs d'entreprise quant à l'importance de l'éthique comme facteur déterminant de compétitivité qui fait ressortir la réalité et donc la performance économique de leurs entreprises.

La moralisation de la vie publique passe par la mise en place des mesures exemplaires de répression des actes de corruption.

La collaboration entre les institutions chargées de réguler la concurrence et les autorités judiciaires est plus que vitale ceci ayant pour but un renforcement des capacités dans la lutte. En effet, les institutions mise en place par les Gouvernements visent souvent « tout dépositaire de l'État », alors que la concurrence se trouve faussée du fait de la corruption ; il est souhaitable que les actions soient conjuguées, les autorités en charge des questions de concurrence doivent poursuivre les opérateurs économiques coupables d'actes de corruption en prenant des mesures efficaces de dissuasion. Ceci aurait pour effet de décourager ceux qui s'adonnent à ces pratiques l'objectif final étant que la compétitivité soit le seul critère d'obtention des marchés.



## GERMANY

### 1. Introduction: The Process of Public Procurement and its Review

Public procurement is a factor of key significance in the German economy, as in many developed as well as developing economies around the world. The volume of public procurement (all contracting authorities combined) in Germany amounted to almost 270 billion Euros in 2007, which constituted a share of roughly 11% of GDP<sup>1</sup>. For the entire EU, the volume of public procurement is estimated at 1.500 billion Euros, which is a share of 16% of GDP.<sup>2</sup>

A contracting authority in Germany that places a call for tenders has to respect certain basic principles in the process leading to its procurement decision, namely and most importantly, transparency, non-discrimination and competition. The aim is, ultimately, to make sure that the contract is awarded to the economically most advantageous offer so that public funds are used in the most efficient way. Furthermore, procurement law is seen as an instrument for integrating the European market and for controlling the exercise of any market power by the state. The relevant principles are specified, in more detail, in the law governing public procurement.<sup>3</sup> Among these principles are a timely announcement of the procurement procedure and non-discrimination in drafting the tender documents and in assessing the bids.

The contracting authority placing a call for tenders is obliged to make sure that its tendering procedure is in accord with these principles, and it is this entity which is responsible for assessing the submitted bids. In this process, the contracting authority is called upon to be aware of and look out for any possible anti-competitive behaviour of bidders and to exclude any such bid.

To ensure that the key principles of public procurement law are respected it is of great importance that, at least for procurement projects exceeding certain thresholds<sup>4</sup>, procurement procedures and decisions can be reviewed by an independent instance in an effective manner. Companies participating in a public procurement procedure have a right to demand that the contracting authority respects the relevant provisions of public procurement law. Therefore, under certain conditions, companies can request a formal review of the procurement procedure and decision. Such a formal review of a procurement decision, under public procurement law, can only be triggered by a company that can demonstrate its interest in the relevant public contract. This implies, in particular, that a review cannot be initiated *ex officio*. The relevant authorities in Germany to conduct the review initiated by a bidding company are the public procurement tribunals of the federal administration, as far as procurement projects of a federal contracting authority are concerned, and the public procurement tribunals of the federal states (*Länder*), for

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<sup>1</sup> The total value of public procurement stated is based on statistics of the Federal Office of Statistics (*Bundesamt für Statistik*) and the budget plans of ministries.

<sup>2</sup> Cf. [http://ec.europa.eu/youreurope/business/profitting-from-eu-market/benefiting-from-public-contracts/index\\_de.htm](http://ec.europa.eu/youreurope/business/profitting-from-eu-market/benefiting-from-public-contracts/index_de.htm) and [http://ec.europa.eu/internal\\_market/publicprocurement/index\\_de.htm](http://ec.europa.eu/internal_market/publicprocurement/index_de.htm).

<sup>3</sup> The relevant legal provisions are to be found in Sections 97 – 129 of the Act against Restraints of Competition (ARC) for procurement above certain thresholds. For procurement below those thresholds, budgetary law is applicable (for thresholds cf. below, FN 4).

<sup>4</sup> The thresholds differ according to the kind of procurement, ranging from 4,845,000 Euros in construction down to 193.000 Euros for other products and services. The thresholds are regularly adjusted.

procurement projects of those contracting authorities under the jurisdiction of the federal states or municipalities.

The public procurement tribunals are independent in their legal review of procurement decisions. Their decisions can be appealed, typically, to the relevant Higher Regional Court (*Oberlandesgericht*). A request for the review of a procurement decision can be put forward by any company that has an interest in the awarding of the contract and whose rights have been infringed because the rules of procurement have been violated and that has therefore suffered, or will suffer, damages.

## 2. General Issues of Collusion and Corruption in Public Procurement

Collusion among bidders is, arguably, a perennial problem in bidding processes, and particularly so in tenders placed by government entities. Strategies of collusion can be executed in a number of ways, among them cover bids (i.e., submission of a bid that is known and designed, by the colluding firms, to be too high) or non-bidding (i.e., refraining from bidding or withdrawing a submitted bid). These strategies serve to make sure that, among the colluding firms, a specific company is awarded the contract. The underlying rule for allocating contracts among the colluding firms can be, e.g., rotation (i.e., over time each one of the colluding firms is awarded a contract), allocating customers (i.e., a specific customer is “reserved” for a specific cartel member) or allocating geographic markets.

Although bidding processes seem to be, on the face of it, particularly competitive procedures, they have certain weaknesses from an anti-collusion point of view. The fact that, at a given point in time and with a given deadline, interested firms are asked to submit bids for products or services according to precise specifications conveys information to market participants that is typically not available in non-bidding procurement situations. Collusion among potential contracting firms is facilitated if certain market characteristics prevail, e.g., a small number of market participants, little or no market entry, repetitive bidding.<sup>5</sup>

In the case of governmental tendering procedures, certain additional factors may further heighten the risk of collusion. Among these factors, in Germany, is typically a ban on re-negotiating a bid that has been submitted in a formal bidding procedure (*Nachverhandlungsverbot*).<sup>6</sup> This may have the effect of stabilising a cartel, since the colluding firms – once they have executed their scheme of collusion and their bids have been filed – do not have to be concerned that any subsequent bilateral negotiation of the contracting authority with bidders will endanger the result. In this sense, a legal provision that aims at protecting the bidding companies *vis-à-vis* the contracting authority may have the unintended side effect of facilitating anti-competitive behaviour. Other specifics of public procurement may further facilitate collusion, e.g., systems of co-financing by different public entities which may necessitate an early enquiry about the product, giving firms more lead time for colluding.<sup>7</sup>

The system for review of public procurement, as described above, is designed to make sure that the intricate rules for bidding processes are respected and that individual bidders who see their rights infringed can have effective legal recourse. However, detecting bid-rigging is not the primary concern of a specific review procedure. This is not what the system is designed to do. In this context it is important to stress that the review of procurement looks at an individual bidding process and considers whether the rules of public procurement have been adhered to. It is not intended to look at a sequence of tenders, which would be necessary to identify suspicious patterns of bidding that only become apparent over time. Furthermore,

<sup>5</sup> Cf. OECD, Guidelines for Fighting Bid Rigging in Public Procurement, pp. 2-3.

<sup>6</sup> Cf. Section 24 VOB/A.

<sup>7</sup> Cf. below.

only a small percentage of procurement cases are potentially subject to formal review that can be initiated by one of the bidders. The value of most public tenders is below the relevant thresholds.<sup>8</sup>

Another problem area in public procurement, besides collusion among bidding firms is corruption, e.g., in the form that a person within the contracting authority calling for tenders engages in improper communication with one (or more) of the bidding companies and transmits crucial information that helps the companies design the winning bid. Collusion and corruption may go hand in hand in bid-rigging scenarios. However, the Bundeskartellamt has no statistics on the significance of these violations, and on the significance of both practices occurring jointly.

While the competition authorities in Germany are responsible for prosecuting undertakings engaging in bid-rigging according to the ARC, the persons involved in bid-rigging are, in principle, prosecuted by the public prosecutor's office according to criminal law. The competition authorities have no jurisdiction in corruption matters. This is the exclusive responsibility of the public prosecutor.

### 3. Cases of collusion in the practice of the Bundeskartellamt

The Bundeskartellamt has prosecuted cases of bid-rigging (collusion) – whether in procurement by public entities or non-public entities – in a wide range of sectors, and there is no strict focus on any sector or industry. Some of the sectors where bid-rigging has occurred are:

- Building materials (concrete);<sup>9</sup>
- High voltage power transformers;<sup>10</sup>
- Large steam generator vessels;<sup>11</sup>
- Specialised vehicles;<sup>12</sup>
- Combat boots;<sup>13</sup>
- House-moving services for military personnel;<sup>14</sup> and
- Waste collection services (*Grüner Punkt*).<sup>15</sup>

Cases were typically triggered by customer complaints, whistle-blowers, or by internal reviews conducted by contracting authorities. In one case, a news magazine that had been contacted by a whistle-blower informed the Bundeskartellamt about an ongoing cartel.

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<sup>8</sup> Cf. above, FN 4.

<sup>9</sup> Cf. Bundeskartellamt, *Tätigkeitsbericht* (hereinafter: Activity Report) 2005/2006.

<sup>10</sup> Ongoing procedure.

<sup>11</sup> Ongoing procedure.

<sup>12</sup> Ongoing procedure.

<sup>13</sup> Cf. Activity Report 1999/2000, p. 42, p. 94.

<sup>14</sup> Cf. Activity Report 2005/2006, p. 33, p. 149.

<sup>15</sup> Cf. Activity Report 2007/2008, p. 153.

A case that is currently being prosecuted concerns bid-rigging in the procurement of certain specialised vehicles. In this case, it is suspected that the relevant producers operated a quota arrangement. The specific rules of public procurement in this sector may have been conducive to operating the cartel. Although the vehicles are ultimately procured by local authorities, they are typically subsidised by the respective federal state. This system entails that in the procurement process an initial round of market investigation takes place to determine the approximate price level in order to establish the amount of co-financing by the relevant state. This might give the producers additional lead time to operate the cartel. The Bundeskartellamt's investigation was triggered by several strands of information, among them one originating from the state authority involved in co-financing, another originating from a local contracting authority.

There is a good theoretical case to argue that collusion and corruption in bid-rigging cases go hand in hand. However, actual cases which provide empirical evidence are rather few and far between, in the Bundeskartellamt's experience.

One such case investigated by the Bundeskartellamt concerned the procurement of combat boots for the German Armed Forces. An employee of the Armed Forces Procurement Agency was bribed by colluding firms and passed on confidential information that facilitated collusion among producers supplying the armed forces with combat boots. An internal review by the procurement agency detected irregularities, and the state prosecutor's office prosecuted for corruption. The relevant information on collusion among the producers was given to the Bundeskartellamt. The investigations of the Bundeskartellamt confirmed the suspicion of quota agreements for four tendering procedures involving six companies. Based on the information that was revealed to them by the bribed official, the companies submitted their bids in such a way that the contracts had to be awarded according to the quotas that the companies had collusively agreed on. The Bundeskartellamt issued fines for infringing the ban on cartels against the companies and their chief executives.<sup>16</sup>

#### **4. Conclusion**

Although the system of public procurement is intended to be competitive, certain characteristics of public procurement may facilitate bid-rigging. With the rules on reviewing procurement decisions in place, the competitive nature of procurement procedures can be monitored at least to some degree. However, these review procedures by the procurement tribunals are not aimed, primarily, at identifying bid-rigging, and cannot accomplish this in a systematic way. The main responsibility for avoiding bid-rigging – e.g., by designing procurement procedures accordingly – and for being sensitive towards indicators of bid-rigging lies with the contracting authorities. The cases taken up by the Bundeskartellamt indicate the practical significance that this vigilance has for prosecuting bid-rigging.

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<sup>16</sup> Cf. Activity Report 1999/2000, p. 94.

## INDIA

Public procurement can be defined as procurement made by utilising public funds to fulfil needs and requirements of a public authority. Procurement is a key economic tool available with the governments for execution of developmental programmes including delivery of socially important goods & services like Public health, Education, Public Transport etc. Public procurement plays an important role in facilitating use of private sector for public sector goals and acts as a catalyst towards development of particular societal groups and regions.

The primary objective of any effective procurement policy is to obtain goods, works and services with a view to shunning mismanagement, avoiding waste of public funds and in process getting the best value for money. Competition among supplier firms would enable governments accomplish this objective and therefore it is imperative that the procurement process is not affected by any endeavour to embrace practices such as collusion, bid rigging, fraud and corruption. While strict enforcement of competition law is crucial, advocacy in terms of informing and educating public procurement agencies about the needs and benefits of competition would help in designing efficient procurement processes and in turn bring down the cost of procurement at desirable level.

It is estimated that public procurement constitutes about 15% -20% of GDP in developed and developing jurisdictions. Public procurement is estimated at approximately 20% of Gross Domestic Product in OECD countries<sup>1</sup>. In India, public procurement has been estimated to constitute about 30% of GDP<sup>2</sup>. Under the constitutional provisions of India, Union List, State List, and the Concurrent List govern the legislative functions of the central and state governments. State procurement does not figure in any of the lists as a distinct subject and therefore the Union Parliament has the exclusive power to make any laws on the subject of procurement. However, Parliament has not enacted any specific legislation on the subject and hence Public Procurement is performed through Government Policies.<sup>3</sup> The matter of procurement is primarily covered by General Financial Rules 1963 (amended in 2005) which are set of executive instructions framed by the Ministry of Finance and the Delegation of Financial Powers Rules 1978. The Department of Expenditure, Ministry of Finance has also issued three separate Manuals on Procurement of Goods, Services and Works as guidelines to all central government departments in the matters of procurement. Further, the Directorate General of Supplies & Disposals (DGS&D) and the Central Vigilance Commission (CVC) have also issued guidelines prescribing the procurement procedure to be followed by all Central Ministries.

Procurement of goods and services in India is carried out by the Ministries, Departments, Local Bodies, Statutory Corporations and Public Undertakings both at Central and state level. The Ministry of Finance at the Centre and the Department of Finance in the States lay down broad rules in the matters of government expenditures including expenditure on the procurement of goods, works and services. The

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<sup>1</sup> The Size of Government Procurement Markets, OECD, 2001.

<sup>2</sup> “Enhancing value in public procurement”, special address by Shri Pratyush Sinha, Central Vigilance Commissioner, Conference on Competition, Public Policy and Common Men, 16th November 2009 organised by Competition Commission of India in Delhi. Although an Article by Vivek Srivastava, Titled, “India’s accession to the Government Procurement Agreement: Identifying Costs and Benefits”, published in ‘India and WTO’ by Aditya Mattoo and Robert M. Stern published in 2003 had estimated it at 20%.

<sup>3</sup> Tamil Nadu and Kamataka, have recently enacted Acts on ‘Transparency in Public Procurement’.

procuring agencies may issue elaborate guidelines based on these rules. The office of Comptroller and Auditor General of India (CAG) carries out ex-post audit of government expenditures and publish annual and special reports highlighting instances of irregular and wasteful expenditures.

As public procurement in India is decentralised, all States/PSUs have their own procurement organisations. There is no Central Procurement Authority though Central Purchase Organisations like the Directorate General Supplies and Disposal (DGS&D) and state level purchase organisations are associated with the process of rate contracts (akin to framework agreements) with registered suppliers.

There are three types of tenders prescribed in the rules: Advertised Tender Enquiry (ATE); Limited Tender Enquiry (LTE) and Single Tender Enquiry (STE). The general rule in procurement is that any tender above a value of Rs. 25,00,000 must be through invitation by public advertisement. Restricted or limited tenders are prescribed for procurement of goods exceeding Rs.1 lakh but below Rs. 25 lakh or in exceptional circumstances and single tenders are prescribed in the case of exceptional circumstances like urgency and proprietary items. The basic procedural framework, therefore, is no different from World Bank Guidelines or UNCITRAL model law or the other good models of public procurement and it can be said that there is a reasonably good framework of rules, procedures and documents in place.

The Defence Procurement Procedure - 2008<sup>4</sup> provides comprehensive policy guidelines for all capital acquisitions undertaken by the Ministry of Defence, Defence Services, Indian Coast Guard, Defence Research and Development Organisation (DRDO), and the Ordnance Factory Board (OFB). Defence Procurement Manual governs the procedure for revenue procurement in these organisations. The Government of India has also evolved special procedures and guidelines for procurement of PPP Projects.

The basic guiding principles of public procurement in India, inter alia, include maximising economy, efficiency and effectiveness, fairness, competition among suppliers for supply of goods/services to be procured and transparency in the procedures. The rules governing public procurement are binding only on the State as defined in Article 12 of the Constitution of India. The expression "State" is widely defined and interpreted to include not only the Government but also agencies and other autonomous bodies directly or indirectly controlled by it. Hence private bodies not under the control of the Government are not bound by the procurement procedures prescribed under the rules prescribed by the Government.

The tendering authority has to proceed in accordance with the limitations contained in the tender document or in the applicable Manuals or Rules. The general rule is that the tender is awarded to the lowest bidder (L-1). Post tender negotiations are severely discouraged and even L-1 post tender negotiations are not permitted except for reasons to be recorded in writing. Judicial review of administrative action is vested in the high courts. A tenderer shall have a right to be heard in case it feels that the proper tendering process has not been followed or that its bid has been wrongly rejected. The general rule prescribed by Courts, is that any person having a conflict of interest will not be part of the bid evaluation or award process.

The procurement by the Central Government Ministries and Departments by and large works satisfactorily using fair and reasonable procedures. However, cases of corrupt practices, instances of bid – rigging and collusive bidding have also come to fore.

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<sup>4</sup> The Defence Procurement Procedure – 2002 (DPP- 2002) came into effect from 30 December 2002. The scope of the same was enlarged in June 2003 to include procurements flowing out of 'Buy and Make through Imported Transfer of Technology (TOT)' decisions. This procedure was reviewed in 2005 and later in 2006. The Defence Procurement Procedure – 2006, was again reviewed and revised based on experience gained in implementation and DPP 2008 came into existence with effect from August 2008.

The problem of corruption is rooted in substituting public welfare by the personal interest of employees. Personal payoffs result out of anti-competitive practices giving rise to poor quality and higher costs of public procurement. Anti-competitive procurement manifests in practices like specifications which could be chosen either to favour some suppliers or as entry barriers for others or procurement of non standard items. Bureaucratic hurdles can also be effectively used to erect entry barriers selectively. Annual worldwide bribery of about US \$1 trillion<sup>5</sup> has been estimated on account of corrupt practices in procurement.

While anti-competitive procurement policies can be used effectively by the public officials to engage in corrupt practices, anti-competitive behaviour by the supplier firms can also generate benefits for them. By colluding with the public officials, the suppliers can form informal cartels to create entry-barriers. In Indian context, public works contracts are prime examples of such collusion. Unlawful gains through public procurement become the main objective of many individuals.<sup>6</sup>

Collusion between the supplier and the procurement agency to maximise payoffs is major problem with public procurement which may take various shapes; viz quantity variations or changes in specification, paying for fictitious work, accepting poor quality product or work etc.

Corruption affects the allocation of public resources since projects more likely to provide opportunities to illegal gratification are preferred and in process many socially desirable schemes may get neglected. Corruption leads to a different process of allocation of contracts compared to a genuine competitive process. Corruption either gives rise to a situation where the contract is not awarded to the lowest bidder but rather to the firm who has offered a bribe or to a situation in which there are fewer bidders than would otherwise have been the case, thus, distorting the competitive process. There is complementarity in corruption and anti-competitive practices as corrupt procurement officials may ask the supplier firm to ensure (through bid-rigging) that its bid will be the lowest bid. Other competing firms may simply agree either in exchange of some consideration or out of promise of sub-contract of main work. There are possibilities of tacit exchange in sense that if the competing firms collude, markets can later on be allocated, giving gains to all the firms which are parties to this arrangement.

Central Vigilance Commission (CVC)<sup>7</sup> was set up in India in 1964 to guide the central government and its agencies in tackling corruption by public officials. It supervises investigations under the Prevention of Corruption Act, 1988. The CVC has also issued guidelines and instructions to curb corruption in procurement. Each Ministry or Department has its own vigilance machinery which looks into the procurement related misdemeanours. CVC has issued 'Standard Operating Procedure' laying guidelines for adoption of Integrity Pact and role of independent external monitor in respect of all major procurements. Department of Personnel and Training has suggested to all State Chief Secretaries to consider IP adoption in respect of State Public Sector Undertakings (PSUs) as outlined by CVC. Ministry of Defence in its 2008 Procurement Policy has proposed to adopt IP in all defence deals of Rs 100 crore and above. So far, 38 Central PSUs have committed to adopt IP.

State Vigilance Commissions have also been set up in some states. Besides, Lokayuktas or ombudsmen have been put in some states to investigate charges of corruption against public servants,

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<sup>5</sup> Interview by Director, World Bank Institute Global Governance, Daniel Kaufmann <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html> (accessed on 23.12.2009).

<sup>6</sup> Many such individuals also try their luck in politics by using ill-gotten funds at their disposal.

<sup>7</sup> Details may be seen at ([www.cvc.nic.in](http://www.cvc.nic.in)).

politicians and officers. The Right to Information Act, 2005 with its objective of arming citizens with right to get information marks a benchmark in transparency and accountability in governance.

*Section 3(3) of Competition Act, 2002* specifically provides that any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, *which directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.* Since the concerned section has been notified only in May 2009 the results of enforcement actions have not yet been fructified. However, significant steps have been taken towards advocacy on the issue of public procurement. Several conferences and workshops have been organised for the benefit of public procurement officers and other stakeholders. A seminar on "Public Procurement Reforms for Better value for Money" was held recently in New Delhi. Another conference was organised in November on "Competition and Public Procurement Policy" in which many eminent experts had the occasion to put across their view points.

Currently, many countries are in the process of evolving ways to save costs by preventing corruption in government procurement. Korea's experience demonstrates that using IT can be one of the most effective policy tools in this direction. Proper adoption of an e-procurement system can expand transparency in the procurement market and also contribute to the prevention of corruption. Towards this, Department of Expenditure, Ministry of Finance, Govt. of India has taken significant steps by issuing instructions to all Govt. Ministries/ Departments/Organisations to switch over to e-procurement regime.

Corruption induces lack of competition which leads to the neglect of innovation. More potential suppliers in market not only results in additional competition giving rise to lower prices, innovations, better quality goods & services but also translates into reduced tax burden. The governments also in the process find more funds at their disposal for delivering public goods.

Collusion in public procurement may be reduced by careful consideration of the various features of the bid process. Procurement tenders are required to be designed in such a way that the bidders' ability to reach collusive arrangements is significantly reduced. Competition authorities need to make efforts to increase awareness of the cost of bid-rigging to the government and to the taxpayers by way of educating and training procurement officials and government investigators and take exemplary actions against firms involved in bid-rigging and other illegal conduct which undermines competition. Competition authorities can develop check lists to help procurement agencies in detecting instances of possible collusion.

A stronger antitrust and anti-competition agency with strong co-ordination with other law enforcement agencies will contribute to reducing the corruption in public procurements. Systematic exchange of information between the antitrust bodies and anti-corruption bureaus is highly desirable in this regard. Drive against corruption and steps towards enforcement to eliminate anti-competitive practices are complementary in nature since improvement in the procedure by which the tender documents are designed and the bidders are ultimately selected will not only reduce corruption but also enhance competition in the procurement market.

## INDONESIA

### 1. Introduction

Corruption has become a chronic problem in Indonesia and kept mushrooming in spite of the reformation and regional autonomy era. Practices of collusion and nepotism towards corruption have also expanded and involved central and regional public officials, business actors, and the public. Corruption is not only related to business activities that regulate licensing, concessions, procurement, *et cetera*, but has expanded to such other matters as the handling of resident identity cards, driver's licenses, travelling documents, and the like.

A number of efforts have been put to eradicate corruption in Indonesia, particularly since 1998, when the waves of reformation began to roll on. A variety of social organisations have kept growing and actively demanding corruption eradication. Apart from its shortcomings, reformation has successfully resulted in a number of laws to stimulate democratic values in the fields of politics and economy followed by good, clean, transparent, and accountable government. Among others are laws on general election, laws on prohibition against monopolistic practices and unfair business competition, and laws on corruption eradication.

However, those efforts are still not enough. Corruption practices that have been systemic and deeply rooted in Indonesia require more serious, systematic, simultaneous, and co-ordinated eradication efforts. Corruption eradication has to be a national People's Movement by involving all elements and layers of the society. Both the system and the actors have to be good. Without exception, efforts for law enforcement on competition have to bring about positive impacts to efforts for corruption eradication. At least, with law enforcement on competition, the climate of fairer business competition will grow, so that business actors will be encouraged to set more competitive prices with nearly normal/reasonable level of profit. With smaller profit, the potency of corruption will also be reduced.

From the perspective of the development of the economic system, the position of business competition is very strategic in that it is an essential need of the nation. Indonesian founding fathers have inherited *Pancasila*<sup>1</sup> and the Constitution of 1945 as constitutional grounds for living as a nation and a state. Therefore, Indonesia's economic system must be source from Indonesia's own national constitution, not from various theories, let alone from the constitutions of other nations. According to *Pancasila* and the Constitution of 1945, the objective of economic development is to realise a just and prosperous (affluent) society in addition to a distributive mechanism of economic resources that is also regulated in more detail in Article 33 of the Constitution of 1945.

It is explicitly stated that a state can control or at least intervene market mechanism if it is related to specific business lines that are important for the state and the people. Control in any form, however, is basically very limited, as the state must be able to show that the people's prosperity would improve. Otherwise, the state's intervention can be abusive and distortive, thereby increasing burden/hardship on the

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<sup>1</sup> Consists of five key elements, namely (1) Believe in the one end only God; (2) Just and Civilized humanity; (3) The unity of Indonesia; (4) Democratic life led by wisdom of thoughts in deliberation amongst representatives of the people; (5) Achieving social justice for all the people of Indonesia.

people. Therefore, Indonesia's constitution provides enough room for the market mechanism to allocate economic resources. In line with the development of globalisation, the demand towards market economy system is unavoidable.

Theoretically, negative impacts of market economy can be corrected by the state's intervention. However, it may be complicated if the state concerned is included as one of the states most infiltrated by corruption in the world.

In Indonesia's case, it is important to understand its history to understand how why corruption is such a large issue and how the drive for improvements and reform have emerged. In the past, Indonesian economy had been developed in centralistic manner for more than 30 years and not based on economic democracy as outlined in *Pancasila* and the Constitution of 1945. Through centralised policies, a very small number of business actors had gained extraordinary benefits, especially those who were close to policy makers. Finally, the economic structure became more unbalanced, where 20% of business actors controlled more than 80% of economic assets, whereas the remaining 80% of business actors competed to obtain the remaining assets that were less than 20%. As a result, with monetary crisis beginning in Thailand in mid-1997, the economy that had been built for more than 30 years was ruined.

The reformation has rolled on massively since 1998. It has put *Pancasila* and the Constitution of 1945 to be understood more progressively with the spirit to affirm democratic principles in the fields of politics and economy as well as good, clean, and accountable government. The law on business competition was one of the solutions being offered at that time.

## **2. Business Competition and Corruption Eradication**

Corruption has been one of the biggest enemies of Indonesia. The issuance of law on corruption eradication, Anti-Corruption Court, and the establishment of anti-corruption institutions indicates the state's commitment to accelerate corruption eradication. In this case, various measures of prevention and action have been taken by law enforcement agencies. However, corruption will not be successfully eradicated if it is dealt with by law enforcement agencies only, let alone by anti-corruption institutions only.

Therefore, the law on business competition should be enforced also as efforts for corruption eradication, at least as efforts for corruption prevention. This is very possible as the potency of corruption with bigger scale may be attributable to business actors who have some funds from their profits, which are very potential to be granted as illegal fees or bribes or other forms to policy makers.

One of the characteristics of a government with high corruption level is strong relationship between those in power and business actors. Business actors who have access to power are usually provided with exclusive rights and other facilities with proportional compensation to the related officers. The business actors can then freely exploit consumers by excessive pricing in order to gain supernormal profits.

It is through these supernormal profits that business actors are able to set aside some quite big funds potential for corruption practices in order to maintain status quo or even business expansion. As such, those rogue officers will be stronger and richer by the grants of related business actors. Policies and regulations are used as tools to enrich themselves and maintain their power. It goes on with win-win principle to be a vicious circle that is not easy to break.

Based on survey results, corruption level in Indonesia always relatively ranks as one of the highest in the world. The result of a Transparency International (TI)'s survey in 2009 showed that Indonesia was ranked the 111th (with index of 2.8) out of 180 states. Indonesia is part of the ASEAN grouping of South East Asian countries and initiatives associated with its membership of this organisation is important for the

country's further development. Several other ASEAN states were much better with Singapore in the 3rd rank (with index of 9.2), Malaysia in the 56th rank (with index of 4.5), and Thailand in the 84th (with index of 3.4).

The following table also describes the ranks of competitiveness in terms of several ASEAN member states. With regard to corruption index, we know that Indonesia's competitiveness index ranked the 55th (with index of 4.25), far below Singapore that ranked the 5th (with index of 5.53), Malaysia that ranked the 21st (with index of 5.04), and Thailand that ranked the 34th (with index of 4.6).

At a glance, there is a pattern that the better the corruption rank of a state, the better its competitive rank. This can be explained that with tough climate of competitiveness, the business world must try hard to improve efficiency and competitiveness and avoid wasting. The profits gained are also reasonable instead of supernormal. As a result, the potency for corruption becomes lower.

**Table 1. Comparison of Corruption and Competitiveness Indices in 2009**

States	Corruption		Competitiveness	
	Index	Rank out of 180 states	Index	Rank out of 134 states
Singapore	9.2	3	5.53	5
Malaysia	4.5	56	5.04	21
Thailand	3.4	84	4.6	34
Brunei	5.5	39	4.54	39
Indonesia	2.8	111	4.25	55
Vietnam	2.7	120	4.1	70
Philippines	2.4	139	4.09	71

Source: Processed from various sources.

In connection with the matter mentioned above, in a World Bank's publication titled "*Redesigning the State to Fight Corruption*", Ross-Ackerman (1996) formulates a hypothesis that in general, various efforts to improve competitiveness would reduce incentives for corruption. The conceptual framework is based on illegal fees that are often found in a condition where there is a lack of competition (Celentani and Ganuza, 2001).

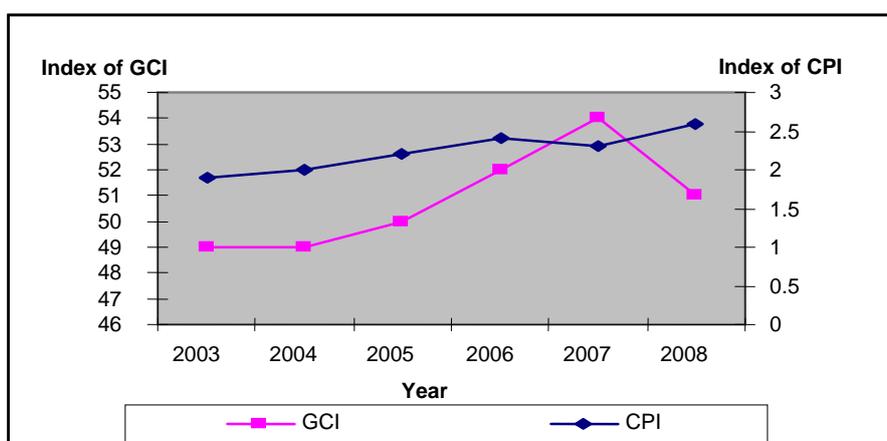
A model is plainly outlined that the level of corruption is often represented in the form of bribes and illegal fees. In connection with the procurement of goods and services for the government, a bribe may be in the form of a kickback and/or a token of gratitude in the form of gratification. The question is: How can business actors (tender winners) have enough funds to provide various forms of bribe and other legal fees? The answers may vary.

From the perspective of business competition, however, excessive pricing that results in supernormal profits is one of potential sources of funds for companies to finance various corruption related activities. This is in line with the concept that in a condition where there is a lack of competition, business actors would have market power and be very potential to misuse such power to gain supernormal profits. Market power can come either from the dominance of individual firms or collectively through a collusive arrangement. Like a vicious circle, the accumulated supernormal profits will then become potential sources of funds for business actors to put illegal fees and other forms of bribery into practice, particularly with the objective to protect the interest of companies in the future from various regulations, policies and other provisions that may affect business operation. In such a condition, a potential corruption is begun in the formulating process of a regulation/policy and discussion between an interest group (lobbyists) and policy makers.

Based on some literature, significant relationships between (potential) corruption and competition climate cannot be confirmed yet. Admittedly, various factors that affect competition conduct may be different from those that affect corruption conduct. Therefore, there is not always correlation between competition index and corruption index.

Research that was conducted by Celentani and Ganuza (2001) and Allen and Qian (2007) showed that the relationship between competitiveness and corruption is not easy to comprehensively explain. Moreover, the research of Straub (2005) concluded that competition can actually result in welfare improvement, but at the same time corruption may increase as well. Such an ambiguous condition may also be perceived when we compare corruption perception data (CPI) and competitiveness data (GCI) in Indonesia as follows:

**Figure 1: Graph of Indonesia's GCI and CPI**



The above CPI graph shows that the higher the CPI index, the lower the corruption perception (prevalence); on the contrary, GCI index shows that the lower the index, the higher is the competition.

The above graph shows that during the period of 2003-2006, Indonesia's CPI and GCI increased, implying that the corruption level was declining but at the same time the competitiveness was weakening. Negative relationship (as expected between corruption and competitiveness) was only perceived a little in 2007-2008 where there was increasing competitiveness in line with decreasing corruption perception.

Several other researches have tried to describe the relationship through parameters that affect corruption level and competitiveness level such as the number of business actors who participate in bidding process (Celentani and Ganuza, 2001) and in the procurement of goods and services for the government (Allen and Qian, 2007). The pattern of goods and services procurement for the government was chosen in that it is one of vulnerable points for interaction between government officials and business actors that is tinged by corruption practices.

In spite of ambiguity in the relationship pattern, this at least constitutes a future challenge for researchers and academicians to explain the relationship between the level of corruption and the competition climate more accurately.

### **3. Business Competition Supervisory Commission (*KPPU*) and Efforts for Corruption Prevention in Public Procurement**

In the framework of law enforcement, *KPPU* of the Republic of Indonesia that was established pursuant to Law No. 5/1999 has duties and authorities to prevent and take action against violation of law on competition and provide the government and related state agencies with recommendations and considerations.

Notwithstanding various constraints, *KPPU* has made a variety of efforts to enforce the law on competition in Indonesia. Moreover, with its relatively young age (9 years), a UN institution, i.e. UNCTAD, has granted an award as appreciation to *KPPU* for its relatively good performance and effectiveness.

Within the nine-year period upon its establishment, *KPPU* has shown ever increasing outputs of law enforcement. The data shows that in terms of report handling, *KPPU* received two types of report, i.e. 2,824 written reports and written information; whereas in this year of 2009, up to the second week of December, *KPPU* has received 730 reports from various regions. Those reports consist of 201 written reports and 529 written information, meaning there is an increase compared to last year's 707 reports.

From the perspective of alleged articles being reported, the reports that go to *KPPU* were still dominated by reports about tender conspiracy, i.e. 84% or 169 out of 201 written reports. In the last three years, the types of report have tended to be more various. This shows that the public has been more aware that *KPPU* is not an institution that only supervises tender conspiracy. This is evident from reports on merger, consolidation, acquisition, share ownership, dual position, monopsony, closed agreement, and so on.

Meanwhile, in terms of case handling, during the period from January up to the second week of December 2009, *KPPU* has handled 33 cases, covering 28 cases originating from reports of the public and 5 initiative cases. As at December 2009, *KPPU* is handling 20 cases that are still in investigation stage.

The relationship between the law on competition and corruption conduct in Indonesia lies on the application of prohibition against conspiracy in tender as referred to in Article 22 of Law No. 5/1999. In the Article, business actors are prohibited from committing tender conspiracy with other parties (including the government) in winning certain business actors. Vertical conspiracy between business actors and tender committees cannot be separated from corruption efforts. It is less impossible that if there are facilities from a tender committee (the government) to a certain business actor, it is without involving bribery or corruption.

The main idea of the corruption in the procurement process is agreeing that the bid committee arranges conditions or specifications for a certain bid participant to win, in which the bid committee shall guarantees to all the conspirators that the person they have agreed should win a bid actually is awarded that bid. In some case, the collusion involving several bid participants and the bid committee. This pseudo-competition (cartel) is hard to manage, especially when not involving the certainty for the loser to get a subcontract from the bid winner. One way to ensure this cartel succeeds is that when any of the colluding bidders tries to cheat on the cartel by putting in a lower price, the bid committee will tell the other members of the cartel or even find a reason to award the contract to the person who the conspirators agreed would be the winner, such as revising the requirement and evaluation criteria.

**Box 1. Example of collusive tender Cases:  
Case of Vertical and Horizontal Conspiracy in a Shares and Bonds Tender**

PT. A, acting as a financial advisor on behalf of X, and B, announced in 2 newspapers that it would sell B's entire shareholding in C and the entire bonds issued by B and X. The sale of C's shares and bonds were done through a tender with a sales process in accordance with the provisions made in the Procedure for the Submission of Bids, which included sale structure, binding bid, submission of bids and selection of the winning bidder and closing of the transaction. Among the criteria of tender participant were that it was a partner, or principal, or a subsidiary of a partner including a colleague of a subsidiary, a car distribution company, other auto companies and financial advisor or in essence they had to be bona fide companies.

The implementation of tender for the sale of shares by PT. A did not follow the implementation schedule of the tender for the sale of C's shares made by X as intended in the TOR. PT. A invited 135 companies but only 16 companies signed the confidentiality agreement as required by the procedure. Afterwards, the companies that submitted final bid documents and then participated in the tender were D, E and F. D was finally declared as the winner of the divestment tender.

In this case of sale of shares by tender there is a vertical and horizontal conspiracy, because it involved the owner, the work owner, and the tender participant. Based on its investigation, KPPU discovered that the conspiracy in this case was done by conducting adjustments, comparing tender documents prior to submission, the creation of a pseudo-competition, and the granting of an exclusive chance to a certain tender participant by committing various acts that violated the stipulated procedures.

The indication or signs of conspiracy in the above case came from these discoveries:

- The implementation schedule of the sale of shares tender was very short, namely 14 days, while the tender was related to huge sums of money and a complex company structure;
- There were similar tender documents among the tender participants, namely in the choice of words, the form of the letter, and the syntax on the cover letter;
- There were almost similar bidding prices submitted by two tender participants, namely F and E. The value only differs 5% from the highest bidding price submitted by D;
- There was an effort by two tender participants, namely PT ASI and D, to compare the tender documents before submitting the final bid documents. The matter was discovered following the similarities in the choice of words, the form of the letter, and the syntax in the cover letter submitted during the final bid;
- There was an effort to create a pseudo-competition following the discovery that a tender participant, E, did not seriously attempt to complete and meet the requirements asked by the selling party as included in the procedures for the submission of bid;
- There was an effort to give an exclusive chance to a certain tender participant by committing various violations on the stipulated tender procedure. One of them is by giving a time extension of the final bid submission window and there were no objections on the extension by the punctual tender participants. In addition, it was also discovered that the tender committee had accepted a tender participant that did not meet the requirements stipulated in the procedures of the submission of bid, among them were that it was not invited, it never sent a letter of interest and warranty letter, and it did not sign the confidentiality agreement.

In coping with corruption in public procurement through enforcement of law on business competition, *KPPU* uses several approaches. Firstly, through co-operation with the Anti Corruption Commission. Law in Indonesia mandates the anti corruption commission, the police, and the attorney general's office to coordinate in preventing and taking action against corruption conduct. Since corruption may also be related to the enforcement of the said Article 22, *KPPU* has initiated a formal co-operation with the institution. The co-operation is focused on exchange of data and information, joint socialisation related to prevention of conspiracy in tenders, and delegation of conspiracy cases that involve corruption. With such co-

operation, if *KPPU* finds that a government element is involved in a corruption, *KPPU* may delegate the corruption case to a more competent institution. In addition, *KPPU* would also recommend administrative actions against the officers concerned to those with higher position in their organisation.

**Box 2. Co-operation between the KPPU and  
the Corruption Eradication Commission**

Co-operation between the Corruption Eradication Commission (KPK) and the Commission for the Supervision of Businesses Competition (KPPU) was agreed on February 6th 2006. The co-operation is aimed to build co-ordination within the nation's supervisory institution, understanding that there is a correlation within corruption practices and unfair businesses competition, especially those related to tender conspiracies. The scope of co-operation were involving inter institution access on data, information, and co-ordination related to respective case findings. If there is indication of corruption in any cases handled by KPPU, then KPPU could apprehended the corruption aspect to the KPK, while KPPU continues with the collusion aspect and vice versa.

During the implementation, KPPU apprehended several big cases involving corruption. One of the biggest is a bid rigging case for an auction of Very-large Crude Carrier (VLCC) which involving one of the State-owned Enterprises in Indonesia. While, the KPK once apprehended a bid rigging case on the procurement of helicopter by Indonesian Police. Apart from law enforcement, the co-operation also established precaution activities through joint dissemination programme to the national stakeholder on the tender conspiracy.

From advocacy side, most discussion topics in those activities include conspiracy in public tenders. In order to enhance understanding of the stakeholders that include the government, business actors, academicians, journalists, legal practitioners, and the public, *KPPU* conducts advocacy activities through dissemination programmes for the stakeholders. Throughout the year of 2009, the dissemination is more intensive than that of the previous years. There are 78 activities including mass media network development (journalist forum), competition forum development at national level, joint workshop between the parliament and the government, seminar for business competition in regions, formulation of advocacy subject matters, intensive public education in media, joint workshop with judges, joint workshop with public institutions, discussion fora in Regional Representative Offices, and business competition seminars in regions. Throughout this year, there are 1,916 participants who have participated in the activities held by *KPPU*. They include journalists, academicians, business actors, the government, the parliament, judges, and the public. Most discussion topics in those activities include conspiracy in public procurement.

Experience has shown that those approaches have not resulted in sufficient deterring effects, so that *KPPU* is currently putting another effort into the punishment of administrative sanctions to tender committees or principals. This is applied based on the definition of business actors in Law No. 5/1999, where in public procurement, a tender committee acts as the purchaser and therefore it can be classified as a business actor and imposed with sanctions.

This might be different by practice in other countries such developed country. The idea that not to frighten the tender committee, but to educate them to comply with competition law and assisting us in supervising bid participants and other member of the bid committee or principal not to breach the law. Therefore in the guideline published by the KPPU, several cartel indications are mentioned as a warning sign to the related parties. Other government institutions also published their own publication in detecting misconduct and corruption on public procurement.

In prevention efforts, various activities of business competition advocacy are always carried out. Those activities are conducted by publishing manual for prevention of conspiracy in tenders and holding various seminars and workshops with the government, business actors, and other stakeholders in regard of Law No. 5/1999 and particularly conspiracy in tenders.

### **Box 3. Guideline on the Prohibition of Tender Conspiracy**

The guideline defines tenders as the bids submitted to contract certain work, for the procurement of goods or the provision of services. This article does not mention any number of parties submitting bids (either by several business actors or by one business actor in case of direct appointment/selection). Such definition of tender includes bids submitted (1) to contract or carry out a certain work, (2) to procure goods and or services, (3) to purchase goods and or services, and (4) to sell goods and or services. Based on the aforementioned definition, the basic scope of the application of Article 22 of Law No. 5/1999 shall be tenders or bids that can be submitted through Open Procurement, Limited Procurement, Public Auction, and Limited Auction. Based on this basic scope, direct selection and direct appointment that constitute parts of tender process is also included in the application of Article 22 of Law No. 5/1999.

Conspiracy in tenders in the Guideline is classified into three categories, namely horizontal conspiracy (amongst business actors), vertical conspiracy (between the tender committee and business actor) and combination of vertical and horizontal conspiracy.

In order to discover the existence of a conspiracy in a tender, the Guideline explains various indications of conspiracy in a tender. These indications ranged from planning activity until the contract implementation. However, the Guideline also views that an Investigation Team or the Commission Council of KPPU must still prove the form or manner of the conspiracy or the existence of conspiracy through an investigation.

## **4. Closing**

Collusion and corruption in public procurement have been a chronic and spreading disease in Indonesia. A variety of efforts have been put into corruption eradication. However, corruption cannot be eradicated only by enforcement of corruption criminal law. Corruption eradication has to be a national people's movement by involving all layers of the society, including through competition policies.

From the perspective of economics, the practices of monopoly and unfair business competition are very potential to fertilise collusion and corruption. Cartels, misuse of dominant positions, merger and acquisition, and other forms of anti competitive behaviour are conducted by business actors with expectation to gain supernormal profits. In bid rigging case, the supernormal profits could be expected by the bid participants and or the bid committee who guarantee certain bid participant to get the contract.

Despite only expectation to win a tender, business actors would be please to provide any parties (other bid participants and or bid committee) with some funds to realise it. Moreover, if a supernormal profit has ever been gained through a mark-up in contract value, a quite significant funding would be available to ensure their winning on the next procurement, maintain profits or even make their market expansion. As such, the relationship of corruption and unfair competition would form a vicious circle that is all the longer the harder to break.

The enforcement of law on fair business competition contributes to realising the aim of obtaining a level playing field. Government policies and regulations would also put more attention on accessibility, treatment, equal opportunities for business actors without discrimination. The society would certainly be more prosperous in that they would be able to save their income and make rational choices in the market. Meanwhile, the business world would be able to grow significantly if the competition climate is healthier as competition would help promote efficiency, productivity, and competitiveness. Business actors would keep gaining profits but at reasonable and sustainable levels. Thereafter, with profits limited to reasonable levels, business actors would have less ability to provide kickbacks or bribes to dishonest officials.

## IRELAND

### 1. Public Procurement Objectives and Policy

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.

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

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>

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.

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>

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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.

<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

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>

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>

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.

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.

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.

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>

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

7 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.  
8 Public Procurement Guidelines at paragraph 3.1.

9 Public Procurement Guidelines at paragraph 3.6.

10 Public Procurement Guidelines at paragraph 3.8 (Emphasis supplied).

11 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).

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

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

### 3. Ethics and Standards in Public Office

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.

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.

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.

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.

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.

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

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

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

<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).

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

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*

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>

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>
- 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*

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

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<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.

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**

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.

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**

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**

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.

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:

- 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.

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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*.

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.

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.

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***

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.

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***

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.

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.

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**

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**

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.

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.

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.

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

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.

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

<sup>25</sup>

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

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.

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.

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.

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**

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.

## ISRAEL

### 1. Introduction

Cases of collusion and corruption in public procurement are particularly sensitive as conspiracies like these take away resources from the purchasers and the taxpayers, diminish public confidence in the competition process and undermine the benefits of a competitive market. Some markets and industries rely heavily on public procurement and hence maintaining competition in those markets is of great importance to governments and competition agencies in particular. Defence products, energy and infrastructure markets usually involve a significant role for public procurement.

For several years now the Israel Antitrust Authority (hereinafter – IAA) has focused on the promotion and the protection of competition in public procurement: the former is done through targeted advocacy efforts whereas the latter through rigorous enforcement.

This report illustrates the experience of the IAA in protecting and promoting competition in public procurement. Issues pertaining to corruption are being handled by the National Fraud Investigation Unit of the Israeli Police and as such, the IAA does not have the power to investigate such offences, unless they constitute a violation of the Restrictive Trade Practices Act (herein – RTPA). However, in recent years the IAA has come across cases where an antitrust offence covered up fraud. In these cases, the IAA investigators can apply to the Minister of Public Security for a special permit to investigate fraud. The Attorney General can issue a special permit to the IAA legal department so that the fraud offence can be prosecuted by the IAA.

### 2. Public Procurement in a Small Island Economy

Due to Israel's relatively small size and unique characteristics, its economy is generally referred to as a small island economy. The smallness of the market is both in terms of population and land. With just over seven million inhabitants, the local market features limited demand and insufficient capacity to accommodate a large number of competitors in various sectors of the economy, particularly with respect to nationwide infrastructures. The island factor stems from a combination of elements, including geographic remoteness from main trading partners, limited degree of trade with close neighbours, language barriers, cultural and historic differences, and substantial reliance on foreign trade. Subsequently, and despite the higher openness to trade in recent years, there are still challenges to competition. Israel's small size and relative high entry barriers often make it less attractive to entry by foreign competitors. Subsequently, the shortage of immediate potential competition from neighbouring markets alleviates competitive constraints on local incumbents.

### 3. Enforcement Activity

Enforcement efforts break down to two main elements, namely enforcement against collusion and bid-rigging and enforcement through the IAA review process of mergers and applications to approve restrictive arrangement. This section offers some examples for enforcement activity that relates to the protection of competition in public procurement.

#### 4. Merger Control

The IAA has recently opposed a merger between two companies, Ackerstein Ind. and Netivey Noy Ltd., in the business of designing and installing curb stones and edge stones used for public streets. These products are typically procured by public bodies such as government offices and municipalities.

Ackerstein asked to merge with its competitor Netivey Noy by buying off all of its technical equipment which would have resulted in decreasing the number of competitors in the market from four to three. Upon examination, the IAA found that the market in question has oligopolistic features and that the level of prices did not match up with the relatively low costs of production and instalment. The merger was blocked after the IAA concluded that it would significantly harm competition which would result in public procurement bodies paying supra competitive prices.<sup>1</sup>

#### 5. The Envelope Manufacturers Cartel<sup>2</sup>

The “Envelope Manufacturers Cartel” is a key example of a public procurement process falling victim to cartel activity that included price fixing, market allocation and abuse of taxpayer's money through governmental bids and tenders.

Three envelope manufacturers were indicted and convicted of bid rigging offences between the years of 1995-2002. The market share of the three defendants was estimated at 80-90% during the cartel activity. The government purchased and then distributed the envelopes among the various ministries and governmental agencies.

A former employee of one of the three manufacturers contacted the IAA and revealed substantial information that kick-started the cartel investigation. During the investigation, a major source of information and documentation was the government which provided the IAA with data relating to the different bids and details of the rigged offers submitted by the defendants.

The information provided evidence about the structure and conduct of the cartel: for example, a large number of bidders were disqualified for alleged technical flaws where in fact the bidders used this method to divide the market. This, however, could not be proven in court and thus the defendants could not be indicted on these charges.

Testimonies taken by IAA investigators showed that some government officials suspected that a collusion or bid-rigging might be taking place due to suspicious rotation patterns among the leading manufacturers of winning the public tenders and due to identical tenders submitted to the government. No government official, however, disclosed his or her suspicions due to insufficient experience in recognising cartel activity and due to lack of empirical evidence.

The District Court convicted the three envelope manufacturers and their executives in July 2007 of violations of the RTPA because of their participation in a cartel during the years of 1995-2002. The Court ruled that the cartel activity led to a division of market amongst the manufacturers, the coordination of tender submissions and the bribery of an envelope importer in order to protect the market from other imports. In December 2007, the defendants were sentenced to periods of compulsory public work ranging from 6 months to 60 days; the companies were fined between 180,000 NIS to 250,000 NIS while the executives paid tens of thousands of NIS in fines.

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<sup>1</sup> Ackerstein Ind. Ltd. - Netivey Noy Ltd. (Objection to Merger); Publication Number 5001526.

<sup>2</sup> Criminal case 377/04 (District court Jerusalem) State of Israel v. Gvaram *et al.*

In March 2008 the IAA appealed to the Supreme Court against the District Court's ruling. The IAA appealed the light sentence for the defendants as well as their acquittals with respect to the charges that they had violated the RTPA under aggravated circumstances.

The IAA argued that in light of the manufacturers' share and position in the envelopes market, which as mentioned above constituted 80-90% of the market and the seven year long period of continuous cartel activity, the envelope cartel was able to cause substantial damage and harm to competition. Therefore, the District Court should have convicted the defendants of having committed the offenses under aggravated circumstances.

The IAA further argued in its appeal to the Supreme Court that the penalties and fines imposed on the cartel are significantly more lenient than those that should have been imposed. The sentence deviated from the clear policy established in the Supreme Court's case law according to which antitrust offenders face imprisonment and substantially larger fines. The IAA asked the Supreme Court to impose actual prison sentences and substantially larger fines.

The Supreme Court only partially accepted the IAA's appeal: the fines were raised to 375,000 NIS and compulsory community service time was prolonged. The Supreme Court's main argument against imprisonment of the defendants was that too much time, namely seven years, had passed between the discovery and cessation of the cartel (2002), and the Supreme Court's verdict (2009). Other reasons as to why imprisonment was not an appropriate punishment, according to the Supreme Court, were due to more personal objections with regards to the main defendant. The private reasons were not disclosed to the public and thus the IAA has no detailed knowledge of the defendant's argumentation.

During the proceedings the IAA and the Civil Division of the State Attorney's office considered the possibility to sue the cartel members for damages on behalf of the State. This would have been an unprecedented action in Israel. However, the amount of quantitative and numerical evidence of the State's loss due to the cartel's activity did not suffice to support such a claim before court.

## 6. The Traffic Lights Cartel<sup>3</sup>

The following example demonstrates a highly complex and problematic relationship between the public procurers and the bidding parties from a competition policy standpoint. The case is known as the "Traffic Lights Cartel".

In 1992 the Haifa municipality, the third largest city in Israel, issued a bid for the instalment and maintenance of traffic lights across the entire city. Before the municipality published the bid, they attempted to apply for an exemption from publishing a public bid. In Court the representatives of Haifa municipality claimed that for safety reasons only one company, namely "Menorah", can install and maintain the traffic lights. The municipality argued that only Menorah has the technical know-how to connect the traffic lights to the newly established control centre. Therefore, the exemption from publishing a public tender should be granted. "Ariel" is a major electricity and traffic light company and is also Menorah's main competitor. Ariel appealed to the court against the municipality with the claim that they can provide the same services with the same technical know-how as Menorah. Consequently, the Court ordered the municipality to publish a public bid for the tender.

A few days before the deadline of the public tender, however, the CEOs of Menorah and Ariel reached an agreement in which Ariel committed to concede the bid in return for 1 million NIS and the subcontractor rights for maintaining the traffic lights in Jerusalem. After the agreement, Menorah won the

<sup>3</sup> Criminal appeal (Supreme Court) 7829/03 State of Israel v. Ariel *et al.*

municipal tender which it priced at over 1 million NIS and thus exceeded the estimated cost of the Haifa municipality.

Both parties and their CEO's were charged for conspiring in bid-rigging offences. Menorah and its CEO paid 900,000 NIS after having signed a plea bargain; the CEO paid an additional 100,000 NIS in fines and was indicted to three months of community service. The District Court acquitted Ariel and its CEO with the reasons that competition is restricted in this industry due to technical barriers related to the traffic control centre. The IAA appealed the ruling of the District Court on the grounds that it was mistaken when considering the alleged technical barriers as reasons for restricting competition through bid-rigging as it is an offence under any circumstances. The Supreme Court accepted the IAA's appeal and convicted Ariel and its CEO. Additionally the ruling stated that the municipality's reluctance to publish a public tender was detrimental to competition and did not serve the public interest. The Supreme Court added that the agreement between the defendants harmed competition and did disservice to the public and the tax payers. The ruling of the Supreme Court emphasised the severity of the offences that were made in relation to a public tender published by a municipality. The bid-rigging offence, according to the Supreme Court's decision, deserves to be treated harshly through imprisonment sentences that reflect a clear and deterring message against those who try to extract "easy profits" on the expense of tax payers. The Supreme Court accepted the IAA's appeal over the sentences imposed by the District Court, and decided to impose harsher sanctions on the undertakings and individuals involved.

## **7. The Snowplough Cartel<sup>4</sup>**

Another case of bid-rigging, known as the "Snowploughs Cartel", saw the involvement of several firms colliding together between the years of 1997 and 1998 into a cartel when bidding for tenders published by the Ministry of Defence and the Jerusalem Municipality. The Government has no choice but to publish its tenders for the purpose of public procurement and therefore in 2001 the Court ruled that bid rigging offences in the public procurement process need to be treated with extra severity and punished with firm rulings.

## **8. The Defence Industry**

As stated above, certain industries are based on public procurement; one of such examples is the defence industry. This industry has a substantial degree of state involvement and its structural framework is a key factor for concerns for competition in public procurement. For these reasons, the IAA devotes a considerable amount of time and effort to advocate the importance of competition in the defence industry market through frequent discussions with officials in charge of public procurement.

The Ministry of Defence (hereinafter – MOD) is the single most substantial buyer of locally produced defence products. It is also in charge of regulating the procurement process of the industry. The MOD is the authority to grant the sales and export permits and regulates the security matters with regards to the industries' operations. In addition to all that, three out of the four major defence industries are state owned.

Although a considerable amount of revenue is collected from exports, the defence industry is nonetheless very dependent on the local market, especially when launching a new product. The MOD believes that local knowledge for development and production of the defence system is a fundamental requirement that cannot be compromised. As a result of this, defence products produced abroad by competitors are not regarded as substitutes for the locally produced products. The MOD claims that the local quality and the technical advantage are superior to products from abroad and therefore procurement

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<sup>4</sup> Criminal case 1131/00 (District court Jerusalem) State of Israel v. Motorgrader *et al.*

of the local defence industry is vital. Other arguments brought forward by the MOD are the minimisation of the dependence of foreign supplies and the greater investment in R&D among local companies.

In recent years the IAA was asked to approve joint ventures between major defence industries with the aim to develop high quality technology products. The MOD was in favour of joint ventures as a combination of expertise, skills and the knowledge of each party will yield optimal technological solutions in an even shorter time span. Recent cases included a joint venture in 2007 between "Elbit" and "Ness" in order to develop an information technology for the air force and a venture in 2009 between the Israel Aerospace Industries and "Refael" in order to develop an electro-optic system tracing ballistic missiles. The IAA however, expressed concerns that large scale ventures would undermine competition in the product market and would therefore decrease the overall intensity of competition. The IAA voiced a concern over a possible anti-competitive spill over effect due to convergence of economic interest among competitors. Sharing commercial information between the parties to a joint venture may have a detrimental effect on competition.

## **9. Joint Venture between Elbit Ltd. and Israeli Aircraft Industries Ltd.**

In 2007 the IAA examined a joint venture between "Elbit Ltd." and the Israeli Aerospace Industries Ltd. who sought to develop an advanced military vehicle. The MOD issued an urgent demand for the product. The IAA understood the operational importance of allowing joint ventures to develop the product but insisted on a few important conditions. The IAA demanded that the joint development was limited to specific functions of the product and that all other functions were developed separately. In addition to that, limitations on information transferral between the parties had to be guaranteed as well as that ownership of information developed by the parties had to remain in their possession. The IAA approved the joint venture under the condition that each party would be entitled to use the knowledge developed during the joint venture in other fields of operation without the need for consent from the other party.

## **10. Promoting Competition in Public Procurement through Advocacy**

In addition to the sensitivity of the public procurement process, often public procurers give a different priority to the notion of competition as understood by the competition agency itself. Certain circumstances, according to public procurers, may allow balancing competition with other considerations in the procurement process.

For instance, public procurers may be under time pressure that requires a fast paced decision making which does not include careful planning of the competitive aspects associated with the procurement process. In some cases, procurers may consider objectives which reflect other facets of the public interest. The relationship between the IAA and public procurers is one of the issues exemplified in this report. A few prominent examples are given that demonstrate the experience and involvement in promoting and protecting competition in public procurement through advocacy and enforcement activity.

## **11. Awareness to Bid Rigging in Public Procurement**

In light of the exposure of the public procurement process to anti-competitive practices, the IAA has embarked on a targeted awareness and advocacy campaign. In the first stage of the campaign the IAA's Director General and the Government's General Accountant which oversees and supervises the public procurement process, jointly issued a letter to all government procurers sending a strong message to enhance and strengthen competition. In addition to the letter, the OECD Anti-Bid-Rigging Guidelines were summarised in Hebrew and distributed to all the government procurers. The letter from the IAA's Director General and the Government's General Accountant underscored the importance of protecting competition in the public procurement process and emphasised the potential economic harm associated with bid

rigging. It went on to say that from a legal perspective, bid rigging is an illicit restrictive arrangement prohibited by the antitrust law. The letter outlined that the IAA investigates bid rigging offences and handles criminal cases against undertakings and business people who are alleged offenders. According to the antitrust law the maximum penalty for bid rigging offences is a five year imprisonment. In addition to the government's efforts to fight bid rigging offences through enforcement, the government sees great importance in raising awareness about the topic especially to the public procurement officials. A greater awareness may help the procurement body to decrease the risk of bid rigging amongst suppliers, ex ante and increase the chances to detect illicit bid rigging activity, ex post. The letter stated that the OECD Anti-Bid Rigging Guidelines should be considered with relevant adjustments to the Israeli legal framework.

The second stage of the campaign aims to raise awareness about bid rigging and collusion. Currently the IAA is preparing the seminars and workshops which will be carried out in early 2010. The IAA organises workshops which are based on the aggregated experience of the IAA as well as other competition agencies and on the OECD Anti-Bid-Rigging Guidelines. The IAA workshops will be attended by public officials that deal with public procurement on different levels, from government offices to municipalities and other public institutions. The seminars are designed to inform those who are involved in the public procurement process of the potential risks involved with bid rigging and their legal implications. In addition, these seminars will provide the public officials with the necessary tools to detect bid rigging attempts and instruct them how to respond to these situations.

## **12. Conclusion**

The different examples demonstrated above permit to deduce a twofold conclusion. Firstly, in order to promote competition in the public procurement process, it is necessary to take a proactive approach which is based both on advocacy alongside a tough enforcement activity. The combined strategy, encompassing both approaches, will yield better results and will have a more effective impact on the promotion of competition. The second factor that needs to be taken into consideration is the strong impact on the level of competition in the public procurement process because of the specific market characteristics and the role of the procurer. The competition authority, therefore, must identify the areas that are structurally problematic and give a special attention to specific needs of public procurement entities.

## JAPAN

### 1. The JFTC's Strict and Proactive Enforcement of the Antimonopoly Act against Bid Rigging

Bid rigging is typical cartel behaviour and one of the most serious breaches of the Antimonopoly Act ("AMA"). Therefore, the Japan Fair Trade Commission ("JFTC") has been strictly and proactively taking actions based on the AMA against bid rigging. In FY 2008, the JFTC ordered companies that violated the AMA to pay surcharges of 27.03 billion yen in total, including those of 2.89 billion yen for bid rigging cases. For the past five years, the JFTC ordered 913 companies that were involved in bid rigging to pay surcharges of 38.89 billion yen in total.

**Table 1.**

Fiscal Year	2004	2005	2006	2007	2008
Amount of Surcharge (billion yen)	11.15	18.87	9.27	11.29	27.03
For Bid Rigging (billion yen)	3.45	18.80	6.38	7.37	2.89
Number of Companies Surcharged	219	399	158	162	87
For Bid Rigging	194	392	137	132	58

This strict and proactive enforcement against bid rigging has served to maintain and promote fair and free competition in public procurement markets, thereby creating economic benefits such as a decline in contract prices. For example, following the initiation of investigations by the JFTC, the rate of contract prices to expected prices decreased by 18.6% on average in 22 bid rigging cases in which legal measures were taken between 1996 and March 2003.<sup>1</sup>

The amendment of the AMA, which increased the surcharge rates and introduced a leniency programme and criminal investigative powers for the JFTC, came into effect in January 2006. Deterrent against violations of the AMA, including bid rigging, were strengthened and the amended AMA has shown successful results so far; for example, the leniency system<sup>2</sup> is being actively used in bid rigging cases and the JFTC has referred bid rigging cases to the prosecution agency by conducting criminal investigations.

In addition, another amendment of the AMA, which raised the surcharge rates for a party that has played a leading role in a violation, increased the maximum number of leniency applicants, extended the Statute of Limitations, increased the maximum jail term, etc., was approved by the Diet on June 3, 2009, and came into effect on January 1, 2010. The amendment aims to further enhance deterrent effects against violations of the AMA, including bid rigging.

<sup>1</sup> The data was prepared based on materials and other items submitted by the procurement agencies during the investigations.

<sup>2</sup> The leniency programme in Japan does not stipulate exclusion of application when any persons or corporations are involved in bribery or corruption. However, if there are any facts demonstrating persons or corporations forced other parties to commit violations or hindered them to discontinue violations, the leniency programme cannot be applied. (Paragraph 17 of Article 7 (2) of the AMA).

## **2. The JFTC's enforcement of the "Involvement Prevention Act" against malfeasance by procurement agencies**

### **2.1 Enforcement when procurement agencies are involved in bid rigging**

Recently in Japan, there have been cases where the officials of procurement agencies were involved in bid rigging. (This kind of bid rigging is called "*Kansei-dango*" (i.e., bid rigging initiated by government officials).) While the AMA is applied to entrepreneurs and trade associations (including their executives), procurement agencies are normally regarded as the victims of violating actions of the AMA as bid rigging causes them to have no choice but to contract at a higher price than usual, etc. However, when procurement agencies are involved in bid rigging, measures taken against them can be as follows:

- In the case when entrepreneurs and their employees are accused of and prosecuted for being involved in bid rigging as a criminal case (Article 89 of the AMA), the procurement officers can be accused and prosecuted as conspirators;
- In the case when administrative measures (cease and desist orders or surcharge payment orders) are taken against a bid rigging case, as a general rule, the JFTC cannot take measures against procurement agencies based on the AMA. However, when the JFTC recognises certain kinds of involvement by the officials of procurement agencies, it may demand the procurement agencies to implement improvement measures based on the Act on Elimination and Prevention of Involvement in Bid Rigging, etc., and Punishments for Acts by Employees that Harm Fairness of Bidding, etc. ("Involvement Prevention Act"). The Involvement Prevention Act was revised in December 2006, to introduce a criminal penal provision on the officials of procurement agencies and expand the scope of conducts that fall under illegal involvement in bid rigging, etc., as well as the types of procurement agencies to which the act applies.

The contents of the Involvement Prevention Act are as follows:

### **2.2 Outline of the Involvement Prevention Act**

#### **2.2.1 Improvement measures by the procurement agencies (Article 3)**

When the JFTC recognises that the officials of procurement agencies<sup>3</sup> have been engaged in "involvement in bid rigging, etc.,"<sup>4</sup> in which they are involved to a certain extent, it may demand that the heads of the procurement agencies implement improvement measures based on the Involvement Prevention Act and will also implement elimination measures against companies based on the AMA. When the procurement agencies receive a demand from the JFTC, they shall perform the necessary investigations and implement improvement measures to eliminate the involvement.

Although the above investigation and improvement measures are voluntary actions taken by the procurement agencies, they shall notify the results of the investigation and the contents of the improvement measures to the JFTC. When the JFTC finds it particularly necessary in such cases as there being

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<sup>3</sup> The procurement agencies to which the Act applies are 1) the national government, 2) local government and 3) a corporation in which the government or local governments have equity of 50% or more, etc. (Paragraphs 1, 2 and 3 of Article 2 of Involvement Prevention Act).

<sup>4</sup> "Involvement in bid rigging, etc.," is specified in the Involvement Prevention Act (Paragraphs 5 of Article 2) as the following 4 types of conduct: (1) express indication for bid rigging; (2) indication that a specific party is preferred as the counterparty to the contract; (3) disclosure of secret information about ordering; and, (4) aiding a specific act of bid rigging, etc.

significant discrepancies between the results of the investigations taken by the JFTC and by the procurement agencies, etc., it may express its opinion.

### 2.2.2 *Claim for damage (Article 4) and disciplinary actions (Article 5)*

The procurement agencies shall make the necessary investigation if the employees involved in bid rigging, etc., are liable to the government for damage, etc., and shall demand compensation for the damage promptly when the employees have caused damage due to wilful or gross negligence. And the procurement agencies shall perform the necessary investigation if it is possible to impose disciplinary actions upon the employees and shall publicise the results of these investigations.

### 2.2.3 *Penalty for employees who harm the fairness of bidding, etc. (Article 8)*

If an employee, in respect of concluding an agreement by bidding, etc., by public procurement, has conducted any acts that harm the fairness of such bidding, etc., by inciting any entrepreneur or person to conduct bid rigging, informing any entrepreneur or person the target price or any other secret concerning such bidding, etc., or by any other method, in breach of his/her duties, such employee shall be sentenced to imprisonment with labour not exceeding five years or punished with a fine not exceeding 2.5 million yen.

## 2.3 *Cases to which the Involvement Prevention Act was applied*

So far, the JFTC has demanded improvement measures concerning six cases based on the Involvement Prevention Act (see annex about the improvement measures by the procurement agencies).

### 2.3.1 *The JFTC's demand to Iwamizawa City (January 30, 2003)*

It was found that before putting a contract to tender, the employees of Iwamizawa City, with the consent or complicity of their supporting executives, had fixed the target amount for annual order placements allotted to each company, designated potential bid winners for each construction project to almost ensure the target amount for annual order placements and communicated the name of an expected bidder, as well as the rough amount of a contract, to the board members of trade associations, who then transferred the tip-off to each expected bidder. Based on the provisions of the Involvement Prevention Act, the JFTC demanded the mayor of Iwamizawa City to take necessary measures to confirm the elimination of the involvement in bid rigging, etc., in the procurement of the city's construction projects.

### 2.3.2 *The JFTC's demand to Niigata City (July 28, 2004)*

It was found that the employees of Niigata City continuously disclosed the expected construction prices, which should have been kept confidential, before bidding was conducted in response to the requests of companies who were selected by the bidders as the designated winner. The JFTC also found that a copy of the explanatory materials of proposals submitted to the contractor designation committee, which should have remained secret, had continuously been leaked to certain bidders who tendered for the order for jacking work and open-digging work. Therefore, the JFTC demanded the mayor of the city to implement improvement measures.

### 2.3.3 *The JFTC's demand to the Japan Highway Public Corporation (September 29, 2005)*

It was found that the employees of the Japan Highway Public Corporation (i) accepted the submission of "allocation tables," which showed the expected successful bidders for competitive bids of construction projects for the upper part of steel bridges, from the retirees of the corporation and approved the allocation tables on each occasion, (ii) placed split orders for the construction projects, for which a bulk order had been originally planned, at the request of the retirees, and (iii) lowered the standard for order placement

from 1.5 billion yen or more in the past to 1.0 billion yen or more at the request of the retirees. The purpose of these (i) to (iii) activities was to secure reemployment for retirees from the corporation, and the employees not only gave tacit approval to and authorised bid rigging, but also encouraged companies to engage in it. In addition, the employees were found to have disclosed unpublished information, such as the expected timing of placing orders. Therefore, the JFTC demanded the president of the corporation to implement improvement measures.

#### *2.3.4 The JFTC's demand to the MLIT (March 8, 2007)*

It was found that the employees of the Ministry of Land, Infrastructure and Transport (MLIT) indicated their intentions regarding the expected successful bidders for floodgate projects to companies, which were referred to as “co-ordinators,” and enabled the cartel to be conducted smoothly, before ordering the projects. The JFTC demanded the Minister of Land, Infrastructure and Transport to implement improvement measures.

#### *2.3.5 The JFTC's demand to the City of Sapporo (October 29, 2008)*

It was found that the employees of the City of Sapporo communicated their selection of the successful bidders to those designated as successful bidders for most of the special electric equipment construction ordered by the City of Sapporo before the bidding, and thereby had the participants in the bidding arrange the bid rigging. The JFTC demanded the mayor of the City of Sapporo to implement improvement measures.

#### *2.3.6 The JFTC's demand to the MLIT (June 23, 2009)*

It was found that the employees of the MLIT provided unpublished information, such as the names of the designated entrepreneurs for the applicable bidding or the names of the office where the applicable bidding was planned, etc., before the designation notices for annual designated competitive bidding for the applicable vehicle management jobs. The JFTC demanded the Minister of Land, Infrastructure, Transport and Tourism to implement improvement measures.

### **3. The JFTC's promotion to improve ordering systems for public procurement**

Many aspects of public procurement systems are related to bid rigging. The JFTC has conducted questionnaire surveys, etc., regarding bidding systems, targeting procurement agencies, such as local governments, about the situation of reforms for the bidding systems and the measures to improve compliance between FY 2003 and FY 2008. The JFTC has compiled the results and published its views regarding ideal public procurement from the viewpoint of competition policy.

#### ***3.1 Report concerning the study group on public procurement and competition policy***

In 2003, the JFTC held a study group on public procurement and competition policy from the viewpoint of creating a more competitive environment for public procurement and aiming at the effective prevention of bid rigging. The study group identified problems with bidding and contracting systems for public procurement and examined measures to improve the problems with the aim of enhancing competition in public procurement. The JFTC published a report summarising the results of the study in November 2003.

The report said that it was important to ensure as much competition as possible based on the basic idea of “value for money,” which means purchasing the most valuable with a certain amount of cost, for public procurement by the national and local governments. The report recommended (i) the use of bidding procedures in consideration of prices, technologies and qualities as specific measures (comprehensive

evaluation bidding methods), (ii) the expansion of the scope of general competitive bidding (open tendering) and (iii) the improvement of ordering systems.

### **3.2 *Survey report on actual approaches, etc., to prevent bid rigging in public procurement.***

The JFTC conducted a questionnaire survey targeting 1) local governments (320 governments) and 2) government-sponsored corporations in which the national government had equity of 50% or more (210 corporations) to ascertain actual conditions surrounding efforts to prevent bid rigging as of July 2005. Based on the results of the survey, the JFTC published a survey report in October 2005.

The report proposed (i) to strive toward full dissemination and training of employees to prevent bid rigging, (ii) to formulate compliance manuals, (iii) to establish systems for organisationally examining bid rigging information and (iv) to improve the management of bid information.

### **3.3 *Survey Report on the Actual State of the Tendering and Contracting System in Public Procurement***

The JFTC conducted a questionnaire survey targeting local governments and government-sponsored corporations, in which the national government had equity of 50% or more with the aim of understanding (i) reforms of the bidding and contracting systems at procurement agencies and (ii) measures to improve the compliance of the officials of procurement agencies as of July 2006. Based on the results of the survey, the JFTC published a survey report in October 2006.

The report recommended that (i) in order to deal with complicated paperwork and difficulties in the elimination of bad/unqualified companies, which resulted from the growth of the general competitive bidding method, measures such as the rationalisation of paperwork through the introduction of information technology or the implementation of spot inspections against the companies may be effective, and (ii) efforts need to be made step-by-step where the national government and other large-scale procurement agencies gradually implement a comprehensive evaluation method, accumulate implementation experiences and then transfer their know-how to small-scale procurement agencies for the overall dissemination of such methods, etc. (see also (5) below).

### **3.4 *Report concerning the Study Meetings on the Measures and Promotion of Reform in Public Procurement***

The JFTC held meetings referred to as “Study Meetings on the Measures and Promotion of Reform in Public Procurement” (hereinafter referred to as “the Study Meetings”) beginning in November 2007. The aim of the Study Meetings is to exchange information concerning the status of efforts made by procurement agencies for enhanced compliance and reforms of bid tendering systems, by inviting officials in charge at national and prefectural governments, etc., and to further promote effective measures by studying the issues and problems that the procurement agencies faced in the course of implementing their reform measures, through discussions including outside experts. The JFTC compiled the results of the meetings into a report and published it in May 2008.

The report proposed (i) to enhance compliance in procurement agencies, (ii) to implement a comprehensive evaluation method so that participating bidders do not have any suspicions that the evaluation was arbitrarily conducted or suchlike, (iii) to ensure competition in setting regional requirements and (iv) to take measures to make bidding more competitive concerning the issue of participation by only one bidder or failure of bids to materialise.

### **3.5 *Relationship between measures based on the AMA and nomination suspension<sup>5</sup> by procurement agencies***

The above mentioned report published in 2003 recommended that “Concerning suspension from bidding measures, it is important that significant differences do not exist among procurement agencies and it is appropriate to take nomination suspension measures after the final judgments by the JFTC are issued”, etc.

Moreover, the report published in 2006 showed that while almost all prefectures, etc., took nomination suspension measures at the point when cease and desist orders, etc., were issued, other local governments did not do so. Because cease and desist orders as administrative measures will be issued in case violations of the AMA are found, it was recommended in the report that it is appropriate to take nomination suspension measures, as a general rule, at the point when cease and desist orders were issued and it is desirable to improve the process of nomination suspension measures accordingly.

The above mentioned report in 2006 also pointed out that, in response to the introduction of a surcharge leniency programme, about 90% of prefectures, etc., and about 50% of other parties had stipulated or were planning to stipulate a provision to shorten the suspension period of the entrepreneurs’ nomination. Based on this result, the report stated that it was advisable to work to ensure consistency between the surcharge leniency programme and nomination suspension measures for the promotion of bid rigging prevention by the government as a whole through the initiative of both national and local governments.

## **4. The JFTC’s efforts to prevent bid rigging**

From the viewpoint that the effort of procurement agencies is very important to prevent bid rigging, the JFTC has held meetings for the procurement officers of procurement agencies, co-operated in dispatching lecturers to and providing materials for seminars for procurement officers, which are held by the national and local governments, and has held seminars for procurement officers of public corporations. The JFTC formulated and published the “Guidelines Concerning the Activities of Firms and Trade Associations with Regard to Public Bids” (“Public Bids Guidelines”) to promote the correct understanding of the AMA in related industries. See Japan’s contribution to the breakout sessions of collusion and corruption in public procurement for further details.

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<sup>5</sup> Nomination suspension is a measure taken by procurement agencies concerning public procurement to suspend entrepreneurs from bidding for a certain period, because those entrepreneurs are disqualified from accepting construction orders for falling under certain conditions, such as involvement in bid rigging, etc.

**ANNEX - MEASURES TAKEN BY ORDERING ORGANISATIONS UNDER THE ACT ON  
ELIMINATION AND PREVENTION OF INVOLVEMENT IN BID RIGGING, ETC.**

<b>City of Iwamizawa</b>	<b>City of Niigata</b>	<b>Japan Highway Public Corporation</b>
<b>Request Date:</b> 30 January 2003	28 July 2004	29 September 2005
<b>Submission Date:</b> 11 June 2003	28 April 2005	16 February 2006
<b>Main Contents of Improvement Measures</b>		
<ul style="list-style-type: none"> <li>• To prepare, disseminate and enforce the "Manual to prevent the introduction of bid rigging" so as to thoroughly reform the consciousness of the staff</li> <li>• To separate the project dept. and bidding dept. to construct an effective system and organisation for appropriate bidding</li> <li>• To largely extend the designation suspension period for the enhanced supervisory system for any violation against the Antimonopoly Act</li> <li>• To increase competitive bidding so as to assure fair and free competition in bidding</li> <li>• To restrict entrepreneurs' access to the sections involved in ordering</li> <li>• To restrain the retired city staff from working for companies in the related industries</li> </ul>	<ul style="list-style-type: none"> <li>• To prepare and disseminate a compliance manual and to provide training so as to reform the consciousness of the staff and organisation culture</li> <li>• To assure a recording and publication system of upcoming bids and to establish an organisation in charge of compliance so that compliance is observed and staff ethics are maintained</li> <li>• To extend the designation suspension period and cancel the qualification for bidding as enhanced measures to prevent bid rigging</li> <li>• To cover a wider range of bids with competitive bidding methods and to abolish regional requirements so that the transparency and competitiveness of the bidding and contract system are assured</li> <li>• To restrict entrepreneurs' access to the sections involved in ordering</li> <li>• To restrain the retired city staff from working for companies in the industries concerned and to prohibit them from approaching city officials</li> </ul>	<ul style="list-style-type: none"> <li>• To make the ethical standards of behaviour stricter and provide lectures so that the consciousness of the officers and staff members is improved</li> <li>• To collect written oaths on compliance from the officers and staff for higher compliance consciousness and to establish a compliance committee and in-house consultation desk</li> <li>• To largely extend the designation suspension period and raise the amount of penalties</li> <li>• To increase the use of competitive bidding, to abolish designated bidding in principle and to improve and enhance comprehensive evaluation methods</li> <li>• To request the entrepreneurs to restrain from promotional activities</li> <li>• To restrain the retired staff from working for companies in the related industries and to review the custom of early retirement</li> </ul>
<b>Claim for Damages</b>		
<p>According to the report, a civil expert said (March 2003), "There was no damage to the City of Iwamizawa," so no claim for damages was made against any staff member.</p>	<p>At present, no claim for damages has been made against any staff member.</p>	<p>In July 2008, damages of about 8,683 million yen in total were claimed as a joint and several obligation with the entrepreneur, against two executives of the corporation at the time who were found to be involved in bid rigging</p>
<b>Disciplinary Measures</b>		
<p>The top 3 municipal officers and 18 of the city's executives were punished (by reducing the mayor's salary to 1/10 (for 4 months), etc.)</p>	<p>The top 3 municipal officers, executives and other staff found to have been involved in bid rigging (70 persons in total) were punished (by reducing the mayor's salary to 50/100 (for 3 months), etc.)</p>	<p>The corporate division manager, branch manager and other staff found to have been involved in bid rigging at that time (53 persons in total) were punished (by suspending the Director-General of the Toll Road Dept. at that time from duty for 3 months, etc.).</p>

Note: The Japan Highway Public Corporation was privatised on October 1, 2005, and divided into three highway corporations (East/Central/West Nippon Expressway Company Limited).

Table 2. (As of July 31, 2009)

Ministry of Land, Infrastructure, Transport and Tourism	City of Sapporo
<b>Request Date:</b> 8 March 2007	29 October 2008
<b>Submission Date:</b> 18 June 2007	1 July 2009
<b>(Main Contents of Improvement Measures)</b>	
<ul style="list-style-type: none"> <li>• To prepare, disseminate and enforce the “Manual to maintain the law of the land for ordering parties” and to provide training courses and lectures</li> <li>• To establish “Compliance Desks” inside and outside and to record the contents of inappropriate approaches from outside and publish measures taken</li> <li>• To strengthen measures such as the suspension of business activities under the Construction Business Act and designation suspension as the ordering party</li> <li>• To adopt various ordering methods; increase the use of competitive bidding; enhance the general evaluation system; and introduce bidding bonds for higher competitiveness, transparency and fairness in bidding and contract procedures</li> <li>• To restrain the staff in charge of bidding and contracts from working at the same post for a long time</li> <li>• To restrain the staff from working for any corporation that has been involved in a bid rigging case</li> </ul>	<ul style="list-style-type: none"> <li>• Proper ordering of drainage work: Improvement of estimation method of design, review of qualification for bidding, strict information management in designing and adding-up, establishing of a committee to enforce discipline and improvement of the work environment</li> <li>• Enhanced supervising system: Strengthening whistle-blowing system, investigation on the relation between the bid rigging initiated by the government officials and parachuting of retired officials</li> <li>• Enhanced restraint of retired staff from working for related industries</li> <li>• Improved staff culture: Training courses on compliance, personnel transfer to prevent the negative influence of working at the same post for a long time</li> <li>• Organisation improvement: Establishing a compliance committee (tentative title) and establishing a section in charge of compliance promotion</li> </ul>
<b>Claim for Damages</b>	
At present, no claim for damages has been made against any staff member.	At present, no claim for damages has been made against any staff member.
<b>Disciplinary Measures</b>	
The Deputy-Director of the Kanto Regional Development Bureau at the time of the involvement in bid rigging was suspended from duty for 2 months, and 7 other staff members, including a vice-minister, were punished (reprimand, admonition and oral warning).	Salary and regional benefits were reduced by 50% for the mayor, 30% for the vice mayor in charge of the construction bureau and 20% for other vice mayors for one month respectively.

## KOREA

### 1. **Bidding System for Government Construction Contracts: Centring around Design-Build System**

#### 1.1 *Objectives of Government Construction Bid System*

Government construction projects pursue two objectives; saving national budget and building high-quality and safe public facilities. The two objectives, however, are contradictory<sup>1</sup> in nature, so it is difficult to devise a bid system that accomplishes both of the objectives. For that reason, complementary measures are taken in each bid system to satisfy the two objectives. For instance, in the lowest tender system that saves national budget and achieves the objective of price competition, review on appropriateness of bid prices is made to prevent the possible problems caused by excessively low bid prices - poor quality of the constructed facilities and the deteriorating financial condition of the construction company.

#### 1.2 *Concept of Design-Build System*

A Construction company conducts both designing and building in a design-build project<sup>2</sup> unlike in other general government constructions where the building companies are responsible only for construction based on an architectural design plan made by the government. That is, in a bid for design-build contract, the government provides only basic plans of the bid and RFP (Reference for Proposal) and the bidders, i.e. construction companies, submit architectural drawings, application and other bidding documents. Then, finally, the awarding authority, i.e. the government, chooses a winning bidder based on review of what bidders submit.

Since design plan is made by construction companies themselves, the companies face more risk under design-build system. This system, however, ensures higher efficiency of the construction work by shortening the construction work period and minimising management work for the government and enabling the construction company to utilise their new technology.

#### 1.3 *Design-Build & Bid Rigging*

Design-build is usually limited to government construction projects for facilities requiring advanced technology and construction methods such as bridges, dams, ports, railways, sewage treatment plants, waste incineration plants or CHP plants (combined heat and power plants). Therefore, a small number of companies, two to five at most with high-level technology, participate in a tender for design-build

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1 The emphasis on “budget-saving” means engaging as many companies as possible in bidding for price competition while “safe and high-quality facilities” can be better secured when just a few eligible companies participate in bidding for quality competition.

2 Design-Build is also called “turn key,” because all that an employer of the turn key project does is just turning a key to the completed building that is both designed and constructed by a contractor.

contracts, which results in higher possibility of bid rigging, at least in terms of the number of bidders, than in tenders for other construction work<sup>3</sup>.

## **2. Conditions Facilitating Bid Rigging in Design-Build System**

### **2.1 *Favourable Environment for Large Construction Companies***<sup>4</sup>

Since design-build system is usually used in large-scale construction projects<sup>5</sup> for bridges, dams or ports that require enhanced technology, large construction companies with advanced equipment and labour force are in an advantageous position in a tender for design-build contracts compared to small- and mid-sized enterprises (“SMEs”). High costs incurred for a design drawing also put SMEs in a disadvantageous position, because the costs will not be reimbursed even if the company fails to win the contract<sup>6</sup>.

Generally when government prepares design-build contracts, it hires architectural design firms to make basic plans of the bid and RFP (Request for Proposal). The problem is that from the point of commissioning of the work, the information on the tender tends to be leaked out to large construction companies which have maintained close relationship with those design firms. In this case, the information helps the construction companies prepare for the tender in advance, which serves as another advantage for the large companies.

In short, the possibility of bid rigging in design-build contracts is heightened due to the small number of the participants and a superior position of a few large companies in labour force, technology, financial condition and information.

### **2.2 *Information Exchange between Construction Companies***

Employees of construction companies tend to maintain close relationship with those in other competing companies, have meetings or contact each other on a regular basis to exchange information on tenders or architectural design.

Sometimes information on, for example, which construction company hires which design firm to prepare for a tender is shared even before the bid announcement. This can be regarded as legitimate information exchange for sales, but lead to restricted actual competition in the bidding for the construction contract.

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3 For example, at least 20~30 companies participate in a bid for construction work where the contract is awarded to the lowest bidder.

4 There is no precise definition of large construction companies, but six companies are currently regarded as large construction companies in design-build projects. (The six companies account for 30.9% of the total orders placed in 2008.)

5 In Korea, construction work of the estimated cost of 30 billion won or more is considered as a large-scale construction.

6 In fact, the government pays compensation for companies whose bids are not accepted in a tender, but the amount is far short of the cost incurred for the bidding.

### **3. Types of Bid Rigging Schemes in Design-Build Projects**

#### **3.1 *Bid Rotation***

Bid rotation occurs usually when several tenders for design-build projects are announced in a short period. Under the scheme, each conspirator, mostly large company, is designated to be the successful bidder on certain contracts. This way, the conspirators get their “fair share”, avoiding competition and easily securing contracts they are interested in.

Some companies argue bid rotation is inevitable, citing that the scheme helps maintain construction costs at an appropriate level, averting cut-throat price competition and the consequent shoddy construction. The scheme, however, apparently is a bid-rigging conspiracy in that it restricts competition among bidders in the beginning.

#### **3.2 *Complementary Bidding***

Complementary bidding occurs usually between large companies and SMEs while bid rotation scheme is used by companies of similar sizes. In complementary bidding, a company generally of large size asks a small company to submit a cover bid to avoid a situation where its bid is unsuccessful, because no other companies participate in the bidding.

It could be seen that the requested company has no reason to participate in the tender considering incurring costs in design drawing, management and others. In the long run, however, participating in the bid is not an economic loss for the requested company, since compensation is made for the participation. The large company, for example, may compensate its conspirator by inviting the company to be a member of consortium bidding for other construction projects later on.

#### **3.3 *Cartel in Architectural Design***

A successful bidder can be chosen in several ways in a tender for design-build contracts. Among them is frequently used the method of adding up the scores allocated to each category of architectural design and bid prices-60% and 40% of the total evaluation respectively in most cases- and awarding the contract to the bidder of the highest score.

Although rigging bid prices is the most common form of bid-rigging conspiracy, cartel on architectural design can also occur in a bid for design-build projects. That is because the rate of architectural design is higher in the evaluation than bid prices unlike the lowest tender system where the bid prices naturally become the target of collusive act. Since the ultimate goal of bid rigging is designating the winning bidder in advance or restricting competition in a tender, there is no need to limit collusion only to bid prices.

Cartel on architectural design can be conducted in the two ways in general.

One of them is designating the successful bidder in advance and ensuring the acceptance of the designated bidder by intentionally making other conspirators get poor evaluation in their design plans. In general, bidders hire architectural design firms for architectural designing since the architectural drawing has to be submitted shortly after the bidding announcement, usually in 60 or 90 days. Therefore cooperation from the hired design firms is needed to deliberately lower the score of design plans by satisfying only basic requirements or intentionally excluding necessary parts in their drawings.

In other cases, the bid rigging participants do not designate who will win the bid but agree on inclusion or exclusion of some parts in drawings. For example, they get together with competitors to agree

to exclude certain parts in the drawings in order to save drawing costs. This scheme is not a traditional way of bid rigging where a successful bidder is designated in advance, but it apparently constitutes cartel conduct in that competition in the architectural design is restricted in the bid. Bidders have to compete not only in bid prices but also in quality of architectural drawings.

#### **4. Sanctions against Bid Rigging**

##### **4.1 Relevant Laws**

The Korea Fair Trade Commission (KFTC) has the exclusive authority to regulate cartel conduct, but bid rigging conspiracy by construction companies is governed by several laws other than Monopoly Regulation and Fair Trade Act (MRFTA), the competition law enforced by the KFTC.

##### *4.1.1 Monopoly Regulation and Fair Trade Act*

On August 3, 2007, the KFTC revised<sup>7</sup> the MRFTA to stipulate that bid-rigging conspiracy is an act of collusively determining the successful bidder, bid prices, winning bid price, bid-winning probability, architectural design or construction method or other competitive factors in a bid or auction.

Construction companies which engaged in bid-rigging conspiracy stipulated in the MRFTA may face corrective order, surcharges up to 10% of the contract price or imprisonment of three years or less or fines not exceeding 200 million won. Since the revision, the KFTC imposed corrective orders and surcharges on construction companies for nine bid-rigging cases. The bid-rigging case of Seoul subway extension work will be explained later.

##### *4.1.2 Framework Act on the Construction Industry*

In the case where a person earns illegitimate proceeds or rigs bid prices to restrict competition in a bid for construction contract, the person faces prison terms not exceeding five years or fines of 50 million won or less in accordance with Article 95 (Penalty) of the Framework Act on the Construction Industry.

This law, however, has limitation in that it does not regulate cartel on architectural design in a bid for design-build contract, which is sanctioned under the MRFTA.

##### *4.1.3 Act on Contracts to Which the State is a Party*

Article 76.1.(3) of the Enforcement Decree of the “Act on Contracts to Which the State is a Party” provides that Public Procurement Service shall prevent a company violating the regulations of the MRFTA from bidding for government construction contracts for a period it sets of one month or longer not exceeding two years in the case where the KFTC makes such request. Such restriction in bidding for future government construction contracts can be seen as severer than corrective order, surcharge or punishment since it could have significantly adverse impact on the turnover of the construction company.

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<sup>7</sup> It does not mean that bid rigging was not regulated before the revision. Before the revision, the KFTC had enforced against bid rigging in design-build projects by recognising bid- prices rigging as “an act of fixing, maintaining or changing prices” and cartel on architectural design as “ an act of restricting types or specifications when producing or trading goods or services.”

#### 4.1.4 *Criminal Law*

According to Article 315 (Disturbance of Auctions or Tenders) of Criminal Law, a person who undermines fairness of a tender by using deceptive means or force faces imprisonment up to two years or fines not exceeding seven million won.

The provision of the criminal law, however, stipulates only collusive agreement leading to the actual conduct is subject to sanctions unlike the MRFTA, which recognises an agreement itself among construction companies to restrict competition as cartel conduct without the consideration whether the agreement actually result in the action.

#### 4.2 *Case Summary: Bid Rigging for Seoul Subway Line No.7 Extension Work*

The case is a typical example of bid rotation for design-build projects. As Seoul city announced a basic plan on tenders for design-build contracts on six sections of work construction to extend Seoul Subway Line No.7 in December 2003, six large construction companies<sup>8</sup> secretly agreed to participate in the bidding, allocating each section of work to each company of them. Their concern is that without the agreement more than one company could bid for the same section, leading to failure to win the bid. On July 11, 2007, the KFTC held a full-member committee meeting and decided to impose corrective order and surcharge of 22.1 billion won and file a complaint against the six companies with the prosecution.

### 5. **Efforts to Eliminate Collusion in Public Procurement**

#### 5.1 *Advocacy Targeting Private Companies*

Bid rigging is one of typical hard-core cartel conduct. It is particularly distinguished from other cartel conspiracy in that it is considered antisocial since the conduct wastes national budget and undermines the effort to ensure safety and high quality in public facilities.

Considering there are quite many tenders for government construction work, the problem for the competition authority, KFTC, is that it cannot prevent the problems of budget waste and poor-quality public facilities just with detection of the cartel conduct which already happened. In that sense, the Commission recognises the need to establish a round-the-clock monitoring system to better detect the conspiracy and prevent conditions conducive to bid rigging by construction companies with systematic approach.

As part of such efforts to prevent collusion, the KFTC's officials attended the briefing sessions of some bids for large-scaled construction to explain to the bidders the harms of bid-rigging as well as the potential sanctions and inform them of the reward program for complainants and the leniency program.

#### 5.2 *Co-operation with Public Procurement Agencies*

Besides advocacy program targeting bidders, close cooperation is needed between the KFTC, the regulator of cartel conduct, and public procurement agencies given that the latter are in direct contact with the bidders and thus in better position to prevent and detect collusion.

In order to train the procurement officials, the KFTC issued a Big-Rigging Prevention Manual in early 2008 that explains in easy terms about what is bid-rigging and its various kinds, what costs and harms it causes, how to detect it, etc. The Manual was distributed to major agencies in charge of procurement. To

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8 They are the six large construction companies mentioned in the footnote 4.

promote the use of the manual, the KFTC held a seminar in July 2008 for the procurement officials on 'prevention of bid-rigging' and 'private lawsuit for the damages caused by bid-rigging'.

In connection with the training, the KFTC built and operates "the Bid Rigging Indicator Analysis System" for effective and systematic detection and notification of collusion, which will be further explained below.

Also, the KFTC is planning to clearly stipulate in bid announcements the sanctions for collusion or in contracts the expected compensation amount (which will be 10~20% of contract prices) through close consultation with public procurement agencies.

Meanwhile, Public Procurement Service, the largest public orderer, operates its own unlawful bid indicator analysis system, based on which it requests the KFTC to investigate suspicious bidders, introduced fingerprint identification system for e-bidding and rewards complainants for possible collusion.

### 5.3 *Bid Rigging Indicator Analysis System (BRIAS)*

Bid Rigging Indicator Analysis System automatically and statistically analyses bid-rigging indicators based on data<sup>9</sup> concerning bids placed by public institutions. With the data delivered online from the public institutions, the analysis system calculates the probability of bid rigging by giving weightings to various indicators like bid-winning probability, the number of bidders, bid prices, competition methods, the number of unsuccessful bids and hikes in reserve prices, transition into private contracts, etc.

Since October 1997, the KFTC conducted manual analysis on bidding documents obtained from some public agencies, and then in September 2006 it set up the analysis system for bid-rigging monitoring. At first, it was applied to information provided by Public Procurement Service, but the Commission had expanded the application of the system into more public bodies and all the public bodies<sup>10</sup> started to provide information for bid-rigging indicators analysis in 2008. In particular, the KFTC secured a legal ground in the MRFTA for mandating all the public bodies to provide bid-related information for the KFTC starting from January 1, 2009.

The analysis system helps the KFTC better uncover bid rigging conspiracy by enabling it to monitor tenders of the public sector chronologically and conduct on-site investigation into those with significant indication of bid rigging. It also prevents national budget waste caused by bid rigging and helps establish fair competitive order. Furthermore, the system makes companies voluntarily stay away from bid rigging by sending a signal that the KFTC is keeping an eye on every bid for public work.

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9 The Analysis is not limited to public construction work and includes all the G2B transactions of goods and service on the condition that bids prices of construction works is worth more than five billion won or more and bid prices for goods and service worth more than 500 million won or more.

10 The totals of 322 public agencies are currently participating including central administrative agencies, local governments and government-owned companies.

## LATVIA

**1. Size and policy objectives****1.1 *What fraction of your economy does public procurement account for? What are the principle policy objectives of public procurement?***

The data is not known. The main policy objectives are to provide transparency, free competition among the suppliers, equal and fair attitude to the all suppliers, to provide the effective application of financial resources of state and local government due to reduce utmost the risk for demanders.

**2. Corruption – Corruption prevention and combating bureau (KNAB) was invited to give the answers to this part of inquiry****2.1 *What is the cost of corruption?***

No in-depth research has been made to estimate the total cost of corruption. However there have been several announcements from authorities and NGOs about the cost of corruption or the extent of shadow economy. For example, the Latvian Chamber of Commerce and Industry has recently announced that the firms willing to win have to pay bribes in procurements that constitute 15-20% of the total cost of procurement contract. However, it should be noted that traditionally it is perceived that about 25% of procurement contracts are connected with corruption.

**2.2 *What factors facilitate corruption? Do some factors appear to be more important than others?***

Corruption occurs as a result of complex changes in society and institutions – the level of corruption is affected by overall economical situation, lack of specific internal control measures, insufficient transparency, mutual long term relationship between firms and public officials, etc. Appearance of corruption is also possible when provisions or regulations are very complicated and time consuming.

Complaints received by the Corruption Prevention and Combating Bureau (Bureau) and results of examinations carried out by the Bureau show increasing tendency of illegal activities in public tenders when procurements of large amounts are divided into several parts in order not to apply open competition procedure.

The spheres that are more subject to corruption in public procurement are health, construction, insurance, education and defence.

**2.3 *How do transparency programmes help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?***

The anticorruption policy is defined in the medium term policy paper - Corruption Prevention and Combating Programme 2009-2013. The Programme combines tasks for greater transparency, strengthening internal control and ethics, improvement of regulations and educational activities in the public sector, i.e. it also covers the public procurement.

The Law on Public Procurement sets strict rules regarding the transparency of the procedure depending on the amount of money to be spent, but these rules are not always properly implemented.

The Bureau uses a twofold strategy that corresponds to its name – not only does it investigate and combat crimes, but it also offers educational seminars and methodological materials to public officials, thus preventing them from acting illegally. Preventative work covers also the improvement of regulations, for example, amendments made to the Law on Prevention of Conflict of Interest in Activities of Public Officials make this law now applicable also to members of procurement commission. The purpose of this law is to ensure that the actions of public officials are in the public interest, to promote openness regarding the actions of the public officials and their liability to the public, as well as public confidence regarding the actions of public officials. It sets certain restrictions and obligations to public officials.

**2.4 *Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction?***

No, there is no such demand. Nevertheless it is sometimes the case in big, socially and culturally important projects. For example the rules for applicants to the construction of the National Library included the provision that the applicants that have been involved in bribery cases are excluded.

However, members of the procurement commission and invited experts have to sign declaration stating that they have no interest in awarding a contract to any of tender participants.

The contracting authority may exclude proposals submitted by tender participants who have been found guilty by the court in corruption/fraud offences or other violations of the law.

In accordance with the Criminal Law (CL) both corruption and bribery are subject to sanctions. In the private sector punishment shall be imposed for unauthorised receipt of benefits (Article 198, CL) and commercial bribery (Article 199, CL).

The applicable sentence for commercial bribery is deprivation of liberty for a term not exceeding three years, custodial arrest, community service, or a fine not exceeding fifty times the minimum monthly wage. In case of aggravating circumstances the applicable sentence is deprivation of liberty for a term not exceeding five years, community service, or a fine not exceeding one hundred times the minimum monthly wage.

Public officials can be held criminally liable for accepting bribes (Article 320, CL), misappropriation of a bribe (Article 321, CL), intermediation in bribery (Article 322, CL) and giving of bribes (Article 323, CL).

Giving of bribes is subject to deprivation of liberty for a term not exceeding six years. In case of aggravating circumstances the applicable sentence is deprivation of liberty for a term of not less than five and not exceeding fifteen years, with confiscation of property, and with police supervision for a term not exceeding three years.

The following coercive measures can be applied to legal persons: liquidation; limitation of rights; confiscation of property; or monetary levy. The following additional coercive measures may be specified: confiscation of property; and compensation for harm caused. Confiscation of property may also be applied to a legal person as an additional coercion measure, if as a result of the offence by the legal person it has gained a material benefit and as basic coercion measures limitation of rights or monetary levy has been applied to it.

**2.5 *Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?***

In Latvia prosecution of corruption crimes and all criminal offences is within jurisdiction of Prosecutor's office. Investigation of corruption cases involving public officials is the responsibility of the Bureau.

Competition authority (Competition Council of Latvia (CCL)) is not responsible and competent in this sphere.

**3. Collusion**

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

From our point of view factors facilitating collusion in procurement are:

- Objects for the tenders that are big for Latvia may be regarded as small for international market. Therefore possible profit of participation in regional or national level procurements may be not sufficiently attractive in comparison with the necessary input. All this leads to the situation when due to the lack of foreign competitors local companies feel themselves very comfortable regarding the participation in procurements;
- Many top managers of competing companies have graduated the same universities and know each other. Corporate and even private contacts are very strong. This creates comfortable conditions for collusion, when nothing is agreed in writing, and therefore no direct evidences can be found;
- Also the transparency in the public procurement procedure facilitates the collusion. One of the stages in the procurements procedure in the construction (determined in the Public procurement law) is the visitation of the place where the object is planned to be built. Representatives of the pretenders are invited to the visitation and they have the possibilities to learn which companies are the competitors.

CCL had not analysed which industries are especially vulnerable to bid rigging, but it is supposed that these industries are with less market participants, high profit possibilities, less import alternatives, and where the industrial association exists.

**3.2 *What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to optimise the risk of bid rigging?***

According to the statistics the majority of infringements occurred in the construction, road construction and road up-keeping markets. Results of anonymous poll<sup>1</sup> show that 44% respondents confirmed their participation in collusive riggings in the bids. Also contractors are more or less responsible for creation of the favourable environment for collusion. It seems that in one third of the established bid rigging cases probably existed also some indications on corruption, including situations when contractors somehow were not able to espy self-evident evidences of collusion, that offers of different pretenders were not prepared independently.

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1. Performed within the framework of survey on competition in construction market (2006).

**Table 1: The Statistics on Bid Rigging (Collusion) Cases in 2002-2009**

Year	2002	2003	2004	2005	2006	2007	2008	2009
Number of investigated bid rigging collusion cases	1	1	1	1	4	3	5	1
Number of established infringements	0	0	0	1	3	3	3	1
Number of penalised market participants	0	0	0	3	9	10	19	2
Volume of fines Ls/EUR	0	0	0	76 672/ 109 095	403 670/ 574 374	77 750/ 110 629	197 081/ 280 423	69 733/ 99 222
Industries	Road construction	Construct ion	Road construc- tion	Construc- tion	Supply of oil products, construction	Marketing services, supply of equipment for metal works, road up keeping	Road construction, up keeping, landscape services	Road up keeping

**3.3 *Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?***

Our legislation does not require mentioned certificates as opinion prevails that such measure is unnecessary administrative burden for candidates as well as naïve as while there is not clear impression on regular cartel opening and unavoidable punishment any psychological pressing like certificate or leniency will not work. If firms are “caught” in the collusion they should be eliminated from procurement procedures. Prohibition to participate in public procurements is set now for 12 months, previously it was 3 years however practical application of it was limited due to the uncertainty of its application and actually impossible if decision was appealed in court, as the term was counted from the moment when infringement has occurred. At this moment disqualification term is counted from the moment when the decision becomes final, in such a way excluding possibility to avoid disqualification due the long investigation by CCL and later appellation process in court.

**4. *Fighting collusion and corruption***

**4.1 *What cases from your jurisdiction have involved both corruption and collusion in public procurement?***

Corruption and collusion was established in one case. It was initiated by CCL on the basis of information made public by KNAB as a result of their investigation. On request of CCL KNAB gave CCL access to the evidences in this criminal case initiated for the investigation of a corruption case. The transcripts of overheard phone conversations, taken by KNAB, were also used as evidence in the competition case. From the phone conversation it was clear that the official of a municipality gave instructions to the representatives of the undertakings concerned how to participate in the planned bid for supply of oil products and that the representatives agreed, on prices that should be included into the financial offers of each bidder, the sum of procurement and remuneration for each pretender after the bid. Three undertakings were involved into the bid rigging. The phone conversations were between natural persons, two of them formally were not related to the companies they represented. CCL had to prove the link between relevant natural persons and according bidders. While analysing the offers CCL also established that the prices mentioned in the phone conversations and prices shown in the offers were the same. Besides the information on the bidders transactions on oil product supply market were analysed and it was established that the “planned winner” in the relevant bid offered a price that was approximately by

10% higher than other his prices in similar supplies. Other bidder at the time of procurement did not deal with supplies of oil products at all. CCL established the infringement and imposed fine. This is the only case when CCL used the information (transcripts of the overheard phone conversations) from the criminal case investigated by other authority. Investigation of this case was a good example of good co-operation between competition and corruption prevention authorities fighting against bid rigging in public procurement.

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

Competition Council mostly has detected collusion at local level government level.

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

Wider powers to use also methods used in criminal process would be suitable, for example competition authorities could also have rights to overheard phone conversations under certain conditions.

**4.4 *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?***

Our legislation does not contain prohibition to receive leniency for firms engaged in bribery or corruption.

**5. Advocacy**

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

Good balance between the transparency in the public procurement procedure and collusion prevention has to be found as any possibility for firms representatives to meet one another for example in public opening of tender offers facilitates later collusion. Also requirements for minimal number of offers at certain procurement types may promote collusion to ensure that procurement may proceed.

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

As the Competition Council is competent to investigate cases and impose fines for collusion activities, supervising markets in order to establish competition problems, it can give recommendations to the public authorities how to improve control over the procurement procedures due to identify collusion cases or to advert to the competent authorities the identified problems. Anyway the co-operation among Public procurement office, Anti-Corruption office (KNAB) and competition authorities can give additional advantages in combating against collusion and corruption.

**5.3 *What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? 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 your jurisdiction and what have been the results?***

CCL has provided educational seminars for the main contracting state and municipalities enterprises and authorities. No other particular steps with exception of initiative to clarify regulation on prohibition to participate in procurement if the collusion has established. Disqualification from the procurement as a result of collusion can be regarded as effective deterrent if they are used in practice.

**5.4 *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 risk of corruption?***

Legislative measures usually are estimated to find the compromise of both collusion and corruption prevention. However any impact may be estimated only theoretically and not based on facts. Regarding previously mentioned measures it is expected that it will diminish the risk of the corruption.

**5.5 *Has your competition agency undertaken competition advocacy in this area?***

To raise the awareness of the other surveillance authorities as well as contracting authorities on possible antitrust violations in procurement several educational seminars were provided for the main contracting state and municipalities enterprises and authorities, however these measures were not enough to significantly increase awareness and educational work regarding possible antitrust violations in procurement in future has to be continued and extended in respect of all contractors in the state and municipalities level.

**5.6 *If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?***

In every decision taken on the case of collusion CCL impose fines. No other particular remedies were imposed. Disqualification from procurement process is applied by contracting authority of particular procurement.

## MEXICO

This note summarises Mexico's experience in public procurement contracts from a competition policy prospective. Section 1 describes the relevance of public procurement in Mexico, while section 2 outlines the corresponding regulatory framework. Section 3 identifies competition and corruption concerns associated with this regulation. Section 4 summarises some bid rigging cases and their potential relationship with public procurement regulation and corruption. Finally, section 5 presents some concluding remarks.

### 1. Relevance of public procurement<sup>1</sup>

Public sector activities play a substantial role in the Mexican economy. In 2008, for example, they accounted for 18.4% of GDP with the following distribution among different government entities: public enterprises, 8.7%; state and municipal governments, 5.5%; federal government, 2.9%; and social security, 1.3%.

In 2008, the Ministry of Public Administration registered 70,230 federal public procurement contracts adding up to USD59 billion.<sup>2</sup> The acquisition of goods and services represented 65.2% of this value and the contracting of public works 34.8%.

Five government entities concentrate 71.8% of public federal procurement: Pemex, the state oil monopoly, contributes with 45.6%; CFE/LFC, the state electricity monopolies, with 11.3%; IMSS, the provider of health and social security services to private sector employees, with 6.6%; SCT, the ministry of transportation and communications, responsible for contracting most federal transportation and communication infrastructure, with 4.8%; and ISSSTE, the provider of health and social security services to federal government employees, with 3.6%.

The regulatory framework (see section II) provides for three alternative mechanisms to allocate public procurement): i) *public auctions*; ii) *auctions by invitation* with at least three invitees; and iii) *direct allocations*. In 2008, the shares of these mechanisms in the total amount contracted were: 61%, 14%, and 25%, respectively. Also, these mechanisms can be either domestic (open only to nationals) or international (open to both nationals and foreigners). In 2008, domestic procedures accounted for 65.4% of total federal government procurement.

### 2. Regulatory framework

The Mexican Constitution (article 134) states that public procurement shall assure the best available terms and conditions for the State. To accomplish this purpose it establishes, as a general rule, that public procurement shall be allocated through *public auctions* based on *sealed solvent bids* that are *publicly opened*. It also provides that secondary laws shall establish alternative procedures for circumstances where the above general rule does not ensure the best terms and conditions.

The Law of Public Sector Acquisitions, Leasing and Services (Acquisition Law) regulates federal procurement of goods and services, while the Law of Public Works and Related Services (Public Work

<sup>1</sup> The data in this section was obtained from [www.inegi.org.mx](http://www.inegi.org.mx) and [www.funcionpublica.gob.mx](http://www.funcionpublica.gob.mx).

<sup>2</sup> USD amounts for 2008 were obtained using an exchange rate of 11.13 pesos per dollar.

Law) regulates federal public works. Procurement by state and municipal governments is regulated by corresponding local laws, except for contracts funded with federal resources, where federal laws apply.

Both the Acquisition and Public Work laws establish non discriminatory *public auctions* as the main mechanism to allocate contracts, but under special circumstances they allow for either *auction by invitation* with at least three invitees or *direct allocation* without the need of an auction.

These laws and their corresponding regulations set out the following general auction rules:

- *Lowest-price sealed-bid auctions.* Bids are secret and contracts are awarded to the lowest bids;<sup>3</sup>
- *Public opening of bids.* Bids are publicly opened (bidders, among others, can be present);
- *Multiple provision.* Contracts may be granted to two or more bidders if their bids do not differ by more than 10% with respect to the lowest bid and to the extent that it does not restrict free participation. The winning bidder would be awarded a 50% share or more of the contract and the other participants would be granted the shares previously specified in the auction rules;
- *Joint bids.* Two or more firms may offer joint bids without incorporating into a single firm;
- *Reference prices.* Government entities may set a maximum price, as a reference for bidders to offer discounts;
- *Prohibition of bids below cost or a “convenient” price level.* Entities calling auctions may dismiss tenders if they consider bids are below cost. They may also dismiss bids that are below a given percentage of the average of the main bids offered;
- *Domestic auctions.* Most public procurement contracts are reserved for nationals;
- *International auctions.* Auctions can be open to foreigners in two variants: i) international auctions under FTAs, i.e. those open only to Mexicans *and foreigners from* countries with which Mexico has FTAs with public procurement provisions; and ii) those open to all foreigners. The former are called when it is so mandated by FTAs or if no participants turned out or qualified in a previous domestic auction or their bids were not acceptable (in excess of acceptable levels). Auctions are open to all foreign bidders when no participants turned out or qualified in a previous international auction under FTA or their bids were not acceptable; or if it is so stated in foreign financing contracts granted to the federal government. In the case of the Acquisition Law domestic bids are granted a 15% preferential margin;
- *Reserves.* Under FTA provisions, the Mexican government has the right to set aside a maximum amount of public expenditures from *international auctions*.

Furthermore, the Law of Transparency and Access to Public Federal Information requires federal government entities to make available to the general public detailed information related to procurement contracts. Specifically, this regulation allows any citizen to obtain general information on public procurement as well as specific information on each auction and contract, including copies of corresponding documents.

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<sup>3</sup> In the procurement of services, multiple criteria may be used (e.g. price and quality), by applying an index where price has a 50% weight.

Finally, the Federal Law of Economic Competition (FLEC) typifies bid rigging as a *per se* prohibited anticompetitive conduct subject to a maximum sanction of USD6.6 million; recidivists are subject to a double sanction or to a sanction equivalent to 10% of their assets or annual sales.

### **3. Regulation, Competition and Corruption**

Although the Constitution mandates that public procurement procedures must guarantee that the State obtains the best available terms and conditions, in practice regulations focus too much on transparency and protection of domestic suppliers and too little on assuring a competitive outcome. In general, regulations lack the incentives to promote competition. This situation, in turn, may create extraordinary rents and increase the probability of corruption.

#### **3.1 *Barriers to Competition and Incentives to Collude***

Several aspects of public procurement regulation and practice introduce incentives to collude in markets that are highly concentrated, particularly where auctions are restricted to domestic suppliers:

- Full transparency of auction outcomes (winning bids and bidders) facilitates the implementation of collusive agreements, as it makes it easy to identify and punish cheaters;
- The practice of fragmented and repeated auctions facilitates market allocation, reduces incentives to deviate from collusive agreements and facilitates punishment in case of cheating;
- Multiple provision contracts may limit price competition and lay the groundwork for collusive agreements. In extreme cases, bidders can agree to present identical bids and obtain an equal share of the contract. In concentrated markets, multiple contracts should be used only if strictly necessary to secure supply. Due to these concerns, in these cases the calling entity is required take into account any recommendations issued by the competition authority;
- Joint bids may constitute a simple mechanism to collude. In concentrated markets, joint bids should be allowed only if they do not deteriorate competition: for example, if bidders with complementary capabilities join forces;
- Relatively high maximum prices may be used as an easy reference for bidders to collude on prices. Reference prices should be included only when market information is available to assure their level is not only feasible, but also competitive;
- The prohibition of bids below cost or a convenient price level may eliminate competition from low price bidders, and limits the power of auctions as an efficient mechanism to reveal market information. This prohibition entails a more stringent approach than the predatory price prohibition envisaged under the competition legislation, which is subject to a rule of reason analysis.

#### **3.2 *Barriers to International Competition***

Restrictions on international auctions reduce competition and increase prices. These restrictions may explain to a great extent why international procedures only account for 34.6% of public procurement, even though a much larger portion could be supplied under competition from international suppliers. Markets for inputs, equipment, machinery, engineering and construction services, etc..., required by industries like oil, electricity, construction and health services normally have an international dimension. Although these

industries account for a large majority of public procurement in Mexico, government entities only take limited advantage of international competition in these markets.

International auctions are the default alternative only when a FTA mandates so; even in those cases, the government has the option to reserve for nationals a portion of the associated procurement. In most cases domestic auctions are the default alternative, so procurement officials tend to choose it to avoid not only the need to justify calling for an international auction, but also pressure from domestic suppliers.

International competition would improve terms and conditions of public procurement even in those cases where domestic supply turns out to be the winner, since it increases incentives for domestic suppliers to present internationally competitive bids.

Finally, the discriminatory 15% margin in favour of nationals unnecessarily increases prices and makes it more difficult for procurement officials to justify international auctions.

### **3.3 *Lack of Incentives for Competitive Supply***

Procurement regulations and their supervision focus on auction procedures, but do not take into account the competitiveness of the outcomes. For example, procurement officials may have incentives to undertake a domestic auction even when domestic supply is highly concentrated and international supply is competitive. A domestic auction under these circumstances would increase prices above the competitive level and create extraordinary rents for domestic suppliers. However, a potential audit of this procedure would find it fully legal regardless of the uncompetitive outcome. Thus, domestic providers have incentives to lobby (through legal or illegal means) for a domestic auction, and officials may respond positively without facing much risk. On the other hand, if procurement officials open auctions to international competition and lower the price, they or their entity may not receive any recognition from doing so.

Similar arguments may apply for the use of multiple provision, auction fragmentation and high reference prices, especially when markets are highly concentrated. Incumbent suppliers have incentives to strongly lobby for multiple provision and against consolidating procurement contracts or aggressive reference prices, while procurement officials would not face relevant risks if they respond positively to this lobbying.

## **4. Bid-Rigging Cases**

In spite of the general rule that mandates public tendering in government procurement, several auction rules inhibit competition and facilitate collusive conduct. Thus, in practice, government entities tend to organise frequent and fragmented auctions instead of aggregating purchases into fewer and larger contracts. In many instances, they even divide the national market and hold a series of regional auctions instead of having a single auction for the whole market. These practices turn what could be a one-shot game into a series of games, which facilitate collusive (implicit or explicit) pricing and market segmentation.

The following cases illustrate the issues mentioned above. These cases involve procurement contracts in the public health sector, since it is the sector the Federal Competition Commission (CFC for its initials in Spanish) has studied the most.

#### 4.1 *Surgical Sutures*<sup>4</sup>

In 2000, following a complaint by Sutinmex, the CFC investigated the behaviour of bidders in nearly 90 auctions held during 1999 for the supply of different types of surgical sutures to IMSS and ISSSTE. These auctions were reserved to nationals and included multiple provision clauses.

The CFC identified a collusive agreement among four bidders, which was characterised by identical or similar bids in a significant number of auctions and a clear pattern of market segmentation.

#### 4.2 *X-Ray Materials*<sup>5</sup>

In 2000, following a complaint by Reliable, an international supplier of x-ray materials, the CFC investigated the behaviour of bidders in nearly 250 auctions held during 1998-2000 for the supply of these materials to (mostly) IMSS. These auctions were reserved to nationals and included multiple provision clauses.

The CFC identified a collusive agreement among the three bidders who were the only participants (Kodak, Juama y GPP), which was characterised by identical bids and market shares in the great majority of auctions (almost 100%).

After these findings, IMSS opened procurement of these materials to international competition, which resulted in a dramatic reduction in prices. The following table compares some of the outcomes: in the domestic auctions, the three national suppliers presented high identical bids which assured them identical market shares; meanwhile, in the international auction, an overseas supplier won 100% of the contracts with bids that, on average, were 32.4% lower than winning bids in the domestic auctions.

**Table 1. Auction to Purchase X-Ray Material  
Winning bids\***

Product	International auction	Domestic auctions with multiple provision		
	Reliable	Kodak	Juama	GPP
1	100	222	222	222
2	100	124	124	124
3	100	144	144	144
4	100	123	123	123
5	100	128	128	128
Average	100		148	

\* *Indexes relative to the lowest winning bid for each product.*

\*\**Kodak, Juama y GPP presented identical bids for each product in 17 domestic auctions.*

<sup>4</sup> CFC file: DE-003-2000.

<sup>5</sup> CFC file: DE-57-2000.

### 4.3 *Chemical Developers for X-Ray*<sup>6</sup>

In 2001, the CFC investigated the behaviour of bidders in 64 auctions held during 1997-2001 for the supply of chemical developers for x-ray to IMSS and ISSSTE. These auctions were reserved to nationals and included multiple provision clauses.

The CFC identified a collusive agreement between the two only bidders (Juama and GPP), which was characterised by identical bids and market shares in all auctions.

### 4.4 *Generic Pharmaceuticals*

The CFC recently developed a database with the outcomes of the auctions called by IMSS during 2003-2007 for the procurement of generic pharmaceuticals. This effort was undertaken with the purpose of evaluating the possible presence of bid-rigging in the markets involved. IMSS is by far the largest provider of health services in Mexico and accounts for about 90% of total procurement of generic pharmaceuticals by public health institutions. In 2008, for example, it spent USD 1.5 billion.<sup>7</sup>

The database includes information from approximately 400 auctions for each of nearly 250 different generic pharmaceuticals purchased by IMSS during this period. Preliminary analyses of this database provide us with many examples of competition (and possibly corruption) concerns. Some examples are presented below. For confidentiality reasons, the examples omit absolute prices and names of bidders and products.

#### 4.4.1 *Product 1*

- Four domestic auctions during the same year; lowest-price sealed-bid; and multiple provision rules.

**Table 2. Bids\***

Bidder	Auction			
	1	2	3	4
A	100.13	100.13	100.09	101.51
B	100.06	100.09	NB	100.13
C	100.09	NB	100.00	100.09
D	102.2	100.06	100.13	100.06

\*Lowest bid = 100

Winning bid:

NB: no bid was presented

- Potential competition concerns: winning bids are practically identical among bidders; each contract is divided among three bidders; each bidder wins a share in three out of four contracts; bidders get a similar share of annual purchases; and bidders seem to take turns in participating (or winning).

<sup>6</sup> CFC files: DE-10-2001.

<sup>7</sup> [www.imss.gob.mx](http://www.imss.gob.mx).

4.4.2 *Product 2*

- Four domestic auctions during the same year; lowest-price sealed-bid; and single provision rule.

**Table 3. Bids\***

Bidder	Auction			
	1	2	3	4
A	Nb	nb	nb	100.21
B	105.49	nb	100.00	nb
C	100.21	100.21	nb	nb

\*Lowest bid = 100

Winning bid:

NB: no bid was presented

- Potential competition concerns: winning bids are practically identical among bidders; each bidder wins at least one of the four contracts; bidders get a similar share of annual purchases; and bidders seem to take turns in participating (or winning).

4.4.3 *Product 3*

- Four domestic auctions during the same year; lowest-price sealed-bid; and multiple provision rule.

**Table 4. Bids\***

Bidder	Auction			
	1	2	3	4
A	100.00	nb	nb	nb
B	nb	100.14	nb	100.14
C	103.79	103.79	100.00	100.00
D	nb	100.00	nb	nb
E	100.07	102.00	100.07	101.86

\*Lowest bid = 100

Winning bid:

NB: no bid was presented

- Potential competition concerns: winning bids are practically identical among bidders; each contract is divided among two bidders; each bidder wins a share in at least one of the four contracts; bidders get a similar share of annual purchases; and bidders seem to take turns in participating (or winning).

4.4.4 *Product 4*

- Four domestic auctions during the same year; lowest-price sealed-bid; single provision rule.

**Table 5. Bids\***

Bidder	Auction			
	1	2	3	4
A	100.00	nb	nb	100.00
B	nb	100.00	100.00	nb

\*Lowest bid = 100

Winning bid:

NB: no bid was presented

- Potential competition concerns: winning bids identical among bidders; each bidder wins two of the four contracts; bidders get a similar share of annual purchases; bidders seem to take turns in participating (or winning).

#### 4.4.5 Competitive Bidding

In all the examples above, as well as in many others omitted because of space constraints, a more competitive design of the auctions could have increased competition and reduced the prices paid by IMSS. This hypothesis was validated by the outcomes of a more competitive procurement strategy implemented by IMSS in 2007. Specifically, between 2003 and 2006, procurement of generic pharmaceuticals was based on domestic and fragmented auctions: there was an average of nearly 100 auctions per product per year, as each consuming area (region or general hospital) held its own auctions separately and, in some instances, several times a year for the same product. Additionally, many of these auctions included multiple provision rules and relatively high reference prices. In contrast, in 2007 IMSS implemented a strategy based on using international auctions more extensively, consolidating purchases into one (or a few) annual national contract per product, including aggressively low maximum prices based on market research, and eliminating multiple provision. As a result, similarity of bids and market allocation among bidders disappeared and winning bids decreased dramatically: 18 of the 20 most important products, which represent 42% of purchases, registered an average price decrease of 20%.

This example illustrates the extent to which the design and implementation of truly competitive auctions can enhance the competitiveness of public procurement. The new bidding procedures clearly reduced the space for corruption, since extraordinary rents tend to disappear as prices approach their competitive levels. Unfortunately, the efforts undertaken by IMSS are still an exception and do not necessarily derive from an integral government strategy to improve the competitiveness of public procurement.

The new bidding procedures were developed and implemented by a few central IMSS officials, who had to overcome many obstacles. Domestic manufacturers and distributors of generic pharmaceuticals, individually or through their associations, opposed formally and informally to these changes. They presented formal complaints before the Ministry of Public Administration, responsible for supervising and auditing federal public procurement, arguing the lack of justification for international auctions, procurement consolidation and aggressive price references. They also lobbied intensively against these changes before officials of different government entities: they even approached the CFC arguing these changes were anticompetitive because they would displace or exclude domestic providers.

Finally, the integration and analysis of this database has provided elements not only for the design of more competitive auctions, but also to identify possible illegal bid-rigging. Based on these elements, the CFC undertook formal investigations in several markets to identify additional (direct or indirect) evidence to validate or reject this hypothesis. These investigations are currently underway.

## 5. Concluding Remarks

Competition law and policy can play a key role in promoting competitive public procurement. In achieving this goal, it also contributes to the fight against corruption by eliminating extraordinary rents that may be the source of corruptive actions. Unfortunately, in Mexico public procurement regulations and practice focus too little on promoting a more competitive environment. In most government entities the procurement strategy is characterised by unnecessary barriers to entry and fragmentation, high reference prices, multiple provision, and full transparency of auctions outcomes, among other elements. This environment restricts competition and facilitates collusion in domestically concentrated markets, which in turn creates extraordinary rents and introduces incentives for incumbents to lobby in favour of the status quo.

Nevertheless, the examples presented in the public health sector are important precedents in the efforts the CFC is undertaking to fight bid rigging and promote competitive outcomes in public procurement. The Commission will continue to integrate and analyse databases similar to the one on generic pharmaceuticals to identify and further investigate cases where a hypothesis of illegal collusive behaviour can be reasonably developed. The fight against bid rigging would be easier as the CFC identifies and sanctions more cases and cartel members have more incentives to apply to the leniency programme that has been recently implemented in Mexico. On the other hand, the CFC is collaborating with different government entities to promote pro-competitive procurement strategies and auction designs. In this regards it is promoting the *Guidelines for Fighting Bid rigging in Public Procurement* issued by the OECD Competition Committee in 2009. The CFC has also issued several opinions regarding the need to develop more pro-competitive public procurement regulations.



## MOROCCO

Public procurement is an essential component of the Moroccan economy, firstly because of the scale of the State's expenditure commitments every year, which amount to around 15% of GDP, and secondly because of the strategic importance of such expenditure for the country's development. Over the past decade, Morocco has launched a large number of structural and development projects in which public procurement has a determining role to play in ensuring the rational and efficient distribution of public expenditure.

In view of the large sums of money involved, the diversity of actors and the large number and complexity of rules and regulations, public procurement is an area that is exposed to the risk of fraud, favouritism, misappropriation of funds and other kinds of unlawful practices. The latter fall under two main headings:

- Corruption (or capture), which consists in a coalition between the buyer (the State or one of its subdivisions) and one or more suppliers (bidders) in order to favour the latter over other competitors;
- Collusion, which generally describes the behaviour of enterprises which reach an agreement, collude or act in concert to take market decisions, in most cases with regard to their prices, in order to restrict, impeded or distort the free play of competition.

These illegal practices have adverse consequences such as:

- Wastage of public funds due to their irrational and inefficient allocation;
- Supply of poor quality products or work, which can cause serious accidents and in some cases deaths;
- Wastage of resources due to orders having to be placed a second time or work being carried out twice because it had not been performed properly the first time;
- Delays in or even the cancellation of a number of large infrastructure and development projects.

These various dysfunctions prevent public procurement from being managed rationally on the basis of the rules of Act, free and fair competition, transparency and integrity.

This paper will begin by presenting the legal, regulatory and institutional framework governing public procurement in Morocco. The last two sections will then explore the main thrusts of the reform of public procurement and present the main types of action pursued by the ICPC in this regard.

### **1. Legal and Regulatory Framework Governing Public Procurement in Morocco**

Public procurement in Morocco is governed by a body of texts which organise and regulate the actions of the institutions participating in this process and which guarantee compliance with the rules of fair competition, good management and integrity.

These legislative texts include:

- Decree 2-06-388 of 5 February 2007 setting conditions and terms for the award of government contracts and certain rules relating to their management and control;
- Decree 02-07-1235 of 5 November 2008 regarding the auditing of State expenditures;
- Act 54-05 regarding the delegated management of public services;
- Dahir (Act) 1-02-25 of 3 April 2002 promulgating Act 61-99 on the responsibility of public auditors and accountants;
- General administrative terms and conditions approved under Decree 2-01-2332 of 4 June 2002.

The Decree of 5 February 2007 nonetheless remains the main reference text for public procurement. The aims that this Decree is designed to meet lie mainly in the following areas:

- Strengthening of the rules encouraging the free play of competition through the promotion of wider competition between bidders;
- Introduction of tools that will ensure transparency in the preparation, award and performance of contracts;
- Adoption of the principle of equal treatment of bidders in all stages of the contract award process;
- Requirement that the contracting authority provide all competing bidders with adequate and fair information in the various stages of contract award procedures;
- Strengthening of the rules on administrative ethics and morality by introducing measures designed to reduce the scope for fraudulent or corrupt practices;
- Eliminating the use of paper in procedures and making it mandatory for contracting authorities to publish certain information and documents on the electronic portal for government contracts;
- Introduction of procedures for lodging appeals and for the amicable settlement of disputes relating to the award of contracts.

## **2. Main Institutional Actors in the Management and Monitoring of Public Procurement in Morocco<sup>1</sup>**

### **2.1 Expenditure Commitment Auditor (CED)**

The CED is represented on the Bid Adjudication Committee in a monitoring capacity and is charged primarily with the task of ensuring the budgetary compliance of expenditure made on behalf the State.

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<sup>1</sup> Excerpts from a research thesis for the award of a Master's in Public Administration by the ENA, France (2007-2008), submitted by Mr. Mohamed Abdelmouhcine HANINE, pages 47-49.

The checks carried out as part of this oversight, as laid down in the applicable Decrees, are designed to:

- Ensure that proposed expenditure commitments, notably contracts, are based on available funds;
- Ensure that such proposals comply, in terms of their purpose, with the budgetary heading to which it is proposed to assign them;
- Ensure that these proposals have been accurately costed;
- Ensure that the proposed expenditure commitments comply with legislative texts and regulations;
- Ensure that the proposed commitments relate to the entire expenditure for which the Administration will be liable during the budgetary year;
- Examine the possible implications of the commitment with regard to the use of funds for year in progress or previous years.

After carrying out these checks, the auditor decides whether to approve the contract by adding a number of conditions with which the contracts officer must comply; to approve the contract by setting out a number of conditions which the contracts officer must take into account, but which do not constitute grounds for suspending payment of the contract; or lastly, to refuse approval on the grounds that the contract proposed for commitment is not compliant. This situation may prompt the contracts officer to request arbitration in the event of disagreement over the CED's decision.

The contracts officer, or the sub-contracts officer, must notify the suppliers or enterprises awarded the contract of the references given in the auditor's approval of the expenditure commitments before they start to perform the services covered by the contract. This notification, which ensures that the procedure complies with regulations and that funding is available, is sent after the contract has been signed and before its execution.

In the case of local authorities, the public accounting officer, whose is appointed under an Order issued by the Minister of Finance, audits expenditure commitments.

In the case of public establishments, the audit is carried out by government auditors assigned to public establishments and enterprises, depending upon their legal nature. Their role is to ensure compliance with the legislation on the award of contracts, notably the settlement of contracts relating specifically to individual bodies. These bodies are obliged to use competitive bidding procedures, unless exceptions can be justified, in order to ensure the transparency, equality of access to contracts and the efficiency of expenditure.

Lastly, it should be noted that the auditing of government expenditure commitments has been placed under the responsibility of the General Treasury of the Kingdom and the competencies of the General Auditor of government expenditure commitments have been transferred to the General Treasurer of the Kingdom under Decree 02-06-52 of 13 February 2006. This major change was made as part of the reform of public expenditure initiated by Ministry of Finance.

## 2.2 *General Treasury of the Kingdom (TGR)*

The General Treasury of the Kingdom of Morocco is one of the most important administrations in the Ministry of Economy and Finance, through which all the financial and accounting flows of the State and local authorities are routed.

It is also at the heart of an institutional network comprising public administrations, public establishments, local authorities and other major financial institutions, all of which are concerned with managing public funds.

The main remit of the TGR is to:

- Collect Public Debts

The TGR uses its vast network of public accountants to collect tax and non-tax revenues, primarily by:

- Managing administrative and legal claims regarding tax collection and providing assistance to tax collectors in their work;
  - Taking charge of revenue orders under the general budget of the State and Treasury ancillary and special budgets;
  - Centralising payments and collection of revenues from fines and financial penalties;
  - Managing the accounts for loans and advances granted by the Treasury and working capital provided by financing bodies for public projects;
  - Compilation of statistics on the situation regarding the collection of public debts.
- Auditing and Payment of Public Expenditure

The TGR is responsible for auditing and payment of public expenditure. The TGR's network is therefore charged with the task of verifying the compliance of commitments for practically all State expenditures. It manages the payment of the said expenditures through its network of accountants. The TGR's departments settle the State's debts in response to the proposed commitments and payments orders forwarded by accredited contracting authorities.

The TGR also audits and pays the salaries of around 650 000 civil servants through the National Pay Centre (CNT).

- Management of Local Finances

The TGR manages the budgets of 1659 local authorities, 86 associations of local authorities and 41 districts through its network of communal treasurers and tax collectors.

The TGR collects their receivables, settles their expenditures and pays the wages of their staff.

The TGR also makes use of its expertise by providing local authorities with necessary advice and assistance. This advice may be of a legal and financial nature and relates, among other things, to accounting procedures, financial analyses and the preparation of management charts.

- Management of Treasury Deposits

The TGR is responsible for managing Treasury deposits. This activity gives it a role in financing the State treasury in that it manages the accounts of public enterprises and establishments which are under the obligation to deposit their funds in the Treasury. This activity also extends to the management of deposits by legal persons or private bodies.

- Production of Financial and Accounting Information

The TGR centralises the accounting operations of the State and local authorities and, in consequence, provides a reference for the production and exploitation of accounting data relating to the State and local authorities.

The accounting information generated can thus be used to:

- Precisely describe budgetary and financial operations;
- Rapidly provide the reliable information needed for decision-making;
- Draft documents relating to statements of accounts.

### **2.3 General Inspectorate of Finances (IGF)**

The IGF is entrusted with the task of carrying out random checks on the departments in the Ministry of Finance and other Ministries, local authorities and public establishments.

The inspectors of finance verify the compliance of transactions recorded by contracting authorities, including public procurement.

The IGF can also audit the procedures for the award and execution of contracts financed by external bodies.

Lastly, the auditing of the said inspection is subject to the provisions of Dahir 1-59-269 of 14 April 1960 on the General Inspectorate of Finances.

### **2.4 General Inspectorates Established in Individual Ministries**

The organisation chart for each Ministry contains a General Inspectorate reporting to the Minister concerned which is placed under the Minister's responsibility and whose role is to carry out inspections in the central and external departments of the said Ministry. Public procurement is one of the areas covered by such inspection work.

### **2.5 Procurement Committee**

This Committee is placed under the authority of the General Secretary of Government. It includes members of almost all Ministerial Departments in addition to the General Treasurer, the Expenditure Commitments Auditor and the Head of the Legislation Department in the Government's General Secretariat. All members of the Committee are entitled to vote. The Committee can also call upon other persons to act in an advisory role.

The Committee has two main types of function. The first is to issue opinions on draft legislation or regulations on public procurement, on issues of all kinds relating to the preparation, award, execution and

payment of contracts, disputes arising from contracts and draft contracts or supplementary clauses on which it is consulted by the contracts officer. The second is to propose provisions to supplement legislation and improve contracting departments and to launch studies to improve the conditions for awarding orders and government contracts.

The Committee simply acts in a consultative or advisory capacity and has no real competence to monitor contracts. However, the opinions it issues are important in view of the fact that local authorities, Ministerial departments and public establishments make use of them to resolve certain practical or legal issues raised in the course of awarding, executing of paying contracts.

Matters are referred directly to the Committee by the Prime Minister and the Secretary-General of the Government, contracting authorities and the general inspector of expenditure commitments. The Committee's deliberations are not published systematically. The recent creation of an internet site for the General Secretariat of the Government<sup>2</sup> now allows some opinions to be consulted on-line. The main function of the Committee is to issue opinions on disputes or in cases of where complicated situations arise through ignorance or incorrect application of the legislation.

In addition, the permanent Secretariat of the Committee maintains a general inventory of contracts for work, supplies, services and studies awarded on behalf of the State. The Committee draws up an activities report annually.

## **2.6 Court of Auditors and Regional Courts of Auditors**

These courts exercise oversight of a jurisdictional nature in accordance with Act 62-99 constituting the code of financial jurisdictions of 13/06/2002.

The Court of Auditors is entrusted with a wide range of tasks. It verifies the compliance of the revenue and expenditure transactions of bodies subject to its oversight under the Act, assesses their management and punishes any shortcomings. It has a jurisdictional function with regard to budgetary and financial discipline (Articles 54, 55 and 56). This latter competence concerns all government officials from the officers awarding contracts to inspectors, public accountants or civil servants working under their supervision and all civil servants such as managers or officials working in public bodies and managers or officials working in any other bodies subject to inspection by the Court.

A wide variety of infringements may be prosecuted. In accordance with Article 54 of Act 62-99 the contract awarding officer may be prosecuted if he infringes contracting regulations. According to Article 55 of Act 62-99, the inspector may be liable for sanctions if he fails to carry out the checks he is obliged to perform, notably with regard to the compliance of the planned contract with regulations regarding the award of public contracts. This may consist, for example, in failure to produce the administrative certificate or report presenting the contract which justifies the choice of procedure for awarding the contract, failure of the contract for work or supplies or services to comply with the rules on competitive bidding applicable to the body concerned.

The Court's audits may also be performed after the management audit missions have been completed (Article 75). The aim is to assess the quality of the services supplied and suggest possible ways of improving methods and increasing effectiveness and efficiency. The audit addresses the compliance and sincerity of the operations carried out as well as the reality of the services or goods supplied and the work carried out.

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<sup>2</sup> Internet site of the General Secretariat of the Government: [www.sgg.gov.ma](http://www.sgg.gov.ma).

The nine Regional Courts of Auditors have the same competences with regard to local authorities and the bodies of the latter. They are located in the following towns in the Kingdom of Morocco: Laâyoune, Agadir, Marrakech, Settat, Casablanca, Rabat, Fès, Tanger, Oujda.

## 2.7 *Competition Council*<sup>3</sup>

The Competition Council was set up under Act 06-99 on the freedom of prices and competition, promulgated under Dahir 1-00-255 of 5 June 2000. It is charged with advisory functions for the purposes of providing advice and recommendations and, in addition to the Chairman, comprises twelve (12) members:

- A representative of the Minister of Justice;
- A representative of the Minister of the Interior;
- A representative of the Minister of Finance;
- A representative of the Secretary General of Government;
- A representative of the Minister of Planning;
- Three (3) members chosen for the competence in legal matters, economics, competition or consumption, appointed by the Prime Minister;
- Three (3) members who exercise or have exercised their activities in the manufacturing, distribution or services sector, appointed at the proposal of the Chairmen of the Federation of Chambers of Commerce, Industry and Services, the Federation of Chambers of Crafts, the Federation of Chambers of Agriculture and the Federation of Chambers of Maritime Fisheries.

Scope and means of action:

- Ensure that the free play of competition is respected within the framework of the market economy, in order to guarantee the competitiveness of the national economic fabric and a good cost-quality ratio for the welfare of the consumer;
- Act, at its initiative, to:
  - Inform and raise the awareness of the public and economic and social actors (symposia, seminars, conferences);
  - Study the degree to which competition can be created between different sectors and branches of activity;
  - Draw up the annual report and submit it to the Prime Minister.
- Intervene, when formally called upon, in the event of:
  - Anti-competitive cartels which might prevent, restrict or distort the free play of competition (price fixing, geographical sharing of markets, etc.);

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<sup>3</sup> Taken from the internet site of the Competition Council: <http://www.conseil-concurrence.ma>.

- Abuse of a dominant position or situation of economic dependency (tied sales, refusal to sell, etc.);
- Concentration liable to damage competition.
- Who consults the Council?
  - The Government on any competition-related issue;
  - Standing Parliamentary Committees on any draft legislation covering areas relating to competition;
  - Competent jurisdictions regarding matters concerning anti-competitive practices that are referred to them;
  - Regional Councils, urban communities, chambers of agriculture, crafts or maritime fisheries, union and professional organisations and consumer organisations recognised to be of public utility. The replies by the Council are restricted solely to opinions on matters of principle.

## 2.8 *Central Anti-Corruption Agency (ICPC)*

The Central Anti-Corruption Agency, reporting to the Prime Minister, was established under Decree 02-05-1228 of 13 March 2007. Its members were appointed on 2 December 2008 and the first meeting of its Plenary Assembly was held on 6 January 2009.

In addition to its Chairman and Wali Al Madhalim (mediator), the Central Agency has 43 members representing government, professional organisations (including unions), civil society and universities, which constitute its Plenary Assembly.

The three main missions of the ICPC are to:

- Co-ordinate anti-corruption policies;
- Oversee policies and monitor their implementation;
- Compile and disseminate information relating to corruption.

To this end, it is charged in particular with the task of:

- Proposing to government the main directions of a corruption prevention policy, particularly with regard to co-operation between the public and private sectors to combat corruption;
- Proposing measures to raise public awareness and organising information campaigns for that purpose;
- Contributing, in co-operation with the administrations and bodies concerned, to the development of international co-operation in the prevention of corruption;

- Ensuring the follow-up and assessment of measures taken to implement government policy with regard to corruption and making recommendations to administrations, public bodies, private enterprises and all other actors in corruption prevention policy;
- Providing the administrative authorities with opinions on measures that might be taken to prevent corrupt transactions;
- Collecting all types of information relating to corruption and managing the related database;
- Informing the competent judicial authority of all the facts brought to its attention in the course of its work which it feels might constitute acts of corruption punishable by Act.

With regard to public procurement, the ICPC acts as an advisory body by issuing opinions on different reforms and by making practical recommendations on how to improve the process. Furthermore, recognising the paramount importance of public procurement for the development of the country and the considerable risks of corruption in this sector, the ICPC has set up a working party to analyse issues relating to such procurement in order to continue proposing improvement measures.

### **3. Reform of Public Procurement in Morocco**

Over the past few years Morocco has embarked on a major reform of public procurement primarily aimed at improving procurement management and promoting greater integrity and transparency. The following section presents a summary of the main features of this reform.

The reform of public procurement is part of the major raft of reforms aimed at modernising the Moroccan administration and adapting it to changes in progress and to Morocco's commitments to its partners.

It is with this aim in mind that a new Decree setting conditions and terms for the award of government contracts as well as certain rules relating to their management and control, was published in April 2007, thereby amending the Decree of 30 December 1998 on public procurement.

This reform, introduced less than ten years after the Decree was issued in 1998, was the outcome of the public authorities' desire to give greater responsibility to departments awarding contracts, and at the same time greater freedom and flexibility, in order to achieve efficient and effective public expenditure, coupled with the determination of those public authorities to combat all types of fraud and corruption. Transparency was therefore presented as one of the main challenges of the reform.

The will to achieve transparency is apparent in several of the new Decree's provisions. The demands of modernisation, good governance and economic openness are incentives to introduce regulations on contracts which take account of the objective of consolidating transparency and the interests of the Administration and the private sector within the framework of a balanced partnership, with a view to ensuring higher quality services at lower cost. In addition, the new Decree was designed in line with the new approach to the management of public finances based on the increased empowerment of contracts officers, efforts to improve performance and the placing of relations between central administrations and their decentralised departments on a contractual basis. In short, the 2007 Decree expresses the determination of the public authorities to introduce a framework for the award of public procurement contracts that is irreversibly linked to compliance with the principles of free access to public procurement, equal treatment of bidders, transparency and the streamlining of procedures.

Moreover, it should be noted that work is currently proceeding on an overhaul of the 2007 Decree. This reform is primarily aimed at increasing transparency and at combating all types of fraud and corruption. The need for such a reform is all the more pressing in that contracts are the main way in which the needs of the Administration are met.

The main innovative thrusts of this planned reform consist in:

- Enshrinement of the unity of the regulations applicable to public procurement;
- Simplification and clarification of procedures;
- Increased use of competition and greater fairness in the treatment of bidders;
- Consolidation of transparency measures and introduction of ethical principles into the management of public procurement;
- Modernisation of public procurement procedures;
- Improved guarantees for competing bidders and introduction of appeals mechanisms.

However, this planned reform still contains several provisions which should really be reconsidered to ensure that the reform will effectively help to build a system for management public procurement contracts that is transparent, fair and efficient.

#### **4. Observations by the ICPC on the Reform of Public Procurement**

The Central Anti-Corruption Agency was consulted by the TGR about the new planned reform of the 2008 Decree and made a number of comments regarding appeals, inspections, audits, increased transparency, the exceptions granted to the National Defence Administration and the discretionary power of the contracting authority.

##### **4.1 Appeals**

With regard to appeals, the ICPC felt that complaints should be dealt with by an independent, diligent body with real decision-making power, notwithstanding the use of legal channels for appeals. However, the planned reform maintained the same approach to the handling of appeals as that taken in the legislation currently in force, as well as a hierarchical appeals procedure in which it was possible for an appeal to be lodged directly with the contracts committee despite the fact that the latter remains an advisory body.

##### **4.2 Monitoring and Auditing**

The provisions regarding monitoring and auditing are among the major innovations introduced in the 1998 reform. The auditing of contracts worth more than MAD 5 million (and MAD 1 million for local authorities) is assumed to cover the preparation, awarding and execution of contracts. However, in the ICPC's opinion, the reference made in the second paragraph of Article 110<sup>4</sup> of the draft Decree on public

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<sup>4</sup> Draft Decree setting out the conditions and formalities for the award of public procurement contracts as well as certain regulations regarding their management and auditing: Article 110 Internal controls and audits.

Besides the checks provided for in general legislation regarding public expenditure, contracts and their supplementary clauses are subject to internal controls and audits laid down by decisions by the Minister concerned.

procurement would seem to be seeking to focus the audit on the obligation to draw up and publish the various documents stipulated in the Decree, which considerably restricts the scope of this important provision.

In the opinion of the ICPC, in order to make this provision both operational and effective would require terms of reference for the audit to be specified beforehand. These terms of reference would have to cover at least the following: timeliness, appropriateness of the contract specifications, compliance of the operations relating to the award of the contract, management of deadlines, compliance of the supply and payment of contracts.

#### **4.3 *Increased Transparency***

With regard to increased transparency, the ICPC considered that the planned reform did indeed include advances in this area, notably through the use of the national portal. However, this effort needed to be stepped up in at least two areas: the dissemination of audit reports and the publication of the contracting authority's estimate.

Publishing the audit report or the results of the audit will indeed make it possible to ensure that this provision is implemented and will provide the public, and in particular unsuccessful bidders, with information about how the procedure was executed. Instead of publishing the entire report, consideration might also be given to publishing excerpts.

In addition, the ICPC saw no interest in preserving the confidentiality of the contracting authority's estimate; firstly because the estimate is an essential guide to bidders when drawing up their bids, and secondly because there is a danger that this information might be made available, illegally, to some bidders to the detriment of others.

#### **4.4 *Exceptions Regime Applicable to the National Defence Administration***

While it is perfectly understandable that security-related procurement by the National Defence Administration should be granted exceptions to the public procurement code, the ICPC does not see any particular reason why the everyday procurement by this department should be covered by the many exceptions provided by in the Decree.

#### **4.5 *Discretionary Power of the Contracting Authority***

The ICPC noted that the detailed provisions introduced under the reform make it clear that the contracting authority retains full control over the choice of contract award procedure and the establishment of specifications.

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These controls and audits relate to the preparation, award and execution of contracts, and in particular compliance with the obligation to draw up and publish the various documents specified in the present Decree.

Checks and audits are mandatory for contracts worth more than five million (5 000 000) dirhams and must be presented in a report submitted to the Minister in charge of public procurement or to the Director of the public establishment concerned in the case of contracts for public establishments.

In the case of local authorities and associations of local authorities, controls and audits are mandatory for contracts worth more than one million (1 000 000) dirhams and must be presented in a report submitted to the Minister of the Interior.

However, the provisions of the present Article do not apply to contracts regarding the national defence administration.

In the opinion of the ICPC, it is not so much the power given to the contracting authority which poses a problem, since the latter is held to represent the general interest, but the risk of that power being misused for personal gain. Accordingly, a framework needs to be provided for this power. If there is no framework, compliance with the procedure will be meaningless if a determining tool such as the contract specifications makes it possible to steer the choice towards the supplier benefiting from the favours of those in charge of placing the order.

Besides these observations, the ICPC also voiced reservations about certain provisions, and in particular:

- Introduction of the call for an expression of interest, which duplicates the pre-qualification procedure and which may be diverted from its original purpose;
- Maintenance of firm prices for supplies and services, regardless of delivery schedules. This provision may well affect the aim of producing balanced contracts;
- Maintenance of the procedure for depositing samples, which presents the major risk of revealing the list of bidders a day before the bids are opened.

Various inspection missions and reports drawn up by regional Courts of Auditors revealed major dysfunctions in the management of the contracts awarded local authorities. These dysfunctions may be attributable to the lack of a legal framework properly adapted to the realities and nature of the missions entrusted to these authorities. A draft Decree dealing specifically with this issue is currently being finalised. This draft is aimed at:

- Making the regulations more accessible to elected local representatives;
- Streamlining the procedures with a view to activating local development projects;
- Introducing effective internal management control mechanisms;
- Putting in place bodies to audit and monitor local public procurement contracts;
- Consolidating the requirements for transparency and spending efficiency;
- Transforming local public procurement into a genuine vector for local development;
- Contributing to promote local good governance.

The ICPC has been asked by the General Directorate for Local Authorities to give an opinion on this draft. The Central Anti-Corruption Agency made the following comments:

In general, the draft Decree retains the structure, principles and procedures for the award of public procurement contracts set out in the Decree of 5 February 2007. The additions and improvements mentioned in the outline of the reasons for preparing the said draft, of which there are admittedly a large number, do not make any fundamental changes to the original text. In particular, the ICPC noted that no effort had been made to simplify the text in order to make it more accessible to local authorities with limited managerial resources or to small local enterprises which were unaccustomed to bidding for local procurement contracts.

However, a number of innovations in the draft do merit special mention:

- Creation of a monitoring committee which plays an advisory role in the management of public procurement;
- Creation of a national database for local public procurement;
- Mandatory display of the value of contracts and orders placed by each local authority.

The comments made by the ICPC relate to the following four points:

#### **4.6 *Substantial Discretionary Powers of the Contracting Authority***

The contracting authority retains full control over the choice of contract award procedure, the drafting of specifications and the setting of selection criteria.

It is not so much the fact that the contracting authority has been given this power which poses a problem, given that the latter is assumed to represent the general interest, but the risk of it being misused for personal gain. It therefore needed to be given a proper framework. Without such a framework, compliance with the procedure will be meaningless if a determining tool such as the specifications allows the choice to be steered towards the supplier favoured by those in charge of placing the order.

#### **4.7 *Appeals***

Article 127 establishes a monitoring committee with a dual remit: the first is to improve the management of public procurement by local authorities, and the second relates to the follow-up of applications from actors involved in the award and execution of an order.

The text appears to allow competing bidders and/or contractors to submit grievances directly to the committee. The latter has the power to order the procedure to be suspended should it be deemed necessary.

The committee is composed of eleven members and no indication is given of its composition, apart from its chair.

Although these advances are indisputably positive, it nonetheless remains that an appeals body must be independent of the administrative structures of the contracting authority.

The committee's composition, were it to be widened to include personalities from outside the Administration, could, to a certain extent, remedy this lack of independence. In this respect, securing the participation of the ICPC would be a welcome move.

#### **4.8 *Audits and Inspections***

The audit requirement applies to contracts worth more than one million dirhams rather than the 5 million dirhams specified in the Decree. Terms of reference, and not just a simple formulation, must first be specified for the audit before this provision is implemented. The nature and powers of the body in charge of this audit must also be specified.

The second condition to ensure the effectiveness of the audit is to publish the audit report or at least ensure its wide dissemination.

**4.9 Excessive Formality**

The draft Decree that is supposed to streamline procedures for awarding contracts has maintained a level of formality that jeopardises the transparency and integrity of the procedure in that a minor shortcoming could be used as a pretext for rejecting a competitor's bid.

This risk is clearly illustrated by the list of documents that competing bidders are required to submit. The list of documents to be produced such as the tax statements and CNSS statement given in the draft Decree could perhaps be simplified.

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In conclusion, while admittedly Morocco has made considerable progress in the management of public procurement over the past decade, shortcomings still remain and a constant effort will have to be made to ensure better governance in this area. Aware of the importance attached to public procurement as a lever for the development of the country, the ICPC has made promoting the integrity and transparency of public procurement one of its priority strategic directions.

## MOROCCO

Les marchés publics constituent une composante essentielle de l'économie marocaine, d'une part pour les montants importants engagés par l'État chaque année et qui constituent environ 15% du PIB et, d'autre part, pour l'importance stratégique de ces dépenses pour le développement du pays. En effet, le Maroc a connu lors de la dernière décennie le lancement d'un grand nombre de projets structurels et de développement dans lesquels les marchés publics jouent un rôle déterminant, en termes de répartition rationnelle et efficiente de la dépense publique.

De par les montants importants en jeu, la diversité des intervenants ainsi que la multiplicité des règles et leur complexité, les marchés publics constituent un domaine exposé au risque de fraude, de favoritisme, de malversations et autres sortes de pratiques illicites. Ces pratiques peuvent être regroupées en deux grandes catégories :

- La corruption (ou capture) qui consiste en une coalition entre l'acheteur (l'État ou l'un de ses démembrements) et un ou plusieurs offreurs (soumissionnaires) afin de les favoriser par rapport aux autres concurrents ;
- La collusion qui qualifie d'une manière générale le comportement d'entreprises qui passent des accords, s'entendent, ou se concertent pour prendre des décisions de marché, le plus souvent concernant leur tarification, dans le dessein de limiter, d'entraver ou de fausser le libre jeu de la concurrence.

Ces pratiques illégales ont des répercussions néfastes notamment :

- Le gaspillage des fonds publics dû à leur allocation irrationnelle et inefficente ;
- La réalisation de produits ou de travaux de qualité inférieure, ce qui peut causer de graves accidents, parfois mortels ;
- Le gaspillage des ressources dû au renouvellement des commandes ou au dédoublement des travaux lorsque ces derniers sont mal exécutés ;
- Le retardement, voire l'annulation, de plusieurs grands projets d'infrastructure et de développement.

Ces différents dysfonctionnements empêchent une gestion rationnelle des marchés publics, basée sur les règles de droit, de concurrence libre et loyale, de transparence et d'intégrité.

Ce document présentera, dans un premier temps, le cadre légal, réglementaire et institutionnel régissant et organisant les marchés publics au Maroc. Les deux dernières sections exploreront, ensuite, les grandes lignes de la réforme des marchés publics et présenteront les différentes interventions de l'ICPC à ce sujet.

## **1. Le cadre légal et réglementaire régissant les marchés publics au Maroc**

Les marchés publics au Maroc sont régis par un ensemble de textes qui organisent et régulent l'intervention des institutions participant à ce processus et qui garantissent le respect des règles de bonne concurrence, de bonne gestion et d'intégrité.

Parmi ces textes figurent :

- Le décret n° 02-06-288 du 05 février 2007 fixant les conditions et les formes de passation des marchés publics ainsi que certaines règles relatives à leur gestion et leur contrôle ;
- Le décret n° 02-07-1235 du 05 novembre 2008 relatif au contrôle des dépenses de l'État ;
- La loi N° 54-05 relative à la gestion déléguée des services publics ;
- Le Dahir (loi) n° 1-02-25 du 3 avril 2002 portant promulgation de la loi n° 61-99 relative à la responsabilité des contrôleurs et des comptables publics.
- Le Cahier des Clauses Administratives Générales approuvé par le décret n° 2-01-2332 du 4 juin 2002.

Le décret du 5 février 2007 reste, cependant, la principale référence dans le domaine. Les objectifs escomptés à travers ce décret s'articulent autour des principaux axes suivants :

- Le renforcement des règles encourageant le libre jeu de la concurrence, en favorisant une compétition plus large entre les soumissionnaires ;
- La mise en place d'outils permettant de garantir la transparence dans la préparation, la passation et l'exécution des marchés ;
- L'adoption du principe d'égalité de traitement des soumissionnaires dans toutes les phases de passation des marchés ;
- L'obligation pour le maître d'ouvrage d'assurer à tous les concurrents l'information adéquate et équitable dans les différentes phases des procédures de passation des marchés ;
- Le renforcement des règles de la déontologie administrative et de la moralisation en introduisant des mesures de nature à réduire les possibilités de recours à des pratiques de fraude ou de corruption ;
- La dématérialisation des procédures et l'obligation faite aux maîtres d'ouvrages de publier certaines informations et documents sur le portail électronique des marchés de l'État ;
- L'institution de voies de recours et de règlement à l'amiable des litiges portant sur la passation des marchés.

## 2. Les principaux intervenants institutionnels dans la gestion et le contrôle des marchés publics au Maroc<sup>1</sup>

### 2.1 *Le Contrôleur des Engagements de Dépenses (CED)*

Le CED est un organe de contrôle représenté dans la commission de jugement des offres et dont l'objectif principal est d'assurer la régularité budgétaire des dépenses pour l'État.

Les vérifications effectuées dans le cadre de ce contrôle telles que prévues dans les décrets qui l'organisent sont :

- S'assurer que les propositions d'engagements de dépenses, notamment les marchés, sont faites sur des crédits disponibles ;
- S'assurer que ces propositions sont conformes, quant à leur objet, à la rubrique budgétaire sur laquelle il est proposé de les imputer ;
- S'assurer de l'exactitude des calculs de ces propositions ;
- S'assurer que les propositions d'engagement de dépenses sont régulières au regard des dispositions des lois et règlements ;
- S'assurer que les engagements proposés portent sur la totalité de la dépense à laquelle s'oblige l'administration durant l'année budgétaire ;
- Examiner les répercussions éventuelles de l'engagement sur l'emploi des crédits de l'année en cours et des années ultérieures.

Après avoir effectué ces contrôles, le contrôleur décide soit de viser le marché en formulant ses observations à l'ordonnateur qui doit les satisfaire, soit de viser le marché en lui faisant des observations à satisfaire, à charge pour l'ordonnateur d'en tenir compte, sans que ce visa ne suspende le paiement du marché, soit enfin de formuler le refus du visa en motivant sa décision par l'irrégularité que présente le marché proposé à l'engagement. Cette situation peut donner lieu à une requête d'arbitrage par l'ordonnateur en cas de désaccord avec la décision du CED.

L'ordonnateur, ou le sous-ordonnateur, est tenu de notifier aux fournisseurs, prestataires ou entrepreneurs attributaires du marché, les références du visa du contrôle des engagements de dépenses avant qu'ils n'entament l'exécution des prestations objet du marché. Cette notification, qui constitue une assurance de la régularité de la procédure et de la disponibilité des crédits, intervient après la signature du marché et avant sa mise en exécution.

En ce qui concerne les collectivités locales, le contrôle des engagements de dépenses est exercé par le comptable public. Celui-ci est désigné par arrêté du Ministre chargé des Finances.

Pour les établissements publics, le contrôle est exercé par des contrôleurs d'État ou des commissaires de gouvernement placés auprès des établissements et des entreprises publics en fonction de leur nature juridique. Leur rôle est de s'assurer du respect des textes sur la passation des marchés, notamment le règlement des marchés propres à chaque organisme. En effet, ces organismes sont tenus de faire appel à la

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<sup>1</sup> Extraits du mémoire de recherche pour l'obtention du diplôme de Master en Administration Publique de l'ENA France (session 2007-2008) de M. *Mohamed Abdelmouhcine HANINE*, pages 47-49.

concurrence, sauf exception justifiée, afin d'assurer la transparence, l'égalité d'accès aux commandes et l'efficacité des dépenses.

Enfin, il est à noter que le contrôle des engagements de dépenses de l'État a été rattaché à la Trésorerie Générale du Royaume et que les compétences du contrôleur général des engagements de dépenses de l'État ont été transférées au Trésorier général du Royaume en vertu du décret 02-06-52 du 13 février 2006. Cette importante action s'inscrit dans le cadre de la réforme de la dépense publique initiée depuis quelques années par le ministère chargé des Finances

## **2.2 La Trésorerie Générale du Royaume (TGR)**

La Trésorerie Générale du Royaume constitue l'une des administrations les plus importantes du Ministère de l'Économie et des Finances à travers laquelle transite l'ensemble des flux financiers et comptables de l'État et des collectivités locales.

Elle est également au centre d'un maillage institutionnel constitué d'administrations publiques, d'établissements publics, de collectivités locales et d'autres grandes institutions financières, tous concernés par la gestion des deniers publics.

Les principales missions de la TGR sont :

- Le recouvrement des créances publiques :

La TGR assure, par le biais de son vaste réseau de comptables publics, la perception des recettes fiscales et non fiscales, à travers notamment :

- La gestion du contentieux administratif et judiciaire relatif au recouvrement et l'assistance des percepteurs en la matière ;
  - La prise en charge des ordres de recettes au titre du budget général de l'État, des budgets annexes et des comptes spéciaux du Trésor ;
  - La centralisation des prises en charges et des recouvrements au titre des amendes et condamnations pécuniaires ;
  - La gestion des comptes de prêts et d'avances accordées par le Trésor et de «fonds de roulement» consentis par des organismes de financement des projets publics ;
  - L'élaboration des statistiques concernant la situation du recouvrement de créances publiques.
- Le contrôle et le paiement des dépenses publiques :

La TGR assure le contrôle et le règlement des dépenses publiques. Ainsi, le réseau de la TGR est chargé de contrôler la régularité des engagements de la quasi-totalité des dépenses de l'État. Elle assure à travers son réseau de comptables, le règlement desdites dépenses. En effet, au vu des propositions d'engagement et des ordres de paiement transmis par les ordonnateurs accrédités, les services de la TGR procèdent au règlement des créances de l'État.

La TGR assure également, par le biais du Centre Nationale des Traitements (CNT), le contrôle et le traitement de la paie de près 650.000 fonctionnaires.

- La gestion des finances locales :

A travers son réseau de trésoriers et receveurs communaux, la TGR assure la gestion des budgets de 1659 collectivités locales, de 86 groupements et de 41 arrondissements,

En effet, la TGR procède au recouvrement de leurs créances, au règlement des leurs dépenses et à la paie de leur personnel.

La TGR met à contribution également son expertise en offrant le conseil et l'assistance nécessaires aux collectivités locales. Ce conseil qui est de nature juridique et financière, concerne, entre autres, la modernisation des procédures comptables, l'analyse financière et l'élaboration des tableaux de bord.

- La gestion des dépôts au Trésor :

La TGR assure la mission de gestion des dépôts au Trésor. Elle participe à travers cette activité au financement de la trésorerie de l'État. A ce titre, elle gère les comptes des entreprises et établissements publics qui sont soumis à l'obligation de dépôt de leurs fonds au Trésor. Cette activité est étendue également à la gestion des dépôts d'autres personnes morales ou privées.

- La production de l'information financière et comptable :

La TGR assure la centralisation des opérations comptables de l'État et des collectivités locales et, de ce fait, elle constitue une référence en matière de production et de valorisation de l'information comptable de l'État et des collectivités locales.

La production de l'information comptable permet ainsi de :

- Décrire précisément les opérations budgétaires et financières ;
- Restituer rapidement une information fiable et indispensable à la prise de décision ;
- Préparer les documents relatifs à la reddition des comptes.

### **2.3 L'Inspection Générale des Finances (IGF)**

L'IGF est chargée d'effectuer les vérifications inopinées des services du Ministère des Finances et des autres ministères, des collectivités locales et des établissements publics.

Les inspecteurs des finances s'assurent de la régularité des opérations enregistrées par les ordonnateurs, incluant les marchés publics.

L'IGF peut également auditer les procédures de passation et d'exécution des marchés financés par des organismes extérieurs.

Enfin, le contrôle de ladite inspection est organisé par le Dahir n° 1-59-269 du 14/4/1960 relatif à l'Inspection Générale des Finances.

### **2.4 Les Inspections Générales placées auprès de chaque ministre**

L'organigramme de chaque ministère contient une inspection générale auprès du Ministre concerné qui est placée sous son autorité et qui a pour rôle d'exécuter des missions d'inspections dans les services

centraux et extérieurs dudit ministère. Les marchés publics sont parmi les domaines concernés par cette inspection.

## **2.5 La Commission des Marchés**

Cette Commission est placée auprès du Secrétaire Général du Gouvernement. Elle comprend des membres de presque tous les départements ministériels en plus du Trésorier Général, du Contrôleur des engagements de dépenses et du chef de service de la législation au secrétariat général du gouvernement. Tous ont voix délibérative. La commission peut faire appel à d'autres personnes à titre consultatif.

La commission a deux grandes catégories d'attributions. La première consiste à émettre des avis sur les projets de textes législatifs ou réglementaires sur les marchés publics, sur les problèmes de toute nature relatifs à la préparation, passation, exécution et règlement des marchés, les contestations résultants des marchés et sur les projets de marché ou avenants sur lesquels elle est consultée par l'ordonnateur. La seconde à proposer des dispositions pour compléter la législation et perfectionner les services de marchés et lancer des études pour améliorer les conditions de placement des commandes et des marchés de l'État.

La Commission n'a qu'un rôle consultatif et de conseil, et n'a pas une réelle compétence de contrôle des marchés. Toutefois, les avis qu'elle émet sont importants compte tenu du fait que les collectivités locales, les départements ministériels et les établissements publics y ont recours pour résoudre certains problèmes de fait ou de droit soulevés lors de la passation, de l'exécution ou du paiement d'un marché.

La Commission est saisie directement par le Premier Ministre et par le Secrétaire Général du Gouvernement, les ordonnateurs et le contrôleur général des engagements de dépenses. Les travaux de la Commission ne sont pas systématiquement publiés. La création récente du site Internet du Secrétariat général du gouvernement<sup>2</sup> a donné la possibilité de consulter certains avis en ligne. La principale attribution qu'elle exerce est d'émettre des avis en cas de litiges ou en cas de situations compliquées induites par la méconnaissance des textes ou leur mauvaise mise en application.

En outre, le secrétariat permanent de la Commission fait un travail de recensement général des marchés de travaux, fournitures, de services et d'études passés pour le compte de l'Etat. La commission prépare annuellement un rapport d'activités.

## **2.6 La Cour des Comptes et les Cours Régionales des Comptes**

Ces cours exercent un contrôle de type juridictionnel organisé par la loi n°62-99 formant code des juridictions financières du 13/06/2002.

La Cour des comptes est dotée d'attributions très larges. Elle exerce un contrôle de la régularité des opérations de recettes et de dépenses des organismes soumis à son contrôle en vertu de la loi, apprécie leur gestion et en sanctionne les manquements. Elle exerce une fonction juridictionnelle en matière de discipline budgétaire et financière (articles 54, 55 et 56). Cette dernière compétence touche tous les agents de l'État que ce soit les ordonnateurs, les contrôleurs, les comptables publics ou les fonctionnaires travaillant sous leurs ordres et tout fonctionnaire, responsable ou agent d'un organisme public et tout responsable ou agent de tout autre organisme soumis au contrôle de la Cour.

Les infractions qui peuvent faire l'objet de poursuite sont diverses. D'après l'article 54 de la loi n°62-99, l'ordonnateur peut être poursuivi s'il enfreint la réglementation des marchés. D'après l'article 55 de la

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<sup>2</sup> Site Internet du Secrétariat général du gouvernement : [www.sgg.gov.ma](http://www.sgg.gov.ma).

loi n°62-99, le contrôleur est passible de sanctions s'il n'exerce pas les contrôles qu'il est tenu de faire notamment sur la conformité du projet de marché à la réglementation relative à la passation des marchés publics. Il peut s'agir, par exemple, de la non production du certificat administratif ou du rapport de présentation du marché qui justifie du choix du mode de passation du marché, de la non conformité du marché des travaux ou de fournitures ou de services aux règles d'appel à la concurrence applicables à l'organisme concerné...

Le contrôle de la Cour peut intervenir aussi suite aux missions de contrôle de la gestion (article 75). Le but est d'apprécier la qualité des prestations et de formuler des suggestions sur les moyens susceptibles d'améliorer les méthodes et accroître l'efficacité et le rendement. Le contrôle porte sur la régularité et la sincérité des opérations réalisées ainsi que sur la réalité des prestations fournies, des fournitures livrées et des travaux effectués.

Les neuf Cours Régionales des Comptes exercent les mêmes compétences sur les collectivités locales et leurs organismes. Elles sont réparties dans les villes suivantes du Royaume : Laâyoune, Agadir, Marrakech, Settat, Casablanca, Rabat, Fès, Tanger, Oujda.

## 2.7 *Le Conseil de la Concurrence*<sup>3</sup>

Le Conseil de la Concurrence a été créé en vertu de la loi 06-99 sur la liberté des prix et de la concurrence, promulguée par le dahir 1-00-225 du 5 juin 2000. Il détient des attributions consultatives aux fins d'avis, de conseils ou de recommandations et est composé, outre le président, de douze (12) membres dont :

- Un représentant du Ministre chargé de la justice ;
- Un représentant du Ministre chargé de l'intérieur ;
- Un représentant du Ministre chargé des finances ;
- Un représentant du Secrétaire Général du Gouvernement ;
- Un représentant du Ministre chargé des affaires générales du gouvernement ;
- Un représentant du Ministre chargé du plan ;
- Trois (3) membres choisis en raison de leur compétence en matière juridique, économique, de concurrence ou de consommation, nommés par le Premier ministre ;
- Trois (3) membres exerçant ou ayant exercé leurs activités dans les secteurs de production, de distribution ou de services, nommés sur proposition des présidents de la fédération des chambres de commerce, d'industrie et de services, de la fédération des chambres d'artisanat, de la fédération des chambres d'agriculture et de la fédération des chambres des pêches maritimes.

Son champ et ses moyens d'action :

- Veiller au respect du libre jeu de la concurrence dans le cadre de l'économie de marché, afin de garantir la compétitivité du tissu économique national et assurer un bon rapport qualité prix pour le bien être du consommateur.

<sup>3</sup> Extrait du site Internet du Conseil de la Concurrence : <http://www.conseil-concurrence.ma/>.

- Agir, à son initiative, pour :
  - Informer et sensibiliser l'opinion publique et les acteurs économiques et sociaux (Colloques, séminaires, conférences,...) ;
  - Étudier la concurrentiabilité de différents secteurs et branches d'activité ;
  - Élaborer le rapport annuel et le soumettre au Premier Ministre.
- Intervenir, quand il est saisi, en cas :
  - D'ententes anticoncurrentielles pouvant empêcher, restreindre ou fausser le jeu de la concurrence (fixation des prix, partage géographique du marché...) ;
  - D'abus de position dominante ou de situation de dépendance économique (ventes liées, refus de vente,...) ;
  - De concentration de nature à porter atteinte à la concurrence.
- Par qui est-il consulté ?
  - Par le Gouvernement pour toute question concernant la concurrence ;
  - Par les commissions permanentes du Parlement pour toutes les propositions de lois couvrant une dimension relative à la concurrence ;
  - Par les juridictions compétentes dans les affaires dont elles sont saisies sur les pratiques anticoncurrentielles ;
  - Par les Conseil de régions, les communautés urbaines, les chambres d'agriculture, d'artisanat, de pêches maritimes, les organisations syndicales et professionnelles et les associations de consommateurs reconnues d'utilité publique. Les réponses du Conseil se limitent uniquement à des avis sur des questions de principe.

## 2.8 *L'Instance Centrale de Prévention de la Corruption (ICPC)*

L'Instance Centrale a été instituée auprès du Premier Ministre en vertu du décret n° 02-05-1228 du 13 mars 2007. Ses membres ont été installés le 2 décembre 2008, et la première réunion de son Assemblée Plénière a eu lieu le 6 janvier 2009.

L'instance Centrale compte, hormis le Président et Wali Al Madhalim (le médiateur), 43 membres représentant le gouvernement, les organismes professionnels (incluant les syndicats), la société civile et les universités, qui constituent son Assemblée plénière.

Les trois missions principales de l'ICPC sont :

- La coordination des politiques de prévention de la corruption ;
- La supervision des politiques et le suivi de leur mise en œuvre ;

- Le recueil et la diffusion des informations dans le domaine de la corruption.

A cet effet, elle est notamment chargée de :

- Proposer au gouvernement les grandes orientations d'une politique de prévention de la corruption, notamment en matière de coopération entre le secteur public et le secteur privé pour lutter contre la corruption ;
- Proposer des mesures de sensibilisation de l'opinion publique et organiser des campagnes d'information à cet effet ;
- Contribuer, en coopération avec les administrations et les organismes concernés, au développement de la coopération internationale en matière de prévention de la corruption ;
- Assurer le suivi et l'évaluation des mesures prises pour la mise en œuvre de la politique gouvernementale en la matière et adresser des recommandations aux administrations, aux organismes publics, aux entreprises privées et à tout intervenant dans la politique de prévention de la corruption ;
- Donner aux autorités administratives des avis sur les mesures susceptibles d'être prises pour prévenir des faits de corruption ;
- Collecter toutes informations en relation avec le phénomène de la corruption et gérer la base de données y afférentes ;
- Informer l'autorité judiciaire compétente de tous les faits portés à sa connaissance à l'occasion de l'exercice de ses missions, qu'elle considère être susceptibles de constituer des actes de corruption punis par la loi.

En ce qui concerne les marchés publics, l'Instance joue le rôle de conseiller en donnant son avis sur les différentes réformes et en émettant des recommandations concrètes afin d'améliorer ce processus. En outre, reconnaissant l'importance primordiale des marchés publics pour le développement du pays et les risques considérables de corruption dans ce secteur, l'Instance a créé un groupe de travail dédié à l'analyse des problématiques liées auxdits marchés afin de continuer à proposer des mesures d'amélioration.

### **3. La réforme des marchés publics au Maroc**

Le Maroc s'est engagé depuis quelques années dans une importante réforme des marchés publics portant principalement sur l'amélioration de la gestion et sur la promotion de l'intégrité et de la transparence. La section suivante présente un résumé des points importants de cette réforme.

La réforme des marchés publics s'inscrit dans le cadre des grands chantiers de réformes visant la modernisation de l'Administration marocaine et son adaptation aux changements en cours et aux engagements du Maroc vis-à-vis de ses partenaires.

C'est dans cet esprit qu'un nouveau décret fixant les conditions et les formes de passation des marchés publics ainsi que certaines règles relatives à leur gestion et leur contrôle a été publié en avril 2007, amendant ainsi celui du 30 décembre 1998 sur les marchés publics.

Cette réforme survenue moins de dix ans après la publication du décret de 1998, a été dictée par la volonté des pouvoirs publics de responsabiliser davantage les services ordonnateurs tout en leur accordant

plus de liberté et plus de souplesse, afin d'aboutir à une dépense efficiente et efficace, ainsi que par la détermination des pouvoirs publics à lutter contre toutes les pratiques de fraude et de corruption. La transparence est ainsi présentée comme l'un des enjeux de la réforme.

La volonté de transparence se manifeste par plusieurs dispositions du nouveau décret. En effet, les exigences de modernité, de bonne gouvernance et d'ouverture économique encouragent à se doter d'une réglementation des marchés qui tient compte de l'objectif de consolidation de la transparence et des intérêts de l'Administration et du secteur privé dans le cadre d'un partenariat équilibré, en vue d'assurer des prestations de meilleure qualité et à moindre coût. En outre, le nouveau décret a été conçu en adéquation avec la nouvelle approche de la gestion des finances publiques basée sur la responsabilisation accrue des ordonnateurs, la recherche de la performance, ainsi que sur la contractualisation des rapports entre les administrations centrales et leurs services déconcentrés. En somme, le décret de 2007 exprime la détermination des pouvoirs publics d'inscrire, de manière irréversible, la passation des marchés de l'Etat dans une logique de respect des principes de liberté d'accès à la commande publique, d'égalité de traitement des candidats, de transparence et de simplification des procédures.

Par ailleurs, il convient de mentionner qu'un projet de réforme du décret de 2007 est actuellement en cours. Ce projet vise principalement à renforcer la transparence et à lutter contre toutes les pratiques de fraude et de corruption. Cette exigence est d'autant plus nécessaire que les marchés constituent le principal moyen de satisfaction des besoins de l'Administration.

Les Principaux axes d'innovations de ce projet de réforme sont :

- La consécration de l'unicité de la réglementation en matière de marchés publics ;
- La simplification et la clarification des procédures ;
- Le renforcement du recours à la concurrence et de l'égalité de traitement des concurrents ;
- La consolidation du dispositif de transparence et de la moralisation de la gestion de la commande publique ;
- La modernisation de la gestion de la commande publique ;
- L'amélioration des garanties des concurrents et des mécanismes de réclamation.

Toutefois, ce projet comporte encore quelques dispositions qui mériteraient d'être reconsidérées afin qu'il puisse contribuer efficacement à la construction d'un système de gestion des commandes publiques transparent, équitable et efficace.

#### **4. Observations de l'ICPC concernant la réforme des marchés publics**

L'Instance Centrale de Prévention de la Corruption a été consultée par la TGR à propos du nouveau projet de réforme du décret de 2007 et elle a émis un certain nombre d'observations portant notamment sur le recours, le contrôle, l'audit, le renforcement de la transparence, le régime dérogatoire de l'Administration de la Défense Nationale et le pouvoir discrétionnaire du maître d'ouvrage.

##### **4.1 Recours**

S'agissant du recours, l'ICPC considère que le traitement des plaintes devra être assuré par une structure indépendante, diligente et ayant un véritable pouvoir de décision, nonobstant l'usage des voies de

recours judiciaires. Or, le projet garde la même logique de traitement des plaintes que le texte actuel en vigueur et un recours hiérarchique avec une possibilité de saisine directe de la commission des marchés qui reste un organe consultatif.

#### **4.2      *Contrôle et audit***

Les dispositions sur le contrôle et l'audit sont parmi les innovations majeures introduites par la réforme de 1998. L'audit des marchés supérieurs à 5 MDH (et 1 MDH pour les collectivités locales) est censé couvrir la préparation, la passation et l'exécution des marchés. Or, pour l'ICPC, la mention apportée par le deuxième alinéa de l'article 110<sup>4</sup> du projet de décret relatif aux marchés publics semble vouloir focaliser l'audit sur l'obligation de l'établissement et de la publication des différents documents prévus par le décret. Ce qui réduit considérablement la portée de cette importante disposition.

Aux yeux de l'Instance, le fait de rendre opérationnelle et effective cette disposition suppose, au préalable, la définition des termes de référence de l'audit. Ces derniers doivent couvrir au moins : l'opportunité, l'adéquation des cahiers des charges, la régularité des opérations de passation, la gestion des délais, la conformité des réalisations et la liquidation des marchés.

#### **4.3      *Renforcement de la transparence***

Pour ce qui est du renforcement de la transparence, l'ICPC considère que le projet marque certes des avancées dans ce domaine, notamment par l'utilisation du portail national. Toutefois, cet effort devrait être renforcé dans au moins deux domaines : la diffusion des rapports d'audit et la publication de l'estimation du maître d'ouvrage.

En effet, la publication du rapport d'audit ou de ses résultats permettra, d'une part, de s'assurer de la mise en application de cette disposition et mettra à la disposition du public et en particulier des concurrents non retenus des informations sur la manière dont s'est déroulé le processus. A défaut de publier intégralement le rapport d'audit, il peut être envisagé d'en publier un extrait.

En outre, l'Instance ne voit aucun intérêt à garder confidentielle l'estimation du maître d'ouvrage. D'abord, parce que l'estimation est un élément d'indication essentielle aux concurrents pour la confection

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<sup>4</sup> Projet de décret fixant les conditions et les formes de passation des marchés publics ainsi que certaines règles relatives à leur gestion et à leur contrôle : Article 110: Contrôle et audit internes

Les marchés et leurs avenants sont soumis, en dehors des contrôles institués par les textes généraux en matière de dépenses publiques, à des contrôles et audits internes définis par décision du ministre concerné.

Ces contrôles et audits internes portent sur la préparation, la passation et l'exécution des marchés et notamment le respect de l'obligation de l'établissement et de la publication des différents documents prévus par le présent décret.

Les contrôles et audits sont obligatoires pour les marchés dont les montants excèdent cinq millions (5.000.000) de dirhams et doivent faire l'objet d'un rapport adressé au ministre concerné pour les marchés de l'État ou au directeur de l'établissement public concerné pour les marchés des établissements publics.

Pour les collectivités locales et leurs groupements, les contrôles et audits sont obligatoires pour les marchés dont les montants excèdent un million (1.000.000) de dirhams et doivent faire l'objet d'un rapport adressé au ministre de l'intérieur.

Toutefois, les dispositions du présent article ne sont pas applicables aux marchés de l'administration de la défense nationale.

de leurs offres et ensuite, il y a risque qu'une telle information soit mise à disposition, par des moyens illégaux, de certains concurrents au détriment des autres.

#### **4.4 Régime dérogatoire de l'Administration de la Défense Nationale**

Il est parfaitement compréhensible que les achats de l'Administration de la Défense Nationale ayant un rapport avec la sécurité dérogent aux dispositions du code des marchés publics, mais l'Instance ne voit pas de raison particulière à ce que les achats courants de ce département, bénéficient des nombreuses dérogations prévues par le texte.

#### **4.5 Pouvoir discrétionnaire du maître d'ouvrage**

L'ICPC relève que les éléments de précision introduits par le projet, le maître d'ouvrage reste totalement maître du choix de la procédure de passation et de la rédaction du Cahier des Charges.

Pour l'Instance, ce n'est pas tant ce pouvoir conféré au maître d'ouvrage qui pose problème, puisqu'il est censé représenter l'intérêt général, mais le risque de son détournement à des fins personnelles. De ce fait, il s'avère nécessaire d'encadrer ce pouvoir. A défaut, le respect de la procédure n'aura aucune valeur, si un outil déterminant tel que le cahier des charges, permet d'orienter le choix vers le prestataire bénéficiant des faveurs de ceux qui ont la charge de passer commande.

Hormis ces observations, l'Instance a également émis des réserves par rapport à certaines dispositions. Il s'agit en particulier de :

- L'introduction de l'appel à manifestation d'intérêt qui fait double emploi avec la procédure de pré-qualification et qui risque d'être détourné de sa finalité ;
- Le maintien du caractère ferme des prix pour les fournitures et les services, quel que soit le délai de livraison. Cette disposition risque en effet d'affecter l'objectif de l'équilibre des contrats ;
- Le maintien de la procédure de dépôt des échantillons, qui présente le risque majeur de dévoiler la liste des concurrents un jour avant l'ouverture des offres.

En ce qui concerne les marchés passés par les collectivités locales, les différentes missions d'inspection effectuées ainsi que les rapports dressés par les cours régionales des comptes ont permis de constater des dysfonctionnements importants dans leur gestion. Ces derniers peuvent notamment s'expliquer par l'absence d'un cadre juridique adapté aux réalités et à la nature des missions qui sont dévolues à ces collectivités. Un projet de décret spécifique est en cours de finalisation. Ce projet vise à :

- Rendre la réglementation plus accessible aux élus locaux ;
- Simplifier les procédures en vue d'activer l'exécution des projets de développement locaux ;
- Introduire des mécanismes internes de contrôle de gestion efficaces ;
- Mettre en place des instances d'audit et de suivi des commandes publiques locales ;
- Consolider les exigences de transparence et d'efficacité de la dépense ;
- Ériger la commande publique locale en véritable vecteur de développement local ;

- Contribuer à la promotion de la bonne gouvernance locale.

L'ICPC a été sollicitée par la Direction Générale des Collectivités Locales pour donner son avis sur ce projet. Les observations émises par l'Instance Centrale sont les suivantes :

De manière générale, le projet de décret reprend la structure, les principes et les processus de passation des marchés publics fixés par le décret du 5 février 2007. Les rajouts et améliorations cités dans l'exposé des motifs dudit projet, qui sont certes nombreux, ne constituent pas des changements fondamentaux par rapport au texte de référence. En particulier, l'ICPC n'a pas relevé d'effort de simplification pour rendre le texte accessible à des collectivités à faible encadrement ou à des petites entreprises locales n'ayant pas l'habitude de participer à des marchés publics.

Quelques innovations du projet méritent, toutefois, d'être soulignées :

- La mise en place d'un comité de suivi qui assure un rôle consultatif dans la gestion des commandes publiques ;
- La création de l'observatoire national de la commande publique locale ;
- L'obligation d'afficher les prix des marchés et bons de commande passés par chaque collectivité.
- Les observations émises par l'ICPC portent sur les quatre points suivants :

#### **4.6 Fort pouvoir discrétionnaire du maître d'ouvrage**

Le maître d'ouvrage reste totalement maître du choix de la procédure de passation et de la rédaction du Cahier des Charges et la fixation des critères de sélection.

Ce n'est pas tant ce pouvoir conféré au maître d'ouvrage qui pose problème, puisqu'il est censé représenter l'intérêt général, mais le risque de son détournement à des fins personnelles. De ce fait il y a nécessité de l'encadrer. A défaut, le respect de la procédure n'aura aucune valeur si un outil déterminant tel que le cahier des charges permet d'orienter le choix vers le prestataire bénéficiant des faveurs de ceux qui ont la charge de passer commande.

#### **4.7 Recours**

L'article 127 institue un comité de suivi qui a une double mission : la première relative à l'amélioration de la gestion de la commande publique des collectivités locales et la seconde se rapporte au suivi des requêtes émanant des intervenants dans la passation et l'exécution d'une commande.

Le texte semble donner la possibilité aux concurrents et/ou contractants de saisir directement le comité pour exposer leurs doléances. Celui-ci dispose du pouvoir d'ordonner la suspension de la procédure s'il le juge nécessaire.

Le comité est composé de onze membres et aucune indication n'est donnée sur sa composition, mis à part la présidence.

Bien que ces avancées soient incontestablement positives, il n'en demeure pas moins qu'une instance de recours doit être indépendante des structures administratives du maître d'ouvrage.

La composition du comité, si elle est élargie à des personnalités en dehors de l'Administration pourrait, dans une certaine mesure, remédier à ce défaut d'indépendance. A cet égard, la participation de l'ICPC à cette instance serait tout à fait indiquée.

#### **4.8      *Audit et contrôle***

L'obligation d'audit couvre les marchés au delà de 1 MDH au lieu de 5 MDH dans le décret 2007. La mise en application de cette disposition doit, au préalable, être précédée par l'élaboration des termes de référence de cet audit et ne peut se contenter d'une formulation générale. Il faudrait également préciser la qualité et le positionnement de l'organe qui est en charge de cet audit.

La deuxième condition de son effectivité est de rendre public le rapport ou du moins à en assurer une diffusion plus large.

#### **4.9      *Excès de formalisme***

Le projet de décret qui était censé simplifier les procédures de passation a maintenu un niveau de formalisme qui peut être préjudiciable à une procédure transparente et intègre. En effet, un défaut mineur peut être pris comme prétexte pour évincer l'offre d'un concurrent.

Les documents à fournir par les concurrents illustrent bien ce risque. Le projet peut envisager des simplifications sur des documents à produire tels que l'attestation fiscale et l'attestation CNSS.

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En conclusion, le Maroc a certes connu des avancées considérables dans la gestion des marchés publics lors de la dernière décennie, toutefois des lacunes demeurent et appellent des efforts constants en vue d'une meilleure gouvernance en la matière. Consciente de l'importance qui s'attache aux marchés publics en tant que levier de développement du pays, L'ICPC a fait de la promotion de l'intégrité et de la transparence dans la commande publique, l'un de ses axes stratégiques prioritaires.

## NORWAY

Over the past couple of years, there has been an increase in the number of criminal cases regarding corruption in Norway. In 2004, there were 2 cases registered whilst in 2007 there were 32 cases.<sup>1</sup> In 2009, Norway dropped from number 8 to number 14 on Transparency International's list ranking which ranks the least corrupt countries in the world. Could this fall in rank be interpreted as a rise in corruption in the Norwegian society?

One of the questions in the annual survey carried out by Transparency International is if the population considers the government's efforts against corruption to be effective. In the last survey, 61 % of the Norwegians in the sample assessed this effort to be ineffective (TI survey in the Norwegian population about corruption).<sup>2</sup> The natural question to pose is: Do the results of the survey give a correct assessment of corruption in Norway or is the rise in criminal corruption cases, as described above, a result of a more aggressive and/or more effective governmental approach towards corruption?

The development of legislation and prosecution procedures against corruption must be seen in connection with the legislative efforts made to enhance the awareness of civil servants on how to effectively and ethically carry out public procurement. As described below, this field of public activity has undergone an extensive reform in Norway.

In this report, The Norwegian Competition Authority (NCA) will present the Norwegian public bodies involved in fighting collusion, corruption and infringements of the Public Procurement Act. We will also present the mainline of legislation in the three areas and the tools used to uncover and sanction infringements.

### **1. Public Procurement: Enforcement and Legislation**

The Norwegian Complaints Board for Public Procurement (KOFA) has been empowered to enforce infringements of the Norwegian Act on Public Procurement and ancillary secondary legislation.<sup>3</sup> KOFA has mainly power to give advisory decisions in infringements on the public procurements rules. However, where the public authority has failed to notify the procurement (illegal direct procurement) and shown intent or gross negligent in performing the illegal direct procurement, KOFA may issue fines up to 15 percent of the contract value.

KOFA<sup>4</sup> was established in 2003 and the administration has since 2005 been embedded administratively in the Norwegian Competition Authority (NCA). The main purpose behind the establishment of KOFA was to offer an efficient and cheap way to solve conflicts for suppliers in procurement matters. KOFA publish approximately 200 decisions every year and strive to maintain (on average) a three months case handling time for complaints without allegations of illegal direct procurement, and four months time for complaints with allegations of illegal direct procurement. The latter complaints follow a more comprehensive process and thus demand longer time to be handled.

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<sup>1</sup> Cases regarding Norwegian penal code section 276 a-c).

<sup>2</sup> See [www.transparency.no](http://www.transparency.no).

<sup>3</sup> Lov av 16. juli 1999 nr. 69 og Forskrift av 7. april 2006 nr. 402 and Forskrift av 7. april 2006 nr 403.

<sup>4</sup> For more information on KOFA and the decisions, look to [www.kofa.no](http://www.kofa.no).

The Act on Public Procurement over the EU threshold values is an implementation of the EU public procurement directives. Under the threshold values we have national legislation. There are currently no provisions in the procurement rules which sanctions corruption performed by the public authority/its officials in a public procurement process. Thus, the prosecution of financial crime is the responsibility of the Public Prosecutor in Norway, through provisions in the Criminal Act.<sup>5</sup>

In Norway the public sector has a total expenditure of public procurement of more than 380 billion NOK each year.<sup>6</sup> Public procurement constitutes more than 15 percent of the gross national product in Norway (BNP). The main legislative rationale behind the public procurement rules is that, competition gives more value for money in the public sector and that the rules ensure more efficient use of public expenditure.<sup>7</sup> The requirement of competition also reduces the risk of financial crime as this enhances transparency in the spending of public money. As competition reduces the risk of corruption, the issuing of fines for illegal direct procurement may be considered an important remedy to prevent corruption in the public sector.

The Norwegian public procurement legislation impose a duty on the public authority to notify procurements over 500 000 NOK.<sup>8</sup> KOFA has authority to issue fines to public authorities up to 15 percent of the contract value for illegal direct procurement. Since 1<sup>st</sup> January 2007, KOFA has issued 12 fines to various public authorities. Fines have been issued to the Norwegian Defence Estate Agency , the Norwegian Public Roads Administration, the Norwegian Collection Agency, the Norwegian Correctional Services region east, various municipalities (Storfjord kommune, Askøy kommune, Troms fylkeskommune, Hadsel kommune) and health authorities (Helse Nord RHF, Sykehuset Innlandet HF). The highest fine issued is 1.75 million NOK. This represents 8.3 % of the contract value (Askøy kommune).

The power to issue fines for illegal direct procurement was introduced and implemented as a consequence of the National Audits Office' identification of illegal direct procurement in the public sector. The statistics on DOFFIN,<sup>9</sup> the national database for public procurement, showed that public authorities did not always comply with the statutory demand to notify. The government established a select committee (The AUDA committee) which in 2003 issued a report that recommended introducing a fine to combat illegal direct procurement. In the report, illegal direct procurement was considered to be the most serious breach of the legislation on public procurement due to the lack of competition. The existing sanctions were not sufficient to prevent the public authorities, gross negligently or with intent, setting the rules aside. However, it was also stated that the main reason for non compliance was lack of knowledge about the rules.

The interesting question in the aftermath of the implementation of the powers to fine for illegal direct procurement is whether the fine has had the desired effect in preventing breach of the rules. To the best of our knowledge<sup>10</sup> there has not yet been carried out an analysis regarding the effect of the fines. However,

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<sup>5</sup> Lov av 22.mai 1902 nr. 10 §§276 a og 276 b.

<sup>6</sup> Data from expenditure in 2008, See [www.ssb.no](http://www.ssb.no).

<sup>7</sup> There are also other reasons behind the rules, ie. fair and equal treatment of tenderers, transparency, predictability.

<sup>8</sup> Norwegian procurement regulation § 8-1/19-1.

<sup>9</sup> See [www.doffin.no](http://www.doffin.no) for more information.

<sup>10</sup> See also study by Professor Luitzen de Boer and post doc Ottar Michelsen at NTNU on assignment from Norwegian Federation Enterprise (NHO), which estimated that 30 to 60 percent of the public procurement was not notified according to the rules.

the media has given the fines great attention and there are numerous examples of political parties/elected representatives demanding that public authorities increase their knowledge of the rules and improve their routines in handling public procurement. There are also examples of public authorities expressing in the media, after being fined, that the fine has been taken seriously and that there will be a greater focus on better and more efficient procurement routines. In addition, a recent search has shown that, there has been a considerable increase in the number of notifications of procurements after KOFA got the powers to fine. Whilst there were approximately 12000 notifications in 2006 there were 15500 in 2009. The rather huge increase in notifications may also be due to other factors such as increase in public expenditure, but we believe that a significant cause is the underlying threat of fines and the related publicity the fine/infringement is given through

The liability for fines lies on the public authority and there is no personal liability for illegal direct procurement in the public procurement legislation. One may argue that, as long as there is no personal liability for illegal direct procurements, the threat will not have substantial deterrent effects as the added expenditure resulting from the fine can be retrieved easily by increasing the public budget or by transferring the costs to another public authority. However, this is not our experience so far. Our impression is that, the deterrent effect is linked to the publicity and shame of not having complied with the rules, and the underlying suspicion that there may be corruption involved at another level.

The Norwegian experience with corruption in public procurement is so far linked to criminal cases where the main issue for the investigation has been suspicions of fraud, embezzlements or similar crimes. Some cases have led to an investigation into the suspect's role in public procurement, but this has then been at a later stage in the investigation and not as a systematic search for the corruption itself.

## **2. Collusion: Enforcement and Legislation**

Fighting collusion in Norway is done in two tracks as collusion is made a felony punishable by jail as well as an infringement of the Norwegian Competition Act where the NCA can issue fines. Section 10 of the Norwegian Competition Act is an implementation of article 101 in the treaty for the function of the EU.

The NCA can perform investigations if there is reason to believe that undertakings collude. The investigation can span from taking statements from people in key positions in the undertakings involved to performing dawn raids and confiscating evidence in any form.

The NCA has an investigation department which carries out much of the technical side of the investigation. However, the entire organisation participates in the task of uncovering and pursuing cartels and collusion. Unveiling and curtailing cartel activity is one of the NCA's highest priorities.

The NCA has a "*collusion hot line*" to receive tip offs and information on possible infringements on the Competition Act. There is also an active leniency programme shaped much in the same design as in the EU. However, this programme is not effective in the criminal track. There will have to be made deals on a case by case basis with the prosecution authority on the leniency issue.

As part of its work to combat collusion, the NCA can stage preliminary investigations and studies irrespective of whether it has received complaints. To inform the public about these tools a webpage<sup>11</sup> is used in addition to other information campaigns.

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<sup>11</sup> <http://www.konkurransetilsynet.no/>.

Certain important markets are undergoing continuous scrutiny. This means that the NCA tries to maintain up to date knowledge of the trade (sectors), events and the key actors in the market, their market shares and the structure of the business performed and relevant legislature for the markets.

There has so far not been discovered any corruption or infringements of the public procurement Act as result of an NCA investigation. The discovery of either corruption or infringement of the Public Procurement Act would have to be turned over to the police or KOFA, as NCA has no jurisdiction to investigate anything but infringements on the Competition Act.

One important element in the struggle to uncover collusion is a constant (persistent) information campaign towards public procuring entities. As the administration of KOFA is embedded in NCA, NCA personnel join KOFA on information campaigns to make sure that public procurers know about the dangers of falling victim to collusion. The OECD bid-rigging check list is promoted actively. This has made results. Two cases of collusion were uncovered last year. The first case involves two entrepreneurs who colluded on a bid for repair work on a number of bridges. In the second case all the taxis in a region colluded on a joint bid for a long term contract on driving patients from the local hospitals.<sup>12</sup> Both these cases were discovered due to tips from procurers contacting the NCA.

As mentioned above, collusion is a crime. However, the police rarely perform its own investigation in these cases until after the NCA has finished its investigation. After the implementation of the two-track system, no police investigation has been carried out in a case regarding the Competition Act.

### **3. Corruption: Enforcement and Legislation**

Norway has entered and signed the OECD conventions against bribery and the UN convention against corruption, and thus pledged itself to facilitate adequate legal framework.

When it comes to corruption, the regulations were partly there before the said conventions, but were fragmented and quite unpractical with inexplicable differences in conditions for criminality and sentencing framework. The law was limited to cover bribery of domestic civil servants (maximum penalty 1 year imprisonment) or for civil servants receiving bribes (maximum penalty 5 years if the bribe affected the officials choice of actions, otherwise maximum penalty was imprisonment for 6 months).

These regulations were unchanged in the Norwegian penal code from its passing in the parliament in 1902 until 2003. The notable exception was the amendment of revisions in existing regulations in 1998 as a result of Norway's signing of the OECD convention of 1997 on combating bribery of foreign public officials in international business transactions.

During these years up until the 1990s, the cases brought to court on corruption were quite few and far between. With a few exceptions, the said cases also seemed to be about petty bribes. Though serious in itself, this did not bring much attention to the issue, and because of the fragmented nature of the legislation, it was not possible to extract statistical material on this. The fact is that, we do not know exactly how many criminal cases of this kind there were in the penal system in the period preceding 2003.

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The decisions can be found at [www.kt.no](http://www.kt.no)

[http://www.konkurransetilsynet.no/ImageVault/Images/id\\_1987/ImageVaultHandler.aspx](http://www.konkurransetilsynet.no/ImageVault/Images/id_1987/ImageVaultHandler.aspx)

[http://www.konkurransetilsynet.no/ImageVault/Images/id\\_1847/ImageVaultHandler.aspx](http://www.konkurransetilsynet.no/ImageVault/Images/id_1847/ImageVaultHandler.aspx).

As for the development of legislation and public awareness on this issue, this has been studied and reported on in the OECD phase 2 report<sup>13</sup> and its follow-up report as a part of the process following the 1997 convention against bribery. Norway has implemented the Working Group on Bribery's recommendations on legislation. We have also enhanced the institutional framework for investigation. Increased awareness among public procurement officers has been achieved through advocacy schemes. The legislation on this field is now completely revised and reflects the demands in the convention completely. A number of public institutions such as the tax authorities, the Auditor General, The National Authority for Investigating and Prosecuting Economic and Environmental Crime, and many more, have been encouraged to increase focus on detecting corruption. As one can see from the phase 2 reports, this has resulted in several cases where Norwegian companies and individuals were investigated and prosecuted for actively bribing foreign public officials. There have also been some cases of domestic corruption.

As the sentencing frame for severe corruption is now 10 years imprisonment, all the regular investigative tools in the Norwegian penal process, including communication-control, except electronic room surveillance, are available in police-investigation in severe cases of corruption.

#### **4. Cross Over Effects: Do They Exist?**

Public procurement is no doubt an area particularly vulnerable to corruption.<sup>14</sup> As one can see, much effort has been put into combating corruption, collusion and infringements of the regulation on public procurement. Thus, the statistics showing an increase in the number of corruption cases and in cases of infringement of the Public Procurement Act must be seen in this light. An increase in the number of cases should not necessarily be alarming if this is a result of an increased effort to uncover such cases. However it is understandable that the general population gets the opposite impression based on the numbers alone.

Norway is obliged to implement the new remedies directives on public procurement.<sup>15</sup> The Norwegian government has established a committee<sup>16</sup> which is scheduled to submit its proposal in March 2010. The proposals will then be sent on a public hearing and through the usual legislative process. The mandate of the committee is to suggest how the review procedure should be implemented in Norway, and the result will affect the future role of KOFA. One of the essential questions is: Which body should be given the powers of the new directives?

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<sup>13</sup> OECD Norway Phase 2 report on the application of the Convention on Combating bribery of foreign public officials in international business transactions and the 1997 recommendation on combating bribery in international business transactions.

<sup>14</sup> OECD recommendation on Enhancing Integrity in public procurement (2008).

<sup>15</sup> Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

<sup>16</sup> "Håndhevelsesutvalget" led by Francis Seiersted.



## PAKISTAN

### 1. Size and policy objectives

#### 1.1 *What fraction of your economy does public procurement account for? What are the principal policy objectives of public procurement?*

In most developing countries public procurement amounts on average to between 15% and 30% of GDP<sup>1</sup>. In some cases it has also been quoted at 50% of GDP.<sup>2</sup> In Pakistan, while the exact figure is not determined, public procurement would be towards the lower end of the range for developing countries given the country's low tax-GDP ratio.

The principal policy objectives of public procurement in Pakistan are documented in the Public Procurement Rules, 2004, which emphasise fair and open competition<sup>3</sup> leading to quality, efficiency, economy and value for money for the procuring agencies and ensuring proper and prudent use of public money.<sup>4</sup> The Procurement Rules discourage specific or popular brands and encourage a wider participation among suppliers that brings in new entrants<sup>5</sup> and smaller competitors to take the opportunity of open competition and grow as per their potential.

### 2. Corruption

#### 2.1 *What is the cost of corruption?*

While the precise figures of the costs of corruption are not known, kickbacks in public contracts are estimated to constitute approximately 25% of the relevant project or procurement budget.<sup>6</sup> Similarly, it has been estimated that corruption in the procurement process alone<sup>7</sup> came to about 15% of Pakistan's development budget for 2007-8. This would amount to over Rs.150 billion (US\$1,772 million).<sup>8</sup>

The National Corruption Perception Survey 2009<sup>9</sup> carried out by Transparency International shows that the quantum per transaction of bribe is highest in tendering and procurement. The average quantum of

<sup>1</sup> Handbook for Curbing Corruption in Public Procurement, Transparency International. See also Fighting cartels in Public Procurement, OECD, 2008.

<sup>2</sup> William E. Kovacic, "Competition Policy, Consumer Protection, and Economic Disadvantage" (2007) 25 Washington University Journal of Law & Policy 101.

<sup>3</sup> Rule 10 & 20 of the Public Procurement Rules, 2004 available at <http://www.ppra.org.pk/doc/rules.pdf>.

<sup>4</sup> Rule 4 of the Public Procurement Rules, 2004.

<sup>5</sup> Rule 10 of the Public Procurement Rules, 2004.

<sup>6</sup> Transparency International, 2008.

<sup>7</sup> Assessment of the Pakistan Infrastructure Implementation Capacity, 2008. A joint collaboration of World Bank and Planning Commission of Pakistan.

<sup>8</sup> Amount in rupee converted into dollars at the rupee-dollar rate US\$1 = PKR 84.30) prevalent on 6<sup>th</sup> January, 2010.

<sup>9</sup> <http://www.transparency.org.pk/documents/NCPS%202009/NCPS%202009%20%20Report.pdf>.

bribe per transaction in nine sectors surveyed has been calculated at US\$876, whereas in tendering alone the average quantum of bribe amounts to US\$849.<sup>10</sup>

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

The National Anti-Corruption Strategy (NACS) 2002<sup>11</sup> notes that need and greed, combined with opportunity when there is little fear of detection and/or punishment are the basic factors that facilitate corruption. NACS further elaborates these factors as follows:

- inadequate pay and pensions and having to support large families;
- political instability and intermittent military rule that have weakened public institutions;
- complex and cumbersome laws and procedures; and
- selective access to justice, which is itself slow.

At the institutional level three factors have proved to be highly damaging: (i) abuse of power or discretion, which has enabled officials to make arbitrary decisions; (ii) low levels of transparency that have made it difficult for officials to hold each other accountable; and (iii) lack of job security, which has made it less likely for officials to resist political interference in administrative matters and made it more likely for them to collude with others in corrupt acts.

In all the above-mentioned factors, the most compelling one is the lack of accountability. Ineffective detection and absence of deterrent punishment has left public procurement in the hands of weak and/or corrupt public officials who consequently have wreaked havoc on it.

## **2.3 How do transparency programs help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?**

The Public Procurement Regulatory Authority (PPRA) has been bestowed with the power to lay down a code of ethics for public procurement.<sup>12</sup>

Pakistan's Public Procurement Rules, 2004 are aimed at encouraging transparency in procurement. For procurements over Rs. 10 million (US\$ 118,623), all procuring agencies are required to sign an Integrity Pact with their suppliers.<sup>10</sup>

Wide participation<sup>13</sup> in tenders is encouraged to avoid tender failure, which would then result in direct contracting and typically increase the scrutiny of procedures. For procurement work up to Rs. 2 million (US\$ 23,724) an advertisement is required on the website of the PPRA. Tenders exceeding that amount need to be advertised in the print media.

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<sup>10</sup> Ten sectors were surveyed in the report that include Judiciary, Land administration, Taxation, Custom, Police, Health, Local Government, Power, Education, and tendering and contracts. Report shows that quantum per act of corruption in public tendering is 49% of all 10 sectors.

<sup>11</sup> Page 14, National Anti-Corruption Strategy, 2002, National Accountability Bureau. Available at <http://www.nab.gov.pk/Downloads/Doc/NACS.pdf>.

<sup>12</sup> Section 5(2)(d) of the Pakistan Public Procurement Regulatory Authority Ordinance, 2002.

<sup>13</sup> Rule 10 of the Public Procurement Rules, 2004.

As soon as a contract has been awarded, the procuring agency is required to make all documents related to the evaluation of the bid and award of contract public<sup>14</sup> and also post contract awards of over Rs.50 million (US\$ 593,119) on the website of the PPRA.<sup>15</sup> Apart from this, citizens can access government documents under the Freedom to Information Ordinance, 2002.

**2.4 *Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction?***

Firms are required to sign an integrity pact as explained above under question (3) section II. Corruption is a criminal offence under Pakistan's Penal Code and is punishable with imprisonment of up to 7 years or a fine or both.

**2.5 *Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?***

Pakistan has two anti-corruption agencies at the federal and four at the provincial level and three sets of courts. The relevant organisations are:

1. the Federal Investigation Agency;
2. the National Accountability Bureau (NAB), with offices both at the federal level and at the provincial level. The NAB is the main anti-corruption body in Pakistan, which is endowed with comprehensive powers to investigate and prosecute cases relating to corruption.
3. Special Accountability Courts set up under the NAB Ordinance and the Central and Provincial Special Courts established under the Criminal Law Amendment Act 1958.

The Competition Commission of Pakistan does not have power to investigate corruption cases in public contracting.

**3. Collusion**

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

In most of the procurement cases, the number of competitors is limited and this facilitates collusion among the bidders. Collusion is also more likely where the competitors know each other well. Trade associations are the platform utilised by undertakings in Pakistan to discuss their business activities with each other, which has helped facilitate bid rigging and collusion.

The construction industry is the most vulnerable to bid rigging. In Transparency International's international surveys, "corruption was most prevalent in the Rs.272 trillion (\$3.2 trillion) construction

<sup>14</sup> Rule 47 of the Public Procurement Rules, 2004.

<sup>15</sup> Regulation 7 of the Public Procurement Regulations, 2008.

sector and plagued both the developed and developing worlds”<sup>16</sup>. In Pakistan, too, bid rigging seems to be widespread in government construction contracts.

**3.2 *What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?***

Sectors providing utility services like water and power, health, education, privatisation, infrastructure and BOT projects as well as development aid have been greatly affected by collusion in procurement or bidding. The Competition Commission of Pakistan came into existence in November 2007 and has not had the opportunity to design procurement systems that minimise the risks of bid rigging.

**3.3 *Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?***

No such certificates of independent bid determination are required in Pakistan. The procuring agencies are required to specify a mechanism and manner to permanently or temporarily bar [suppliers and contractors who are found to be indulging in collusion<sup>17</sup>] from participating in their respective procurement proceedings. The PPRA website also list national and international firms that have been placed on the banned list.

**4. Fighting collusion and corruption**

**4.1 *What cases from your jurisdiction have involved both corruption and collusion in public procurement?***

Generally, government construction projects, hiring of consultants and the pre-qualification process for purchase of goods by many procuring agencies have involved both corruption and collusion in Pakistan.

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

Procurement is done at all levels of government, from municipalities and towns, to provinces and the Federal Government. While contracting at the Federal or National level is larger in terms of value per contract, local government contracting is also significant in terms of volume and its local impact. There is no clear evidence at what level collusion and corruption cases predominantly occur.

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

Presently, public procurement in Pakistan is treated mainly as a downstream, largely clerical, buying and selling function and therefore does not attract professional and competent staff to deal with the process. There is a lack of integrity and transparency and no real desire to minimise the misuse of meagre resources. Capacity-building of staff and officials involved in public contracting would be helpful to fight against collusion as well as the methods and techniques mentioned under question number 3 of section II.

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<sup>16</sup> Excerpt quoted from the news published in Daily Dawn, Pakistan, March 2005, on the occasion of publication of Global Corruption Report, Dr Peter Eigen, founding Chairman of TI spoke on Corruption in Procurement.

<sup>17</sup> Rule 19 of the Public Procurement Rules, 2004.

**4.4 *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?***

Yes, before the commencement of any enquiries or related proceedings, if the accused voluntarily returns to the NAB any gains acquired through corruption and discloses the full particulars relating thereto, the Chairman NAB may grant leniency or release the accused person with the permission of the accountability court.<sup>18</sup>

At any stage of the investigation or inquiry, the Chairman NAB may also give a full or conditional pardon to a person on condition of his making a full and true disclosure of the circumstances within his knowledge relating to the offence, including the names of the persons involved therein.<sup>19</sup>

**5. *Advocacy***

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

Competition in procurement markets is limited by regulatory or other barriers to participation by alternative suppliers and complex and ambiguous laws can also affect transparency in the procurement process. These might include licensing or other restrictions on entry or participation in markets that unnecessarily make it more difficult for firms to compete. This, in turn, enhances the likelihood/feasibility of collusion by limiting the number of competitors.

In Pakistan the procedure for the evaluation of bids requires that the lowest evaluated bid has to be accepted unless this results in a conflict with laws, rules, regulations or policies of the Federal Government.<sup>20</sup> This clause can be interpreted in varying manner and the decision to award could become less transparent. Similarly, a bidder could be disqualified from participating in a single tender for submitting incomplete information.<sup>21</sup> Further, individual procuring agencies define their own procedures for debarment<sup>22</sup> and such provisions of law may themselves lead to an abuse of the process and eliminate competitors (though otherwise qualified) from the procurement process.

Discretionary powers of the public officials involved in procurement can seriously hamper the process. Members of departmental evaluation committees under the present tendering system have assumed vast discretionary powers, prescribed under the authority of a clause in evaluation procedure that “provided that a bid is substantially responsive, the purchaser may waive any non-conformity or omissions in the bid that does not constitute a material deviation.”<sup>23</sup> Such discretionary power could be abused for reasons which can be ultimately be detrimental for the procurement process.

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

Corruption and collusion both restrict the right to compete among suppliers and increase the price of the goods or services procured and result in wastage of public funds. A competition agency is better equipped to deal with collusive practices than the procuring body and for this reason, public procurement

<sup>18</sup> Section 25 of the NAB Ordinance, 1999.

<sup>19</sup> Section 26 of the NAB Ordinance, 1999.

<sup>20</sup> Rule 38 of the Public Procurement Rules, 2004.

<sup>21</sup> Rule 18 of the Public Procurement Rules, 2004.

<sup>22</sup> Rule 19 of the Public Procurement Rules, 2004.

<sup>23</sup> EU-Asia Urb Project, Preventing Corruption in Public Contracting: Capacity Building and Networking for Civil Society and Local Governments. Public Contracting Handbook – TI Pakistan Section.

could be brought under the jurisdiction of the competition agency. A close relationship between both the procurement authority and the competition agency at the pre- and post-bidding stages might help to minimise the risks of corruption and collusion.

Another possible way would be to give additional powers to the competition agency to investigate and take action against the decisions of public administrative bodies that affect fair public procurement adversely. For example, the competition agency can help in assessing important documents such as the independent determination of bids and in the vetting of other bid documents.

A competition agency can also contribute through advocacy to improve the efficiency of public procurement. Advocacy measures can entail educating public procurement officials on the possible harm and cost of fraud and collusion. Similarly, outreach programs can also help educate public procurement officials about what they should look for in order to detect bid rigging and various types of fraud associated with government procurement and what they can do to protect themselves from corruption and bid rigging.

**5.3 *What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? 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 your jurisdiction and what have been the results?***

A detailed discussion on the measures taken to reduce corruption and collusion and improve efficiency of the public procurement in Pakistan has been given under question 3 section II above. These measures have proved fruitful in terms of saving costs. For example, the Integrity Pact was applied and the evaluation criteria for short-listing were made transparent in the Greater Karachi Water Supply Scheme Phase-V, Stage-II , 2<sup>nd</sup> 100 MGD Project K-III. These measures helped to reduce costs in the contract. In fact, the project was reported as a model for Transparent Procurement Procedures in the report prepared by the Working Party of the Trade Committee of OECD on the Transparency in Government Procurement.<sup>24</sup>

**5.4 *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?***

No, the Commission has not adopted measures to reduce collusion and bid rigging in public procurement and ergo, has not taken into account any potential impact of such measures.

**5.5 *Has your competition agency undertaken competition advocacy in this area?***

The Competition Commission of Pakistan is also mandated to ensure and promote free competition; it has also been conferred authority to promote competition using various advocacy measures.<sup>25</sup> An advocacy approach was utilised in the matter of the Tractors Subsidy Scheme (2008-09) launched by the Government of Punjab. The CCP received complaints from a number of manufacturers and importers of tractors who claimed that only two local tractor manufacturers had been invited by the Agriculture Department, Government of Punjab to supply tractors under the Scheme. The CCP took cognisance of this apparent exclusion of all other manufacturers, dealers/importers of tractors and informed the concerned authorities of the provincial Government that this action ran afoul of competition principles. The situation was rectified and the provincial Government started negotiations with rest of the manufacturers and importers of the tractors for the supply of tractors under the Scheme.

<sup>24</sup> Transparency International, 2002.

<sup>25</sup> Section 29 of the Competition Ordinance, 2007.

Another example of competition advocacy in public procurement was the recommendation given by the CCP to the Federal Government to rectify the policy of the Trading Corporation of Pakistan (TCP) to purchase sugar from the members of Pakistan Sugar Mills Association (PSMA) only, as this could be considered a prohibitive agreement.

**5.6 *If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?***

The CCP took its first action in public contracting in the matter of Karachi Port Authority (KPT) in 2008. A comprehensive inquiry was conducted on complaints filed by TransGlobal Services (Pvt.) Limited (TransGlobal) and Pakistan International Container Terminals Ltd (PICT), against Hutchison Port Holding (HPH), Karachi International Container Terminals (KICT) and KPT. In both complaints, it was alleged that KPT had been engaged in collusive bidding with HPH while granting concessions for the establishment of a new container terminal and had granted HPH concession for more than 80% of the container handling capacity at KPT. A comprehensive inquiry was conducted and Show Cause Notices were issued to KPT and HPH for alleged violations of the Competition Ordinance. However, Show Cause Notices were challenged before the High Court and the matter is *sub judice*. The Commission, has, therefore, not been able to consider appropriate remedies.



## PAPUA NEW GUINEA

### 1. Size and Policy Objectives

Papua New Guinea has a relatively small economy in global terms and is very much a developing economy and society. The Papua New Guinea population is one of the least urbanised in the world, with a large proportion of the people living in small and often isolated village locations.

Accordingly, government involvement in the economy and in the supply of goods and services beyond the village subsistence economy is very significant, much more so than in richer, developed economies. It is estimated that about 70% of the procurement of goods and services in Papua New Guinea is government procurement of one sort or another. This procurement activity is undertaken by all three levels of government, at the national, provincial and local level.

Because of its significance in the overall domestic economy in PNG, government procurement and how it is organised is of critical importance. Many firms in many industries throughout the country are heavily dependent on government customers, in some cases government being their only major customer. This may have positive effects in requiring firms to be cautious that they do not alienate their government customers through trying to charge higher prices by colluding with competitors, but at the same time there may be negative effects with the close commercial relationship between private firms and government, and the dependence on government as a customer, leading to corruption between the supplier and the acquirer of goods and services.

### 2. Corruption

Papua New Guinea has significant problems with corruption; it ranks poorly in international comparisons made in the Transparency International Corruption Index. Anti-corruption measures and institutions are operating widely throughout Papua New Guinea (the Ombudsman Commission, in particular, is very active and has a high profile) but these efforts have not been able to stem the occurrence of corrupt practices. Not surprisingly, that is particularly so in government procurement, where the sums of money involved can be significant. The Ombudsman Commission has in recent years frequently been frustrated, through blocking or delaying legal action or otherwise, in its efforts to prosecute corruption. The Independent Consumer and Competition Commission (ICCC), the national competition regulator, has no direct role in investigating or prosecuting corruption matters.

Corruption in PNG can arise, or remain unchecked, for a number of social, cultural and economic reasons. As far as corruption in government procurement is concerned, the strong social custom of “wantok” can provide opportunities for unscrupulous persons to subvert the procurement process through corrupt conduct. The wantok system is a longstanding tradition of mutual assistance for extended family or village groups, whereby a person is obligated to assist his family member, or wantok, to the maximum extent that he can, and in whatever way, while the wantok has a similar obligation to other family members. This cultural tradition, very important in traditional village life where outside support may be unavailable, has not translated well to a modern economy where it can lead to nepotism or corruption.

Corruption in the form of political patronage can also occur in the use of government funds. Most government infrastructure projects and other major government spending is required, by law, to be arranged by competitive tender through the Central Supply and Tenders Board (CSTB) or Provincial Supply and Tenders Board (PSTB), whose procedures are designed to be transparent and avoid corruption. However, each member of the National Parliament is given a substantial amount of money each year, which has increased dramatically in the last couple of years, to be spent on projects benefitting the member's electorate.

While those funds are supposed to be acquitted fully and openly to the national government and, in respect of amounts over 300,000 kina (about US\$110,000) to be allocated through the CSTB or PSTB tender processes, this acquittal often does not occur; the funds are allocated personally and directly by the Member of Parliament to individuals or firms within the electorate. There is anecdotal evidence of such funds being used corruptly, as would inevitably be the case where the allocation of money is within the personal gift of an individual, and proper procedures for fairness and transparency are bypassed.

Further opportunities for corruption occur in the procurement of goods and services by provincial and local level governments, who are supposed to use CSTB procedures and processes, but frequently do not. With such a lack of transparency, it is difficult to conclude that those procurement contracts are fair and provide value for money.

### **3. Collusion**

In an economy the size of that of Papua New Guinea, most sectors of the market have either very small businesses (e.g. in retailing and distribution) or a relatively small number of larger firms participating in the market. Often that may be limited to three firms or less competing in a particular market, which makes collusion much more likely than in a vigorously competitive market with many participants. The range of firms that are large enough to tender for government goods or services is likely to be even further limited.

Also, where CSTB processes are not followed in government procurement (see above), the opportunity for collusion to go undetected or unremarked is greater. In such situations there is often no great desire to ensure that the government is getting the best value for money from that procurement.

The ICCC, when it identified the likelihood of collusion and bid rigging in government procurement, engaged with the CSTB to make the CSTB and its staff aware of the risks of collusive bid rigging and how it can occur. The CSTB, as part of that process, sought the ICCC's assistance to introduce in the CSTB's Standardised Bidding Documents (SBD) mention of corruption and collusion in government procurement. The SBD contract conditions (which are still in draft form) specify clearly to contractors that where corrupt, fraudulent, collusive, coercive or obstructive practice is detected, the contract will be terminated by the procuring agency. The ICCC's discussions with the CSTB are ongoing.

Papua New Guinea, through the CSTB, does not require a Certificate of Independent Bid Determination (CIBD), though the current tender documents require certification of no conflict of interest. Following the discussions at the 2010 Global Forum on Competition, the ICCC will consider the desirability of introducing a form of CIBD into the tendering process.

### **4. Fighting Collusion and Corruption**

Over the years there have been quite a number of investigations into alleged corrupt practices, by politicians and others, though only a proportion of them relate to government procurement. These investigations have been carried out by, typically, the Ombudsman Commission, the police Fraud Squad and, on occasion, by specially created commissions of inquiry or Royal Commissions. Such inquiries are

strongly transparent, with public hearings which are widely reported. Some of these investigations have resulted in prosecutions, while others have not.

Investigations into corruption have typically concentrated on that issue and have not also examined possible collusion as well. The ICCC has alerted the CSTB to the tell-tale signs of bid rigging, but to date the CSTB has not brought forward any particular matters to the ICCC for investigation.

The ICCC has been trying to publicise the dangers and destructive effects of collusive conduct and the broader issue of cartel behaviour, without limiting this to government procurement, but for the whole of industry. Part of that publicity has been to highlight the detriment such conduct can cause to the victims of collusion or cartel conduct, requesting them to report their suspicions to the ICCC for investigation. This publicity is an ongoing process which may last for a long time.

## **5. Advocacy**

In 2009 the ICCC, and the CSTB, in conjunction with a number of government departments, conducted a series of Joint Central Supply and Tenders Procurement Forums in selected urban areas in Papua New Guinea. These forums brought a measure of awareness to departmental procurement officers around the country and highlighted the harm which collusive tendering and bid rigging can cause. This will form a basis for the ICCC's continuing advocacy for stamping out collusive bidding and anti-competitive behaviour generally; this advocacy will always continue as an important part of the ICCC's charter.

As part of its recognition of the detriment caused by collusion and corruption in public procurement, the Papua New Guinea Government's Procurement Manual identified corruption, fraud and conflict of interest as three main areas of concern. "Conflict of interest" should probably be broadened to include all collusive practices, which have a seriously bad effect on trying to have government procurement as transparent, fair and producing value for money. These efforts to stamp out such corruption and collusion will continue for the foreseeable future.



## PERU

### 1. Introduction

This paper presents an overview on the Peruvian policies against collusion and corruption in public procurement. It has been written to be presented as a country contribution to Session V of the IX Global Forum on Competition, organised by the OECD Competition Committee.

Public procurement in Peru accounts for approximately 11% of the Peruvian GDP and the cases of corruption related to public procurement represent up to 30% of the total amount spent in public procurement. Taking this into account, corruption constitutes a very important issue for policymakers. In fact corruption is a matter of concern for the whole society. According to a survey by Ipsos APOYO Opinión y Mercado S.A. for Proética<sup>1</sup> in the year 2008, corruption of officials and authorities is seen by more than half of the head of households interviewed as a major problem of the Peruvian State, especially in Lima. Furthermore, the majority of the people interviewed considered that the government and other institutions of the State are not committed to combat corruption.

Although important legal reforms have been introduced in order to deter corruption in all areas of the government, these reforms have not specifically addressed the linkages between collusion and corruption in procurement. There is little interaction between the Competition Authority (the Defence of Competition Commission of the National Institute for the Defence of the Competition and the Protection of Intellectual Property Rights - INDECOPI), the Public Procurement Agency (the Supervisory Body of State Contracting - OSCE) and other anti-corruption entities in Peru and there have been only few cases sanctioned by the Competition Authority that specifically involved collusion in public procurement (and none of these cases were related to corruption).

The aforementioned indicates that a more collaborative approach between the different government entities in charge of prosecuting corruption and collusion is needed in order to tackle the problem of collusion/corruption in public procurement.

### 2. Size and Policy Objectives

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

Public procurement amounted PEN 41 851 876 628 (approximately, USD 14 303 443 824 or EUR 9 724 941 409) in 2008, which represents 11.08% of the Peruvian GDP of that year.<sup>2</sup>

Public procurement is regulated by the State Procurement Law (approved by Legislative Decree N° 1017) and its Regulations (approved by Supreme Decree N°184-2008-EF). Article 4 of the Regulations establishes the following policy objectives of public procurement:

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<sup>1</sup> Proética is a non for profit civil association that aims at contributing to combat corruption, its causes and manifestations in Peru. See: <http://www.proetica.org.pe/>.

<sup>2</sup> Source: <http://www.seace.gob.pe/>.

- *Promotion of Human Development:* Public procurement shall contribute to human development in the country according to universally accepted standards on the matter.
- *Morality:* Public procurement shall be subject to the rules of honesty, truth, justice and probity.
- *Free Competition:* Public procurement processes shall include regulations or processes that encourage the most comprehensive, objective and impartial competition, as well as pluralism and participation of bidders.
- *Impartiality:* The agreements and decisions of officials and areas in charge of the procurement process shall be adopted in strict application of the law. In addition, technical criteria shall be considered in order to provide a fair treatment to bidders and contractors.
- *Reasonableness:* Contracts in public procurement shall be reasonable in both quantitative and qualitative terms in order to meet the public interest and the expected result.
- *Efficiency:* Public procurement contracts shall include conditions for the best price, quality and delivery time, as well as the best use of resources. Contracts shall consider criteria of speed, economy and efficacy.
- *Advertising:* Public procurement processes shall be advertised and disseminated adequately and appropriately in order to guarantee the concurrence of potential bidders.
- *Transparency:* All procurement shall be based on objective criteria and qualifications; they shall have a purpose and be accessible to the bidders.
- *Economy:* Criteria of simplicity, austerity and saving shall be applied in all stages of the selection process and in the agreements and resolutions about them, avoiding unnecessary and costly requirements.
- *Technological impacts:* Goods, services and the execution of public works shall be of suitable quality and delivered using modern technologies so that they can effectively fulfil the purposes for which they are required, from the moment they are hired, and for a specific and predictable period of time, with the possibility of being adapted, integrated and boosted if necessary.
- *Fair and Equal Treatment:* All bidders shall have participation and access to contract with government entities under similar conditions. The existence of privileges and advantages is prohibited.
- *Equity:* Benefits and rights of the parties shall keep a reasonable relationship of equivalence and proportionality, without affecting the powers that belong to the State in the defence of the general interest.
- *Environmental Sustainability:* Criteria to ensure environmental sustainability shall be applied in all procurement processes, while avoiding negative environmental impacts according to the rules about the matter.

### 3. Corruption

#### 3.1 *What is the cost of corruption?*

The Ministry of Justice estimates that the cases of corruption related to public procurement represent up to 30% of the total amount spent in public procurement; i.e. around PEN 12 555,56 millions in 2008 (approximately, USD 4 291,03 millions or EUR 2 917,48 millions).<sup>3</sup> Furthermore, Kaufmann et.al (2008) report that Peru ranks 106<sup>th</sup> among a sample of 208 countries when considering the control of corruption.

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

According to a study by the Ministry of Justice, three major factors that enable the emergence of corruption can be identified: formal factors, cultural factors and material factors.<sup>4</sup>

Among the *formal factors*, the following are mentioned:

- The lack of a clear separation between the public and private spheres;
- The existence of a legal system that is not adequate to the national reality;
- The practical ineffectiveness of public institutions.

Some of the most important *cultural factors* identified are:

- The wide social tolerance for the enjoyment of privileges due to a prevalence of private gain versus civic morality;
- The existence of a widespread culture of illegality as a way of functioning in which there is social tolerance towards a corrupt environment;
- The lack of change in the organisational and regulatory systems despite the evolution of States.

And among the *material factors* mentioned, we have:

- The gap between the resources of public administration and social dynamics;
- The gap between actual and formal responsibility of public officials;
- The gap between actual social power and formal access to political influence.

Additional factors that might help corruption mentioned in the same study are the following:

- The low probability of detecting corrupt acts, the slight punishment for corrupt activities and the absence of social sanctions for corrupt individuals;
- The lack of independence of judges responsible for monitoring political corruption and the lack of respect for judicial decisions;

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<sup>3</sup> Ministerio de Justicia del Perú (2007).

<sup>4</sup> Ibid.

- The weak credibility of the institutional order, which is caused mainly by the inability to effectively address social problems;
- The lack of a public career which promotes sound institutions and the compliance of the duties of public employees;
- The informality that characterises the Peruvian economy, which is closely related to the high cost of complying with the law.

Finally, the lack of transparency in the management of financial resources in regional and local governments (which is possible due to the fact that regional and local governments are not obliged by law to publish their financial accounts) is an additional factor that might facilitate corruption in public procurement. This situation is exacerbated by the fact that people who work in regional and local governments is not properly trained and some of them are not familiarised with the State Procurement Law, especially in local governments.<sup>5</sup>

### **3.3 *How do transparency programmes help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?***

Transparency programmes certainly help fight corruption since they make it possible to monitor the development of the procurement processes, thereby helping anti-corruption officials to uncover illegal conducts. In Peru, several reforms have been implemented in order to increase transparency in procurement. One of the most important initiatives in this regard is the implementation of the National Plan to Combat Corruption<sup>6</sup>, which includes several provisions to increase transparency in the government functions. The plan includes seven goals and other various strategies which are summarised next:<sup>7</sup>

#### **3.3.1 *Goal 1: Promoting the strengthening of the System to Combat Corruption***

- Improving and strengthening mechanisms that promote accountability, access to information, promotion of ethics and transparency in public administration;
- Administrative simplification as a strategy for combating corruption;
- Strengthening the human resources system for the prevention of corruption;
- Strengthening the State procurement system in order to prevent corruption;
- Developing strengths in the supervisory and control bodies.

#### **3.3.2 *Goal 2: Institutionalising good governance practices, ethics, transparency and the fight against corruption in public services***

- Strengthening a National Coordinated System to Combat Corruption;

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<sup>5</sup> According to Juan Carlos Rivera, official of the Presidency of the Council of Ministers and member of the Multi Sectoral Working Group monitoring the National Plan to Combat Corruption, interviewed on 14 December 2009.

<sup>6</sup> Established by Supreme Decree N° 004-2006-JUS, issued on 25 January 2006.

<sup>7</sup> Presidencia del Consejo de Ministros (2008).

- Coordinating and monitoring multi-sectoral policies against corruption, at regional and local levels.

3.3.3 *Goal 3: Articulating an effective and comprehensive legal strategy against corruption*

- Strengthening and modernising the judicial system;
- Improving transparency in the administration of justice;
- Implementing and optimising the supervisory bodies of the judicial system to strengthen the fight against corruption;
- Establishing an effective legal framework to combat corruption.

3.3.4 *Goal 4: Promoting practices in the business sector to combat corruption*

- Developing a culture of ethics in the business sector;
- Establishing measures which encourage practices that prevent corruption in the business sector.

3.3.5 *Goal 5: Promoting the active participation of media in combating corruption*

- Ensuring the independence of the media and strengthening its role in spreading ethical values.

3.3.6 *Goal 6: Obtaining the commitment of society to actively participate and monitor the fight against corruption*

- Developing an anti-corruption culture in society, reinforced by ethical values;
- Facilitating citizen surveillance in the fight against corruption;
- Setting up a social-political alliance against corruption.

3.3.7 *Goal 7: Developing concerted international efforts to combat domestic corruption.*

- Applying international agreements referred to the fight against corruption in the national legislation;
- Promoting the strengthening of reciprocity and judicial cooperation between countries.

As a result of the application of the National Plan, several laws have been enacted in the last few years.<sup>8</sup> Among the preventive measures, the following laws have been enacted:

- Supreme Decision N° 160-01-JUS (11 April 2001), which creates the working group of National Anti-Corruption Initiative;
- Law N° 26850, State Procurement Law;
- Law N° 27482, Law governing public statements of income and assets of State officials;

<sup>8</sup> Ministerio de Justicia del Perú (2007).

- Law N° 27806, Law of Transparency and Access to Public Information;
- Law N° 27815, Ethics Code and its Regulations;
- Law N° 28024, Law of Management of Interests;
- Nepotism Law;
- Mechanisms for transparency and citizen participation;
- Creation of committees of ethics and transparency;
- Creation of the Special Commission for Comprehensive Reform of Justice Administration (CERIAJUS);
- Measures proposed by the Presidency of the Council of Ministers;
- Creation of a fund to manage the money recovered from illegal activities against the State (FEDADOI).

Among the sanctioning measures, the following laws have been enacted:

- Creation of the Directorate of Police Corruption, by Ministerial Resolution 1000-2001-IN/PNP;
- Law N° 27978, Law of Leniency;
- Establishment of six corruption anti-courts and six anti-corruption chambers;
- Establishment of Decentralised Anticorruption Public Prosecutor's Offices;
- Establishment of the Anti-Corruption Subsystem;
- Appointment of an Ad-Hoc Attorney for the Fujimori/Montesinos cases.

**3.4 *Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction?***

Firms are not required to certify that they have not bribed an official during the procurement process. Nonetheless, they are required to submit a sworn statement in which they declare under oath that:

- They are not prevented from participating in public procurement processes according to what is established in Article 10 of the Public Procurement Law;
- They know, accept and submit to the terms, conditions and procedures of the selection process;
- They are responsible for the veracity of the documents and information presented by them in the selection process;
- They promise to maintain their bids during the selection process and to sign the contract in case they win the process;

- They know and understand the sanctions contained in the Public Procurement Law, its Regulations and Law N° 27444, General Administrative Procedure Law.

Regarding the sanctions that can be applied to individuals who have engaged in corruption or bribery (either as perpetrator or as participant in the offense) Article 28 of the Penal Code establishes that the following sanctions:

- Imprisonment;
- Restriction of freedom;
- Limitation of rights;
- Fine.

It should be mentioned that the length of imprisonment depends on the offense described in each particular case. For instance, in the case of collusion, the sentence of imprisonment shall be neither less than three years nor more than 15 years<sup>9</sup>; while in other cases, the sentence of imprisonment shall be neither less than four nor more than six years<sup>10</sup>. Furthermore, according to the provisions of Article 92 of the Penal Code, together with the sentence, the aggrieved party is entitled to initiate civil proceedings against the offender in order to claim for civil damages.

Finally, regarding the sanctions that can be applied to firms that have engaged in corruption or bribery, Article 105 of the Penal Code establishes that the Judge should apply all or some of the following sanctions:

- Closure of premises or facilities, temporarily or permanently. The temporary closure will not exceed five years;
- Dissolution and liquidation of the firm;
- Suspension of the activities of the firm for a term which does not exceed two years;
- Prohibition on the firm to perform in the future activities of the class of those in whose practice the crime was committed, aided or concealed.

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<sup>9</sup> According to Article 384 of the Penal Code, the official or public servant who, in contracts, supplies, auctions, price competitions or other similar transaction in which he is involved because of his office or because he is part of a special committee, defrauded the State or any State entity or agency, according to the law, arranging with stakeholders in agreements, adjustments, liquidations or supplies shall be punished by imprisonment of not less than three nor more than 15 years.

<sup>10</sup> According to Article 399 of the Penal Code, the official or public servant who improperly, directly or indirectly or through a simulated act, is concerned, for oneself or a third party, by any contract or transaction in which he is involved because of his office, shall be punished by imprisonment of not less than four or more than six years and disqualification as established under subsections 1 and 2 of Article 36 of the Penal Code.

**3.5 *Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?***

In Peru, there are Special Criminal Courts in charge of prosecuting crimes against public administration and bribery of officials. These courts are also in charge of prosecuting offenses committed by public officials engaged in a public procurement processes.<sup>11</sup>

The Peruvian Competition Authority does not have any power in the prosecution of corruption cases.

**4. Collusion**

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

In addition to the factors identified in economic theory, such as concentration, the existence of barriers to entry, cross-ownership and other links among competitors, regularity and frequency of orders, low buyer power, the existence of a stable demand, product homogeneity, symmetry among firms, etc.,<sup>12</sup> additional factors that might facilitate collusion in procurement processes in Peru are the following:

- *Difficulty in monitoring bidders and their actions.* While in principle, detailed information about the procurement process (such as the bidder's name, number of bidders, bids, etc.) should exist in the records of the procurement process; this information is not always readily available for the Competition Authority and/or third parties. Furthermore, if the Competition Authority needs this sort of information, it should make a formal requirement to the Public Procurement Agency and it is not clear whether the information will be easily to process for the Public Procurement Agency;
- *Supply concentration.* The average number of bidders in public procurement processes is small, which according to economic theory facilitates collusion. In addition, given that the procurement processes are frequent, interaction between the bidders is constantly repeated over time. For example, it has been detected that many bidders are repeated in some processes under different names and items;<sup>13</sup>
- *Corruption.* As it is widely recognised, corruption could also facilitate collusion in public procurement, which is particularly worrying considering the high percentage of corruption in of the Peruvian GDP;
- *Legal limits (caps) on the price offered by bidders according to the State Procurement Law.* In the case of construction works, the State Procurement Law establishes that bids shall not be lower than 90% of the reference price nor exceed it by more than 10%. According to the Competition Authority, this legal provision ultimately reduces competition and could even facilitate collusion because all bidders know that nobody will place a bid above or below the limits established by the law. In fact, we can assume that a bidder that wishes to win the procurement process will respect the limitations specified in the law. However, if bidders want to collude, they can either agree to bid the lowest value allowed by the law (which is not a punishable conduct by the Competition Authority since the bids respect legal specifications) or some of them can agree to

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<sup>11</sup> Administrative Order No. 024-2001-CT-PJ, which was issued on 31 January 2001.

<sup>12</sup> Motta (2004), pp. 142 – 166.

<sup>13</sup> According to Santiago Antúnez de Mayolo, former Executive Chairman of the Supervisory Body of State Contracting – OSCE, interviewed on 15 December 2009.

deliberately bid below or above the limits so they are disqualified from the tender, thereby enabling the remaining bidders to win the process.<sup>14</sup>

#### **4.2 *What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement?***

Since INDECOPI's inception in 1993, only three cases of bid rigging in public procurement have been effectively detected and sanctioned. None of these cases involved a case of corruption.

- *Bid rigging in the procurement of oil barrels*  
The Competition Authority sanctioned two local producers of 55 gallon barrels for bid rigging in a procurement process organised by a State-owned refinery. Rheem Peruana S.A and Envases Metálicos S.A. were two local producers of oil barrels. Petroperu is a state-owned refinery and one of main buyers of oil barrels sold by the above mentioned companies. Between the years 1995 and 1996, both Rheem Peruana S.A. and Envases Metálicos S.A. offered equal prices and almost equal quantities of barrels to Petroperu in three different procurement processes. The Competition Authority considered that the exact matching of prices and quantities was an important element to presume the existence of an agreement, especially taking into account that in the previous years the companies offered different prices and the total amount of barrels requested by Petroperu;
- *Bid rigging in the tender for public works and the construction of a electricity distribution network*  
The Competition Authority sanctioned five construction firms (Villa Rica S.A. Contratistas Generales; E y R S.A. Contratistas Generales; J & J Ingenieros Asociados S.A.; JERRSA Contratistas Generales and Contratistas antares S.A.) for bid rigging in the public tender organised by a municipality for the renewal of a local road. In this case, the Competition Authority considered four events as evidence of the collusive agreement: (i) all firms presented a budget for the works with uniform amounts of direct costs and profits; (ii) similarity of details in the filling of the formats of the proposals, such as the letter fonts and punctuation marks; (iii) evidence that the tender documents were acquired by the bidders in consecutive order and on the same date, and (iv) some of the bidders rented their equipment and machinery from other bidders, which might be considered as an unusual behaviour among supposed competitors. Similar events were considered by the Competition Authority in the analysis of a procurement process organised by Electro Sur Este (a state-owned electricity distribution company) for the construction of distribution network in the downtown area of Puerto Maldonado. In this case, three firms (Inti, Percy Enríquez Esquivel – Ingeniero Contratista and Quiroga Contratistas) were sanctioned for colluding in the process described above.

#### **4.3 *Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?***

Certificates of independent bid determination are not employed in public procurement processes in Peru.

<sup>14</sup> INDECOPI (2004a, 2004b, 2004c, 2005).

If firms have engaged in collusion, they can be sanctioned by Competition Authority. Sanctions imposed by it depend on whether the conduct is qualified as minor, severe or very severe. Sanctions may include fines as well as other corrective measures, such as the cessation of activities.

In addition, according to Article 237 of the Regulations of the State Procurement Law, the State Procurement Court may impose additional sanctions to providers, participants, bidders and contractors if they participate in practices that restrict free competition, including the following:

- Temporary prohibition to participate in State procurement processes. This prohibition cannot be less than six months nor more than three years;
- Permanent prohibition to participate in the State procurement processes.<sup>15</sup>

Furthermore, Article 105 of the Penal Code states that if a Criminal Judge verifies that a person or his organisation has been used for committing or concealing a crime, he is obliged to impose a sanction to this entity, which may include the prohibition to conduct activities similar to those in which the crime was committed. Thus, assuming that a company was found liable in a process linked to the commission of a crime (not necessarily the corruption of officials) for events directly related to a public procurement or acquisition process, the Judge may prohibit that company from participating in such activities for a time period (not exceeding five years) or permanently.

#### **4. Fighting Collusion and Corruption**

##### **4.1 *What cases from your jurisdiction have involved both corruption and collusion in public procurement?***

There has not been any prosecuted case involving both corruption and collusion in public procurement in Peru.

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

In the cases sanctioned by the Competition Authority (see see Section III, question 2), the sectors involved in bid rigging of procurement tenders were: public works (construction of a local road and construction of an electricity distribution network) and provision of oil barrels to a State-owned refinery. It should also be mentioned that the Competition Authority is currently investigating an allegation of bid rigging in the public procurement processes organised by ESSALUD (the Peruvian social health insurance company) for the acquisition of medical oxygen between January 1999 and June 2004. Furthermore, there have been five investigations of bid rigging in public procurement processes which were later dismissed by the Competition Authority: three involving local government contracting agencies and two involving state-owned companies.<sup>16</sup>

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<sup>15</sup> It should be mentioned that the Court will also impose this sanction when a person, within a period of four years, has received two or more sanctions which together add 36 or more months of temporary prohibition.

<sup>16</sup> The above statistics are a very limited sample of the potential cases that might exist in other sectors and therefore should not be considered as a definite indication of the potential scope of allegations of collusion and corruption in public procurement.

**4.3** *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?*

According to Peruvian legislation, leniency schemes may benefit individuals or firms who have committed criminal offenses using public resources or with the intervention of officials or public servants. In this sense, individuals or public officials who have engaged in bribery or corruption may obtain benefits such as the exemption from punishment or suspension of the execution of the penalty, among others.<sup>17</sup>

**5. Advocacy**

**5.1** *What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction?*

Within the framework of implementing the trade promotion agreement signed with the United States, a new State Procurement Law was issued in November 2008. The new law aims at establishing standards designed to maximise value for taxpayer money used in the public procurement of goods, services and works, in a timely manner and with the required levels of prices and quality.

Among the most important changes introduced by the new law, the following can be mentioned:

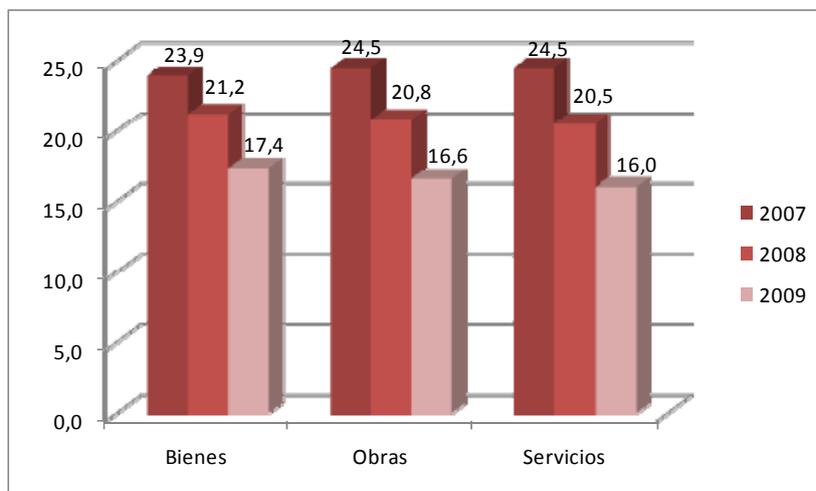
- Corporate purchasing and reverse auction, where appropriate, will be preferred. Furthermore, contracting entities will contract directly through the Catalogue of Framework Agreements;
- Guidelines for the preparation and updating needs of the reference value are determined;
- Special schemes for micro and small enterprises are maintained;
- Infringements of suppliers, participating bidders and/or contractors that deserve sanctions are established;
- Additional functions of OSCE are incorporated. Examples of such new functions are the promotion of the reverse auction and the need to inform the National Control System about the cases in which rules of public procurement are violated, as long as there are reasonable causes to believe that State resources were mismanaged or a crime was committed.

The changes introduced appear to be promoting positive results, such as the reduction in the average duration of the public procurement processes (see Figure 1).

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<sup>17</sup> See Subsection 1 of Article 1 of Law N° 27378, issued on 21 December 2000.

**Figure 1. Average Duration of Public Procurement Processes (in days)**



Source: OSCE.

Furthermore, a new software has been recently installed in OSCE which will help the organism monitor public procurement processes online. For instance, the software detects if a contracting entity purchases a specific item at a significantly higher price than the one offered for the same item to another contracting entity.

**5.2 If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?**

The cases that have been sanctioned by the competition Authority of INDECOPI are related to collusion between bidders only (see Section III, question 2). No analysis of corruption was made by the Competition Authority since it has no power to prosecute this type of offenses.

In all these cases, the only sanctions implemented were fines ranging from 0.5 tax units per firm (approximately, USD 414 or EUR 388) in the case of a local municipality against five firms devoted to civil construction activities and 20 tax units per firm (approximately, USD 18 018) in the case of Petroperu against Rheem Peruana S.A. and Envases Metálicos S.A.<sup>18</sup>

<sup>18</sup> The value of the tax units, as well as the exchange rates corresponds to the year in which the sanctions were imposed (1999 and 1997, respectively).

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## POLAND

### 1. Size and Policy Objectives

In the recent years the value of the public procurement market in Poland has been systematically growing accounting for a large share of the public expenditure. This is particularly due to the boom in the infrastructure projects, often financed from EU funds. Undoubtedly, efficient functioning of this market, with the value of contracts awarded in 2008 amounting to 109.5 billion PLN, which constituted 8.6% of GDP (in 2006 it was approx. 7.5%),<sup>1</sup> is very important for the Polish economy.

The system of public procurement in Poland exists since 1994. Since then the law has been repeatedly changed. In 2004 a new Act on Public Procurement<sup>2</sup> (hereinafter APP) was passed and, in accordance with the EU requirements, opened the Polish public procurement market. It specifies the procedures for awarding public contracts, which are designed to protect fair competition and stimulate the free market.

According to the current rules institutions having public funds at their disposal are obliged to organise tenders if the procurement exceeds EUR 14 thousand. This way they can choose the best bid, which most often means the cheapest one. The annual reports concerning contracts awarded between 2006-2008 show that the biggest group of awarding entities (more than 90%) were the public finance sector units, followed by self government administration and independent public health institutions.

Safeguarding efficient, transparent and competitive procedures of public bids is the main objective of the policy determined in the APP. The principal rules of the Polish Procurement Law encompass:

- Equal treatment of economic operators;
- Open and fair competition;
- Openness and transparency of award procedures;
- Primacy of open and restricted tendering procedures;
- Impartiality and objectivity.

Nevertheless, even the most competitive procedures which are designed to underpin the pillars of transparency and fairness do not always entirely secure the elimination of corruption phenomenon in public tenders. Public procurement is one of the key areas where the public and the private sector interact financially, so the risk of corruption or bribery is high. Moreover, due to the secret character of collusive agreements, manipulation is hard to detect and can be hard to prove.

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<sup>1</sup> Annual Report on activities in 2008 of the Polish Public Procurement Office.

<sup>2</sup> Act of 29 January 2004 Public Procurement Law, Journal of Law of 2007 No 223, item 1655 (Dziennik Ustaw z 2007r. Nr 223, poz. 1655).

## 2. Corruption

According to the 2008 report of Transparency International year after year a significant decline in corruption in Poland is observed. In the ranking of the least corrupted countries Poland rose by nine places in 2008.

In Poland there are several agencies mandated to combating corruption. As regards prosecuting corruption cases in public procurement, the responsible bodies include: the Public Prosecutor Offices, the Police, the Public Procurement Office, the Supreme Chamber of Control, the Central Anti-Corruption Bureau and the Regional Chambers of Audit. Public Procurement Office controls and ensures the effective expenditure of public funds by supervising the completion of public contracts ordered by the State.

The most important documents designed to help fight corruption in Poland, also in public procurement, are the *Corruption Control Programme - Anti-corruption Strategy* and its implementing document: *2<sup>nd</sup> Implementation Phase 2005 – 2009*. The main task of the latter was to carry out actions aimed at preventing corruption and developing appropriate attitudes towards corruption. Strategic objectives of the Programme were to co-ordinate efforts aimed at adherence to anti-corruption legal regulations; to reduce social tolerance for corruption phenomena by awareness raising activities and providing transparent and citizen-friendly public administration structures by the open information society standards. There is also an ‘anti-corruption shield’ – a mechanism aiming at protecting the processes of privatisation and public procurement against corruption.

The APP provides for measures that aim at reducing corruption in public procurement. The Act specifies entities who are excluded from contract award procedures, *inter alia*: natural persons and partnerships whose partner or a member of the management board have been validly sentenced for an offence committed in connection with a contract award procedure, offence against the rights of people performing paid work, bribery, offence against economic turnover or any other offence committed with the aim of gaining financial profits, as well as for treasury offence or an offence of participation in an organised crime group or in a union aimed at committing an offence or treasury offence. Therefore, in contract award procedures the awarding entity may request from economic operators declarations confirming their lack of criminal record by means of information from the National Register of Criminal Records.

Moreover, the APP reads that persons performing actions in connection with the contract award procedures shall be subject to exclusion if they have been legally sentenced for an offence committed in connection with contract award procedures, bribery, offence against economic turnover or any other offence committed with the aim of gaining financial profit.<sup>3</sup>

Persons performing actions in connection with a contract award procedure shall provide a written statement, under the pain of penal liability for making false statements, about the absence or existence of the mentioned circumstances. Furthermore, actions in connection with the contract award procedure undertaken by a person subject to exclusion after they became aware of these circumstances shall be

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3 They shall also be subject to exclusion if they: are competing for a contract; remain in matrimony, consanguinity or affinity in direct line or consanguinity or affinity in indirect line up to the second degree, or is related due to adoption, legal custody or guardianship with economic operator, his legal deputy or members of managing or supervisory bodies of economic operators competing for a contract; during the three years prior to the date of the start of the contract award procedure they remained in a relationship of employment or service with the economic operator or were members of managing or supervisory bodies of economic operators competing for a contract; remain in such legal or actual relationship with the economic operator, which may raise justified doubts as to their impartiality.

repeated, except for the opening of tenders and other factual actions having no influence on the outcome of the procedure

The competences of the Office of Competition and Consumer Protection are regulated in the Act of 16 February 2007 on competition and consumer protection<sup>4</sup> which does not cover corruption offences. (See point III).

### 3. Collusion

The process of rivalry during the tendering procedure can be distorted due to collusion. Therefore, apart from the Act on Public Procurement the issue is regulated by the Act on competition and consumer protection. Its Art. 6.1.7 prohibits agreements which have as their object or effect elimination, restriction or any other infringement of competition in the relevant market, *inter alia*, agreements consisting in collusion between undertakings entering a tender, or by those undertakings and the undertaking being the tender organiser, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price.

Furthermore, bid-ridding is enumerated among the most serious and detrimental anticompetitive practices, reckoned as *hardcore cartels*, and it is excluded from the *de minimis* doctrine. As fraudulent tendering may cause enormous harm to the economy, it is of a great importance to combat this kind of pathologies. Through bid-rigging practices, the price paid by public administration for goods or services is artificially raised, forcing the public sector to pay above market rates. Antitrust protection of tender proceedings against illicit agreements aims at protecting the regularity of the economy in a free market economy. Simultaneously, in the case of public procurement it contributes to the improvement of public property management.

Under the Polish law, tender conspiracies are also criminal offences. According to the article 305 of the Criminal Code the person who, in order to gain material benefits, thwarts or impedes a public tender or concludes an agreement to the detriment to the owner of property or a person or an institution on whose behalf the tender is made, is liable to a punishment of imprisonment for up to 3 years.

While collusion can occur in almost any industry, it is more likely to occur in some of its branches than in others. Particularly, it is likely to be encountered in the engineering and construction industry, where firms compete for significant contracts. The problem is inherent in sectors where there are few sellers. The fewer the number of sellers, the easier it is for them to get together and agree on prices, bids, customers, or market share. Collusion may also occur when the number of firms is fairly large, but there is a small group of major sellers and the rest are marginal sellers who control only a small part of the market. The probability of conspiracy increases if other products cannot easily be substituted for the product in question or if there are restrictive specifications for the product being procured. The more homogenous a product is, the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on other forms of competition, such as design, features, quality, or service. Bid rigging is more likely to occur on markets, where the competitors know each other well through social connections, trade associations or business contacts.

While some market features prompt collusions, paradoxically procurement regulations also may facilitate collusive arrangements. Pursuant to art. 26.3 of APP the awarding entity shall call on economic operators, who did not submit required declarations or documents, or the economic operators who did not

<sup>4</sup> Act of 16 February 2007 on competition and consumer protection, Journal of Law of 2007 No 50, item 331 (Dziennik Ustaw z 2007r. Nr 50, poz. 331).

submit plenipotentiaries, or the economic operators who submitted declarations or documents, that contain errors or those who submitted defective plenipotentiaries, to supplement the documents in a defined time limit unless, despite the supplement, the tender of the economic operator is rejected or the cancellation of the procedure is necessary (...).<sup>5</sup> The law allows complementing the documents after the opening of the offers. Economic operators take advantage of this provision. It happens that they deliberately submit an incomplete bid, but then after the opening of the offers and analysis of the bids of competitors, they assess their own position and depending on the situation, they complete documents or not. Three enterprises from Silesia used this provision, so that the company whose offer was the most expensive could win. The basis for the UOKIK operations was a request submitted by Parexbud Multitrade Company. It accused three enterprises – Impex Trade, “Fornit” Furniture Factory and L&L – of concluding an illegal agreement while submitting bids in the tender. The enterprises bid for a public procurement contract for the delivery and assembly of the equipment of the buildings on the border crossing in Dorohusk.

The proceedings showed that the participants of the collusion had agreed the conditions of their bids – including the prices. Moreover, they agreed to undertake common actions consisting in a deliberate failure to remove formal defects in the submitted documents. During the antitrust proceedings UOKIK also found out that the three enterprises had had mutual business relations and had exchanged information on a regular basis (Decision No. RKT-22/2007).

Similarly, in other decision issued by the UOKIK President, the bidders taking part in the public tender for street cleaning in Poznan concluded an illegal agreement, which affected the course and the result of the tender. They agreed on price conditions of the offers and intentionally failed to submit required documents. Examining the case, the President found that companies, which submitted the most attractive offers, did not complete the formal documentation deficiencies, thus enabling the enterprise with the most expensive offer to win the contract.

Joint bidding may enhance competition in the public procurement process thanks to the synergies arising from bidding consortia that enable companies to combine resources and remove barriers to entry. However, it might also be used as a cover for collusive tendering.

Art. 23 of APP allowing joint bidding may also facilitate conspiracies. Bidding consortia are a good solution when bidding is costly or if a minimum size of business is necessary to carry out the contract. In these circumstances, joint bidding is a way to enable smaller firms to participate in larger tenders, from which they would otherwise be excluded. However, a bidding consortium should not be allowed if each firm in the consortium has the economic, financial and technical capacities to carry out the contract on its own. Therefore, in order to maintain a high level of competition on the market, it should be considered to limit joint bids and sub-contracting in cases when consortia may lead to competition restriction.

The Polish CA raised doubts as to the joint bidding in July 2009 when the President of the Office initiated antitrust proceeding to determine whether two businesses operating in Bialystok that prepared a joint bid in order to increase their chances of winning the tender had entered into an illicit

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<sup>5</sup> Article 26.3 of the APP : *“The awarding entity shall call on economic operators who did not submit declarations or documents, referred to in Article 25 paragraph 1, or the economic operators who did not submit plenipotentiaries, or the economic operators who submitted declarations or documents referred to in Article 25 paragraph 1, that contain errors or those who submitted defective plenipotentiaries to supplement the documents in a defined time limit unless, despite the supplement, the tender of the economic operator is rejected or the cancellation of the procedure is necessary. The declarations or documents, submitted on request of the awarding entity, shall confirm that the economic operator satisfies the conditions for participation in the award procedure and shall confirm the fulfillment by supplies, services or works of conditions specified by the awarding entity, not later than on the day when the time limit for submission of the requests to participate in the contract award procedure expires.”*

agreement. UOKIK questioned the conditions on which the enterprises entered into the tender for the removal of municipal waste. The information possessed by UOKIK indicates that in this case, the business collaboration could lead to restriction of competition and market sharing (the proceeding is pending). The Office does not oppose the right of businesses to form bidding consortia. However, this co-operation must result from either the inability to effectively make a bid by a single trader (e.g. very large volume of orders, lack of some of the required equipment), or the significant benefits it can bring to consumers (e.g. lower prices resulting from the increased efficiency of the undertaking, additional cost savings or technological progress). Otherwise, co-operation where entrepreneurs able to compete individually exclude competition among themselves by agreeing to a joint bid, may be found contradictory to the law of competition.

#### **4. Fighting Collusion and Corruption**

One of the main objectives stipulated in the *Competition policy for 2008-2010* is better detection of anticompetitive practices and in particular better elimination of prohibited practices on the local markets, since such irregularities, although hardly noticeable from the perspective of the entire economy, are very detrimental for consumers. Collusive tendering is very damaging to local markets and it is difficult to gather convincing evidence that will be accepted by the court and proving that the tender process was distorted by an illegal agreement. Therefore, UOKIK's Branch Offices carefully monitor both the unusual behaviour of firms operating on local markets, which may be the result of the conclusion of collusion, as well as local procurement processes.

Most of the bid rigging cases reviewed by UOKIK regarded providing services to public institutions, e.g. cleaning services, supply of foods, and delivery of equipments and occurred on the national market. The problem of corruption has not been involved. As mentioned above, the Office of Competition and Consumer Protection has limited competences as for prosecuting criminal offences, including bribery. Pursuant to article 304 paragraph 2 of the Criminal Procedure Code state or local government institutions which in connection with their activities have been informed of an offence prosecuted *ex officio*, shall be obligated to immediately inform the state prosecutor or the Police thereof.<sup>6</sup> Following this provision the President of UOKIK is responsible to report crimes encountered while conducting proceedings.

Measures, which could aid the fight with collusions in public procurement, should involve a more restrictive approach towards infringements. High fines are an effective tool when it comes to discouraging other companies from participating in such profitable undertakings as bid-rigging.

If an enterprise fulfils conditions indispensable to obtain leniency (i.e. has been the first, amongst the participants of the agreement, to provide the President of the Office with information concerning the existence of a forbidden agreement, is fully co-operating with the President of the Office, has ceased participating in the agreement and was not the initiator of the agreement and did not induce other undertakings to participate in the agreement) the fact of its engagement in bribery or corruption would not affect granting the immunity or reduction of fine. Hence, undertakings can avoid fine, but on the other hand, individuals will be legally responsible for the crime (bribery, corruption) committed.

#### **5. Advocacy**

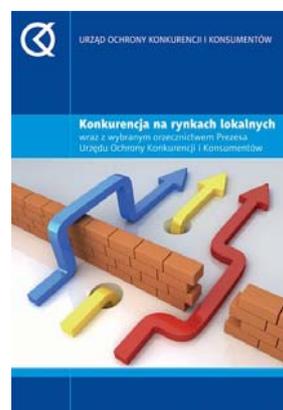
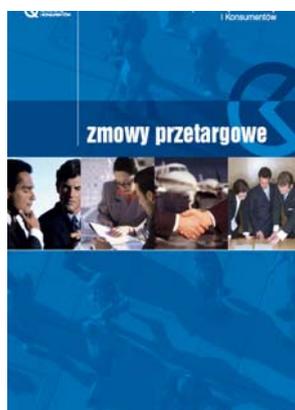
Increasing the effectiveness of the UOKiK activities is one of the priorities of the government strategy 'Competition Policy for years 2008-2010' implemented by the Office. We recognise that making the wider

<sup>6</sup> In addition they are obligated to take steps not amenable to delay, until the arrival of the officials of an agency authorised to prosecute such offences, or until that agency issues a suitable ruling in order to prevent the effacing of traces and evidence of the offence.

public (i.e. other institutions, line ministries, businesses, consumers) aware of our mission and goals, and winning their support and legitimacy for our ideas and initiatives will be crucial to achieve this goal. That is why while carrying out education and information actions on a large scale, e.g. through publications, workshops and seminars intended for e.g. entrepreneurs, we pay great attention to conveying our ideas in the most compelling and accessible ways.

We also try to reach the local authorities for which we have recently carried out a series of workshops on competition law. Local governments, particularly municipalities, face competition law in several different ways. On the one hand they often breach the law, when playing a double role of utility services providers (directly or via their affiliates) and also of local law legislators who limit the access to the market for local companies or impose oppressive terms which such companies must fulfil in order to carry out local economic activity. On the other hand because of insufficient knowledge of competition law works local governments fall victim of anticompetitive practices of businesses, namely tender collusions. Thus, adequate education of these market participants is of a crucial importance. Therefore, from June until September 2009 UOKiK organised a series of events promoting competition law on the local markets. Ten widely attended training sessions for representatives of local authorities were convened in different cities in Poland. Additionally, the Office published a leaflet describing the most popular practices of local authorities that might raise competition law concerns.

According to the results of a survey carried out in 2009, only 69% of the biggest businesses (with 250 employees or more) are aware that bid-rigging is illegal (88% in 2006). Therefore, UOKiK published a brochure (*Bid-rigging*)<sup>7</sup> describing in detail what kind of behaviour is considered collusive tendering, why it is illegal, what sanctions can be imposed, what are the basic types of bid-rigging and reminding about the leniency programme. To better present the problem each description is illustrated with a short case-study. The brochure also gives examples of factors suggesting that collusive tendering may be taking place, e.g. the same errors in bids submitted by different companies.



Furthermore, in order to increase efficiency of law enforcement and restore competition it is of utmost importance for UOKiK to co-operate with other public authorities. The Office influences the state of competition on the market by participating in the legislative process. Each year we provide opinion on ca. 2 thousand draft legal acts as part of inter-ministerial consultations, taking into consideration their impact on competition.

In 2009 UOKiK presented its opinion on the draft amendment to the Act on Public Procurement. The Office pointed out that the proposed provisions could worsen the efficiency of the procedures for awarding

<sup>7</sup> [http://www.uokik.gov.pl/pl/informacja\\_i\\_edukacja/publikacje/ochrona\\_konkurencji/#pytanie28](http://www.uokik.gov.pl/pl/informacja_i_edukacja/publikacje/ochrona_konkurencji/#pytanie28).

public contracts. Namely, the President of the Office was a strong opponent of a change in the open tendering procedure that would enable the awarding entity (after having placed the contract notice in the Public Procurement Bulletin and in the Official Publications of the European Communities) to directly contact the economic operators, that it is aware of, and inform them about the tender commencement. According to the legislators this provision was designed to enhance the competitiveness of the procedures for procurement by opening it to small businesses. However, it was stressed by the Office that such a provision could have quite the opposite effect – it could facilitate corruption and give an opportunity to distort competition. The Office argued that the provision would entail the awarding entity to have a database of small businesses (including data of their financial and technological resources) in order to be able to send them information on the procurement. Consequently, there was a risk that tender contracts would be prepared for a particular small entrepreneur. Due to the above mentioned reasons the proposed provision was opposed by UOKiK.

Another amendment to the APP contested by the President of the Office referred to the repeal of the Act's article setting forth that the awarding entity shall retain the deposit together with interest, if in response to the call the economic operator, did not submit declarations or required documents, unless it proved that it was due to reasons not laying on his part. The draft Act stated that that the provision was excessively rigorous for the contractors and that its objective could be achieved in a less severe way. It was also indicated that the provision was being repealed in order to eliminate or at least lessen the risk of collusion. UOKiK was of the opposite opinion arguing that there is an alternative way to achieve the same goal. It was stressed that reducing the financial burden imposed on the contractors should not be a priority when it comes to protection against unfair competition. Moreover, in the light of this provision, the establishment of the rule of law without the sanction could lead not only to the lack of its effective implementation, but also to the distortion of the substance of the tender. All of the UOKiK's remarks were taken into account and reflected in the final version of the amended Act on Public Procurement.

## 6. Conclusion

The market of public procurement which accounts for 8.6 % GDP in Poland requires an in-depth analysis and observation by all involved institutions. Taking into account its susceptibility to manipulation, the difficulties in detecting violations such as collusive tendering and their negative impact on the economy, it is vital to carefully monitor the ongoing processes. The role of competition authority is crucial when it comes to adopting and enforcing effective measures to combat bid-rigging and increasing public awareness of the benefits of competition. Also appropriate sanctions and UOKiK's strict approach to fining enterprises for competition infringements aim at deterring collusive behaviour.<sup>8</sup> While promoting competition culture UOKiK not only aims at educating all market participants but also actively takes part in the legislative process and closely co-operates with other institutions.

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<sup>8</sup> [http://www.uokik.gov.pl/en/press\\_office/press\\_releases/art143.html](http://www.uokik.gov.pl/en/press_office/press_releases/art143.html) *Guidelines on setting fines for competition-restricting practices.*



## ROMANIA

### 1. Size and Policy Objectives

Public procurement plays a major role in most economies. In OECD countries, public procurement accounts for 15% of GDP and in the new EU member states like Romania the number is approximately 16%.

The most important objectives which may be identified in Romanian legislation concerning public procurement, namely OUG 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts are the following:

- Promoting the competition between the economic operators;
- Guaranteeing equal treatment and non-discrimination of economic operators;
- Ensuring transparency and integrity of the public procurement process;
- Ensuring the efficiency and the efficient use of public funds

Given the extent and complexity of public procurement, this activity is particularly vulnerable to abuse.

### 2. Corruption

Corruption discourages investment, lowers efficiency and erodes democracy. There are many things that can disable an economy but perhaps nothing is more damaging than corruption. Emerging economies particularly are easy targets because they are in a transition state and thus in continuous transformation.

Paolo Mauro<sup>1</sup> found out that corruption is more likely to appear where governments have unlimited powers to grant privatisation and extraction rights and to exercise price controls.

Daniel Teodorescu<sup>2</sup> and other researchers surveyed local public administration officials in 2005 and with a error margin of +-1.2% found out the following causes of corruption in Romania: lack of consistency in applying the reform system (i.e. privatisation), lack of traditions that support a market economy, present administration system reluctant to change, low salaries in the public sector, lack of financial discipline in the public system, and fluctuations in the number of civil servants.

Several key success factors are required to fight corruption in public procurement. The OECD's *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, issued by the OECD Anti-Corruption Division (Directorate for Financial and Enterprise Affairs) highlights three factors in particular:

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<sup>1</sup> Mauro, Paolo. Corruption and growth, *The Quarterly Journal of Economics*, 110(3), 1995.

<sup>2</sup> Daniel Teodorescu, *Romanian Journal of Forecasting* 4/2007.

- Design and implement the right procurement and anti-corruption legislations, enhance enforcement, clear rules on sanctions and penalties are crucial;
- Develop networks of experts with judicial and technical skills to improve prevention and detection within public procurement administration;
- Generate awareness building among staff of procurement administrations and society (private sector) of the effects of bribery and how to apply procurement rules and control mechanisms;

Moreover, transparency, accountability, control and professionalism are key factors in promoting integrity and fight corruption in public procurement.

In the Romanian Competition Council (hereinafter referred to as RCC)'s view, the anti-corruption provisions which can be found in the Romanian public procurement law (e.g. blacklisting of companies previously involved in corruption) contribute to enhance the transparency and integrity of public procurement. Conflict of interest provisions for civil servants that can be found in the Romanian public procurement law are also important measures to detect and prevent corruption.

In addition, the 2006 amendments brought to the Romanian legislation in public procurement in order to eliminate any interference between the different types of public procurement and align the laws to the European Community Directives led to the creation of a well functioning single public procurement authority, namely the National Authority for the Regulation and Monitoring of the Public Procurement (hereinafter referred to as NARMPP), with clear responsibilities in this field, which include monitoring and control of contract allocation.

Publication of the awarding contracts to guarantee transparency and to uncover possible irregularities in the awarding of public contracts is also extremely useful.

Moreover, in order to fight abuse in public procurement, Romania put the introduction and implementation of e-procurement on the top of its list of priority reforms. As a result, since January 2007, all public procurement announcements of the Romanian government have to be published on the national portal "e-Licitatie" ([www.e-licitatie.ro](http://www.e-licitatie.ro)) and are transferred to the EU Official Journal. It has hence become easier and faster for companies in Romania to participate in public procurement by simplifying access to information and to the bidding process, which is especially important for SMEs.

The legislation relating to public procurement provides for the possibility to exclude any enterprise or supplier from participation in the tendering process who has been convicted in the last 3 years of an offence concerning professional ethics, has been found guilty of grave professional misconduct, or it was convicted, in the last 5 years, by definitive court judgement, for participation in a criminal organisation, for corruption, for fraud and/or for money laundering proven by any means which the contracting authority can justify.

Actually, all competitors for a project are required to give a written statement on their own liability subject to the sanctions enforced upon the act of forgery in public documents that they have not been convicted in the last 3 years by definitive court judgement, for an act that does not correspond with the professional ethics or for a grave professional misconduct and that they have not been during the last 5 years, sentenced under final judicial ruling of a court for having participated in activities of criminal organisations, for corruption fraud and/or money laundering respectively.

In the case of malfeasance of procurement officials, sanctions under criminal law are possible: under section 254 (taking a bribe), section 255 (offering a bribe) and section 256 (promising or receiving undue advantages) of the Criminal Code.

For taking a bribe, the procurement official may be punished with imprisonment from 3-12 years and the interdiction of certain rights while in the case of offering a bribe, an individual may be punished with imprisonment from 6 months to 5 years. In the case of promising, offering or giving money, gifts and other benefits, directly or indirectly, to a person who has influence or induces the believe that has influence over an official, that specific official is punished with imprisonment from 2 to 10 years.

The prosecutor's offices attached to the courts of law or the National Anticorruption Department may be entrusted to investigate corruption cases according to the dispositions of the Criminal Procedure Code and the Law no. 78/2000 with the subsequent amendments and completions. In general, all cases of high-level corruption fall under the competence of the National Anticorruption Directorate, which is established as a legal entity within the Prosecutor's Office at the High Court of Cassation and Justice (HCCJ). The Romanian Competition Council has not any competence in criminal suits.

Moreover, in May 2007, the National Integrity Agency (ANI) was set up, an independent anti-corruption agency designed to remedy shortcomings in the monitoring of conflicts of interest and public officials' assets. The law no. 144/2007 establishing the agency provides that penalties for illicit enrichment, conflict of interest and incompatibilities are beyond the agency's competence, so files would be forwarded to the Prosecutor's Office, disciplinary commissions or fiscal authorities. The ANI can impose fines only for failure to submit documents or for overstepping deadlines for submitting declarations.

### 3. Collusion

Cartels are forbidden by the Romanian Competition Law no. 21/1996. Art. 5 par. (1) of the Law (which is similar with the Art. 81 of the EU Treaty) provides a non-exhaustive list of the most severe violations of the competition, such as:

*[...] Any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it, shall be prohibited, especially those aimed at:*

- *Concerted fixing, directly or indirectly, of the selling or purchase prices, tariffs, rebates, mark-ups, as well as any other terms of trading;*
- *Limiting or controlling production, distribution, technological development or investments;*
- *Allocating distribution markets or supply sources according to territorial criteria, sales and purchase volume or other criteria;*

*[...]*

- *Participating, in a concerted manner, with bids rigged in auctions or any other forms of competitive tendering.*

Moreover, the “*de minimis*” threshold for agreements between competitors is not applicable to the agreements regarding prices, sharing the markets and the procurements.

Usually, the industries characterised by fringe competitors, high barriers to entry in the respective bidding market, the presence of industry associations, little or no innovation are especially vulnerable to bid-rigging schemes. In addition, more predictable procurement schedules, the regularity of public purchases, few if any alternative products or services that can be substituted for the product or service that is being purchased are preeminent factors that could facilitate collusion in public procurement.

In Romania, it appears that the most vulnerable public sector to bid-rigging practices was the health sector. Thus, in 2008, the RCC sanctioned with fines of approximately Euro 22.6 million four pharmaceutical companies for sharing the publicly funded section of the insulin market in the context of a national tender organised in 2003 by the Ministry of Health. The collusive practice in this case aimed at sharing the diabetes product portfolio of a drug manufacturer between 3 distributors.

In another important case, 3 distributors who participated in a bid-rigging on the relevant market of dialysis products and equipment in the context of the electronic national tender organised by the Ministry of Health and the National Health Insurance House in 2003 were sanctioned in 2008 with fines exceeding in aggregate Euro 1.5 million.

In both cases, the RCC issued a recommendation to the Ministry of Health to conduct annual tenders, under the National Diabetes Programme, respectively the Nefrology-Dialysis Programme as the legal framework provides so that the access of the existing or potential undertakings to the markets is allowed.

At present, Romanian rules on public tendering do not require a certification of independent bid determination or a statement of non-collusion to accompany the tender.

However, the RCC's participation as an observer in the OECD Competition Committee's *Roundtable: Public Procurement – The Role of Competition Authorities in Promoting Competition (2007)* was very positive since has led to many tips on possible anticompetitive practices.

For instance, one lesson we learnt from the 2007 OECD roundtable discussions relates to the usefulness of Certificates of Independent Bid Determination (CIBD) and their application in the fight against bid rigging within certain OECD member countries.

Acknowledging the importance of introducing such a certificate, the RCC advocated for the introduction of such an obligation in a letter sent by the president of the RCC to the president of NARMPP in the summer of 2009. On that occasion, several strengths of such a document have been highlighted by the RCC such as (i) its informative role about the illegality of bid rigging among the bidders, (ii) prosecution of bid riggers potentially easier, (iii) possibility to apply additional penalties, including possibly criminal penalties, for the filing of a false statement by a conspirator, and (iv) prosecution of a firm that attempts to rig bids becomes possible, even when other bidders do not agree to the proposed scheme.

Following recent discussions between high level officials of the RCC and NARMAPP that took place at the RCC's headquarters about the ways and means to strengthen the inter-institutional co-operation, NARMAPP is now considering using a CIBD in procurement efforts due to bid rigging concerns. Also, the discussions resulted in a mutual agreement with respect to the content of the draft of Memorandum of Co-operation.

Finally, because bid rigging may occur alongside other crimes, such as fraud, money laundering, tax violations and public corruption, efforts have been made to strengthen the relationship between the RCC, public prosecutors and the Ministry for Home Affairs. The goal of this strand of work was to explain the legal standards for a violation of the competition law and to raise awareness of indicators of bid rigging.

Yet, the RCC signed a Memorandum of Co-operation with the Ministry for Home Affairs that creates incentives also for the effectiveness of the RCC's investigative work, especially with regard to conducting dawn-raids.

#### **4. Fighting Collusion and Corruption**

Fighting cartels is a high priority within the RCC. Currently 75% of the RCC's resources are devoted to cartel investigations.

The Romanian legislation in the competition field provides high sanctions in the case of cartels, including bid-rigging schemes. These can amount up to 10% of the total turnover for each cartel operator. Both Romanian and European legislation operate against undertakings not individuals, so the sanctions are applied only to the undertaking part of the cartel. These are culpable of committing a contravention.

However, there are situations which permit the sanctioning of an individual, when they participate with fraudulent intent and in a decisive way to the conceiving, the organisation or the realisation of any of the practices prohibited under Art.5 (1), which includes bid-rigging practices. These individuals are culpable of committing a criminal offence being convicted to jail from 6 months to 4 years or fined. The criminal action starts following the Competition Council's notification.

To improve the capacity to detect cartels, including bid-rigging, the RCC has improved the transparency of the leniency programme and introduced the marker system following the ECN leniency model. Moreover, at the end of 2009, the RCC set up the Leniency Unit that now represents the legal contact point between the RCC and possible whistleblowers.

In the corruption area, individuals engaged in bribery or corruption, are also able to receive leniency. According to the Law 78/2000 on preventing, discovering and sanctioning corruption, the perpetrator is not punished if he/she denounces to authorities the deed before the criminal investigation body is notified for that specific deed.

Yet, only one bid-rigging case gave rise to corruption suspicions and consequently to an opening of a criminal file by the Romanian Anticorruption Body. Ultimately, however, the proceedings were discontinued due to lack of sufficient evidence.

#### **5. Advocacy**

One way to ensure the efficiency of public procurement by a national competition authority is to exercise an active role within the public procurement procedures and in particular, in the auction design.

The intervention of the Romanian Competition Council may be *ex officio* or upon notification by or complaint of a natural or legal person who wishes to ensure the protection and stimulation of competition, a normal competitive environment and promotion of consumers' interest on the public procurement market.

Over the past 3 years, the RCC has increasingly been active in the public procurement area in terms of its enforcement and advocacy activities.

In terms of its advocacy activity, in several occasions, the RCC pointed out that what matters in order to reduce the risk of collusive practices are the procedures that the public contractors follow when calling for a tender. In particular, the calls do not have to contain unjustified restrictions that would automatically exclude on a discriminatory basis some companies.

For instance, in 2006, the Competition Council was asked for a point of view regarding a public procurement procedure for the award of a public supply contract i.e. the acquisition of office equipment consumables. Actually, a group of 8 producers and distributors of rechargeable /compatible consumables and the European Toner & Inkjet Remanufacturers Association (ETIRA) brought to the attention of the Council that in several cases, the terms of the tender dossier did not allow for the participation in the auction of remanufacturers, since only the original brand products were considered acceptable.

In analysing the substitutability of the relevant products, the Competition Council found that the equipment manufacturers do not impose the mandatory use of original consumables. This means the users may replace used consumables with remanufactured or compatible ones without breaching the clauses of the service contract with the OEM.

Therefore, the terms of the tender dossier were not justified and were considered restrictive from the competition point of view. Requiring from the potential bidders a compatibility certificate for the consumables in question may represent an entry barrier, thus restraining potential bidders from participating in the auction and not granting equity of chances for all.

This point of view of the Competition Council was transmitted to the producers' group and professional association in question, as well as to the contracting authorities. It was also made publicly available, through the Competition Council's website. As a result, the design of the auctions was improved, restoring free competition on the relevant market and providing fairness of opportunity for all potential tenderers.

More recently, in two other cases, namely the Romanian oncology products market and the paraclinical medical investigation services market, the RCC initiated investigations in order to review a potential breach by the public authorities with duties in the health field of article 9 of the Romanian Competition Law which prohibits any actions of the local or central public administrative bodies that have as their object or may have as their effect the restriction, prevention or distortion of competition. Based on these investigations, the RCC issued several important recommendations aimed at restoring the competitive environment.

In the case of the oncology products market, the RCC recommended the Ministry of Health to enforce the removal of the B3 form from the standard documentation for the drafting and presentation of bids within the public procurement for the national health programmes in order to allow the occurrence of real competition between distributors within tenders. The B3 form which actually represents a document issued by the producer and attesting the authorisation of the distributor in view of the delivery of products may have represented an instrument at the hand of the producer, which could have chosen to authorise only certain distributors by discriminating others, a situation that would remove the competition among distributors. The Competition Council recommended also the amendment of chapter III - Sole Source Negotiation Procedure of the Regulations on public procurement conducted in the sanitary field in view of redefining the sole source in the sense that the sole source should refer not only to the situation in which not only there is a sole producer, but also the situation in which there is a single distributor of a certain drug on the Romanian market. The final recommendation was that there should be ensured an annual conduct of tenders for the prevention and control programme of oncology pathology with a view to opening the market not only for the existing producers and distributors, but also for those that have entered the market recently.

In the investigation concerning the paraclinical medical investigation services market, the RCC noted that the Ministry of Health and the National Health Insurance House created a competitive advantage to the Euromedic Romania SRL imaging reference centre, thus disadvantaging the other paraclinical medical investigation centres operating on the market by means of a discriminatory regulatory framework and by

undertaking some specific obligations towards Euromedic, based on documents concluded by Euromedic such as promoting and recommending the medical services provided by Euromedic so that Euromedic received a substantial amount of work; granting medical or non-medical support; maintaining the exclusivity of Euromedic for the supply of imaging diagnosis services within the Fundeni Clinical Institute.

Noting the breach of the transparency, equal treatment of all bidders and the principle of free competition, RCC expressly requested the Ministry of Health and the National Health Insurance House to take actions for the removal of the undertaken obligations that granted a competitive advantage to Euromedic.

One important recent initiative taken by the RCC in order to increase the awareness of collusion in public procurement consisted in sending official letters signed by the president of the RCC to all contracting authorities with the purpose of disseminating the Guidelines for Fighting Bid Rigging which were approved by the OECD Competition Committee in February 2009. The main objective followed by the RCC with that occasion was to get procurement officials more engaged in detecting bid rigging, to help them better understand what evidence to look for, and what steps they might take to prevent bid rigging from occurring. The key message the RCC sent through this dissemination activity was that contracting authorities should watch for anticompetitive practices such as collusive tendering and any evidence of suspected collusion in tendering should be brought to the attention of the RCC. The checklist is now placed prominently on the RCC's website portal.

Another initiative of the RCC for improving the efficiency of the public procurement process envisages the creation in 2010 of a special unit within the RCC for the specific purpose of fighting bid rigging in public procurement. An important early goal of the unit will be to establish a close working relationship between officials within the RCC and key officials within other parts of the Romanian government with attributions in public procurement.

Moreover, as part of its outreach programme, the RCC will organise this spring a number of presentations for officials from Governmental Departments including Ministry of Finance officials responsible for procurement policy, state bodies and agencies. The presentations will focus on two particular issues: "Bid-rigging: When it is likely to happen? How is it investigated" and "The relationship between procurement policy and competition policy" aiming at fostering a better understanding of how procurement processes may impact on competition and value-for money. The main idea behind these advocacy activities which will be carrying on in the upcoming period is to increase the awareness of cartel behaviour and to foster a working relationship between procurement officials and the RCC.



## RUSSIAN FEDERATION

The public procurement system in the Russian Federation is regulated by the Federal Law no. 94-FZ of July 21, 2005 “On placement of orders to supply goods, carry out works and render services for meeting state and municipal needs” and the Federal Law no. 135-FZ of July 26, 2006 “On Protection of Competition”. This legal basis establishes rules and procedures aimed at ensuring equal economic area on the territory of the Russian Federation when placing public procurements, effective use of budget funds and non-budget funding sources, prevention of corruption and other abuses in the field of public procurements. Besides, this legal basis ensures openness and transparency of public procurement placement that can be proved by the fact that \$27 billion out of \$133 billion of the total amount of public procurements in the Russian Federation is won by the small businesses in 2009.

As a result of the universal introduction of tender and auction procedures for public procurement the state economised considerable budget funds at all levels. Thus, the economy of budget funds on public procurement in 2008 made up about \$9.7 billion compared to \$6.7 billion in 2007 and \$4.3 billion in 2006.

Nevertheless, this sector is considered to be one of the most coruptional ones. The biggest amount of financial violations can be seen in this sphere. According to experts’ estimates the Russian budget loses approximately from \$5 billion to \$7 billion as a result of absence of proper control over public procurement. Besides, there is a sphere of corporate procurements, carried by the Russian industrial and commercial companies. The corruption problem is also topical in this sphere because the national economy losses here are not less than budget ones.

The “National Plan on Fighting against Corruption” no. 1568 of July 31, 2008 approved by the President of the Russian Federation contains specific provisions related to the public procurement issues. In accordance with the implementation of this Plan the amendments to the Federal Law no.94-FZ of July 21, 2005 “*On placement of orders to supply goods, carry out works and render services for meeting state and municipal needs*” were made in 2009.

These amendments aimed to increase quality and transparency of public procurement placement, provide for the following:

- *Creation of single Russian-wide portal* for public procurement placement in 2011 that will help monitoring authorities to ensure proper control over published information. Availability of single information source considerably reduces risks connected with the unauthorised adjustment of information on the web sites or its unplacing, allowing creation of unified system of automatic control over procedures violations when placing public procurements;
- *Introduction of electronic auctions.* Usage of internet service for public procurements placement will provide for an opportunity to solve the corruption problem more effectively. The advantage of the electronic auctions is the opportunity to track the current price level on the market, almost excepting the possibility of participation of maximum number of suppliers regardless their geographical location in purchasing tenders that give the great opportunity to choose the most profitable co-operation conditions due to natural initiation of competition between the suppliers. Introduction of electronic auctions is aimed at development of fair competition as well as prevention of corruption and other abuses in the field of public procurements. Electronic auction is one of the most effective instruments of fighting against “home” tenders. It eliminates

possibilities of “face to face” direct negotiations of public authorities and specific companies. Along with that, trend for the electronic auctions may allow to save more than 50% of budget funds on a number of cases.

The measures indicated above contribute to the reduction of corruption risks during the public procurement placement.

With regard to the antimonopoly control of public procurement, the Article 11 of the Federal Law no. 135-FZ “On Protection of Competition” provides for “*per se*” prohibition of bid-rigging, which is one of the types of hard-core cartels and one of the major problems in the field of public procurements. There are two types of bid-rigging that can block businesses to enter public procurement process:

- Collusion between tender participants;
- Collusion between tender participants and a customer.

When considering claims by the participants of public procurement and carrying out inspections of customers the FAS Russia reveals the following major industries where bid-rigging prevails:

- Construction of large objects, including roads;
- Medicine (procurement of pharmaceuticals and medical equipment);
- Research scientific works.

The administrative responsibility for bid-rigging is provided for in the Code on Administrative Violations of the Russian Federation.

The amendments made to the Criminal Code of the Russian Federation in 2009 provide for more efficient application of Article 178 of this Code. It establishes imprisonment for the period of up to 3 years, *inter alia*, for bid-rigging. However, there is a possibility for gaining immunity under the leniency programme.

During the first half of 2009 the FAS Russia conducted the following:

- Considered 8319 claims and as a result of its consideration issued 3780 directions;
- Initiated 6010 case proceedings on administrative violations;
- Issued 1487 decisions on imposing fines for the amount of \$3 million.

Hereby as a result of the reform in the field of public procurements, measures taken to control over the observance of the Law and prevention of violations in the field of public procurements, in 2008 the amount of \$7 billion of the Russian budget was saved.

## SINGAPORE

### 1. Introduction

The Singapore government procures a substantial amount of goods and services annually. In 2008, the government purchases amount to an estimated S\$10 billion (€ billion) which is approximately 4% of the country's GDP (S\$257 billion) (€128.5 billion).

### 2. The Three Principles

Three principles underpin Singapore's public procurement process:

- Transparency – An open and transparent procurement regime across all stages of the procurement lifecycle where the government's procurement objectives, criteria and procedures would, as far as possible, be made known to suppliers.
- Open and fair competition - This will encourage suppliers to give their best offers and suppliers are given equitable access opportunities and compete on a level playing field; and
- Value for money – This is based on overall cost-effectiveness and efficiency. Value for money is derived from the optimal balance of benefits and costs on the basis of total cost of ownership. As such, value for money does not necessarily mean that the tender is offered to the lowest bidder.

Singapore's Ministry of Finance constantly reviews the procurement guidelines based on the principles listed above and makes enhancements to the procurement system whenever necessary.

### 3. Transparency

Singapore is party to the World Trade Organisation's 1994 Agreement on Government Procurement ("WTO-GPA") and implements the WTO-GPA in its national laws in the form of the Government Procurement Act, Government Procurement Regulations, Government Procurement (Challenge Proceedings) Regulations and the Government Procurement (Application) Order (the "GPA Laws"). The procurement framework applies to all government ministries including specified statutory boards. Depending on the estimated value of the intended government procurement, the procurement procedure adopted could be by way of a small value purchase, quotation or tender. Goods and services of up to S\$3000 (€1500) in value are considered small value purchases which can be purchased directly from businesses or off the shelf. All government procurement of above S\$70,000 (€35,000) must adopt tendering procedures. For goods of value between S\$3001 to S\$70,000 (€35,000), these will be purchased via a quotation system.

Additionally, the Ministry of Finance is empowered under the law to establish regulations regarding a wide scope of procurement aspects, such as pre-qualification and award procedures. The public have free access to the Government Procurement Act and also government procurement policies and procedures via the internet.

In order to keep corruption in check there is a need for a strong national governance structure based on accountability and transparency, a framework which has the effect of minimising motivation and opportunity for corruption and facilitating its detection. Clear and comprehensive regulations for the conduct of public procurement are a fundamental tenet to curbing corruption in public procurement. Government procurement activities in Singapore are decentralised to individual government procurement entities that make their own arrangements on procurement except for centralised purchasing carried out for common goods and services. In order to maintain uniformity and rigor in the process, these entities must adhere to guidelines issued by the Ministry of Finance. Further, all government officials are required to declare conflict of interests, if any, at every stage of the procurement process. Officers responsible for procurement are rotated from time to time and different officers supervise different stages of work where practicable. Members of a tender evaluation committee and those in the tender approving authority are kept different. Such separation of responsibilities avoids insulation of procurement staff and also ensures greater control through independent scrutiny. This is to ensure integrity in the procurement process.

#### **4. Open and Fair competition**

Open and fair competition is achieved through Government Electronic Business (“GeBIZ”) (<http://www.gebiz.gov.sg>), an e-procurement web portal for the whole of government where all procurement operations from the announcement of a tender to the award of the contract are conducted. All tender notices published online will contain information on the procuring entity, description of products, services, or works to be procured, dates of tender opening and closing, and venue for the collection of tender documents. The content of information which tender documents must contain is prescribed by law. The selection criteria are defined and set out in the invitation to tender and the award of the tenders are announced on the GeBIZ website. Under the GPA Laws, tendering methods may be Open, Selective or Limited. Open tendering is the default option. Selective tenders limit suppliers who satisfy the conditions for participation on grounds such as financial solvency, experience and capability and limited tendering may only be used in exceptional circumstances. Procurement in respect of some security-sensitive purchases may be exempt from the application of procurement regulations. As GeBIZ is on the internet, it ensures the widest reach for the tender and hence encourages vigorous competition.

All government entities generally adopt standard conditions of contracts and instructions to tenderers in their tender documentation. The set of standard conditions of contract contains a specific clause on corruption; bidders face the possibility of a termination of the awarded contract and the prospects of lawsuits and damages via the breach of standard conditions of contract with government agencies if they had been corrupt in obtaining or executing the contract. The GPA Laws also provide that technical specifications cannot be used as barriers to international trade and must be in terms of performance rather than design or descriptive characteristics. They must also be based on the international standard or, if no such standard exists on the applicable standard in Singapore.

Small and medium enterprises (“SMEs”) in Singapore have benefitted from the public procurement process through the following measures

- SMEs no longer need to have track records to pre-register for potential tenders;
- SMEs can receive immediate approval through an Expenditure and Procurement Policies Unit in the Ministry of Finance which performs automatic online processing;
- The rule for the amount of security deposit from suppliers has been relaxed; and

- SMEs will be allowed to form consortiums to bid for projects to overcome larger value tenders where small suppliers may not be able to meet the financial and operational requirements on their own.

## **5. Value for Money**

Government agencies accept proposals/quotations on the basis that they are the most advantageous to the Government, that is, that meet the requirements and offer the best value. Best value does not necessarily mean the cheapest option but the optimal balance of benefits and costs on the basis of total cost of ownership.

Evaluation of public procurement is done in a structured way that meets critical evaluation criteria and proposals should be evaluated on a like-for-like comparison wherever possible. High value projects should be subject to more quantifiable evaluation methods to reduce subjectivity and to provide more robust assessments.

Negotiation is permitted only in situations where there is limited competition, and where it is advantageous for the government agency to obtain better value for money purchases. However, in carrying out the negotiations, the agency should adopt the safeguards in line with the fundamental principles of incorruptibility, fairness and transparency.

## **6. Enforcing the principles**

### **6.1 *Sanctions against bidders***

In addition to a comprehensive system of administration, enforcement also plays an important role in preventing corruption and collusion in public tenders. The risk of being caught and punished acts as a strong deterrent. It follows that an essential tool to protect the procurement process is to put in place effective sanctions to deter both bidders and procurement officers from engaging in corrupt and/or collusive conduct.

Section 34 of the Competition Act (Chapter 50B) (the “Act”) prohibits any agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore. By their very nature, CCS regards collusive tendering or bid-rigging arrangements as restrictive of competition to an appreciable extent. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of the system is that tenderers prepare and submit bids independently. Any tenders submitted as a result of collusion or co-operation between tenderers will, by their very nature, be regarded as restricting competition appreciably.

CCS may, where it has made a decision that an agreement has infringed the section 34 prohibition, impose on any party to that infringing agreement a financial penalty not exceeding 10% of the turnover of the business of such party in Singapore for each year of infringement, up to a maximum of 3 years. In 2008, six pest control companies were found to have colluded to support one another in tendering projects, two of which related to public procurement, and subsequently fined for bid rigging.

Corruption offences arising out of the procurement process are investigated by the Corrupt Practices Investigation Bureau of Singapore (CPIB). Suppliers who corruptly procure a withdrawal of tenders or corruptly offer gratifications to a public officer in relation to a government contract shall be guilty of an offence and liable on conviction to a fine not exceeding S\$100,000 or imprisonment for up to at term not exceeding 7 years or both. In addition, a court may make a confiscation order against a person convicted of

a corruption offence in respect of benefits derived by him from the criminal conduct. There are also related offences of money-laundering for accomplices.

Suppliers convicted of a criminal offence related to the conduct of their business or profession may also be debarred by individual procurement entities from future government tenders. There is also the Standing Committee on Debarment (“SCOD”), comprising representatives from various government bodies, which is the authority that decides on all cases of debarment of defaulting contractors. In general, the debarment period should be commensurate with the financial or material losses suffered by the government agency and the need to protect other government agencies from the infringing persons. The debarment action has a wide application, imposing sanctions on the following:

- The contractor or any of its employees, directors, partners or its sole proprietor who had bribed a public sector officer or another person, in connection with a government agency or contract;
- Directors/partners/sole proprietors of the debarred companies/business who are involved in corruption/rigging and recommended by CPIB for debarment;
- Other companies/businesses on which blacklisted directors/partners/sole proprietors sit; and.
- Existing and new subsidiaries of the principal offending company (companies in which the principal offending company has 50% or more ownership directly or indirectly).

Debarred directors/partners/sole proprietors are allowed to appeal to the Permanent Secretary (Finance) against sanctions against them if they have good reasons not to be held personally responsible directly or indirectly, for the default.

In cases where concurrent infringement of the two jurisdictions (Competition Act and Prevention of Corruption Act) occurs, both CCS and CPIB will collaborate to handle the case. To avoid confusion, the working approach in such instances will be one agency to be the lead agency to handle dealings with the public. Both agencies will update each other on the developments in their respective investigations, subject to the confidentiality obligations under the respective Acts.

For information lodged by a complainant to either agency, the receiving agency will assess if the complaint is under its purview. If it is not, the receiving agency will, with the consent of the complainant, refer the information to the relevant agency accordingly. The referring agency will also send an interim reply to the information provider that the information has been directed to the referred agency which will then follow up with the information provider henceforth.

## **6.2 Sanctions against procurement officers**

Provisions are also put in place to bolster the integrity of procuring agency staff and bidders. Procurement officers are required to report attempts by suppliers to undermine the impartiality and independence of action through the offer of bribes, benefits or other forms of inducement under Section 32 of the Prevention of Corruption Act, Chapter 241 (the “PCA”).

To underline the priority of integrity in government procurement in Singapore, penal sanctions against procurement personnel found guilty of fraudulent practices such as accepting or soliciting bribes in relation to government contracts are particularly harsh; up to seven years imprisonment or a fine not exceeding S\$100,000 or both, may be imposed for active or passive bribery in government procurement. Such criminal penalties are compounded by civil proceedings which can be initiated against a corrupt public

official even after a conviction in court for corruption. Under Section 14(1) of the PCA, an officer may also face civil sanctions such as recovery of a civil debt by the principal against the procurement personnel.

### **6.3 Other safeguards**

To ensure the proper sanctioning of any attempt to undermine procurement regulations, anyone who has suffered or reasonably risks suffering loss or damage as a result of a breach of a contracting authority's duty is entitled to bring a challenge before the Government Procurement Adjudication Tribunal (the "Tribunal"). The Tribunal may order any decision or action taken by the contracting authority concerned to be set aside and take action in accordance with the applicable regulations in place of that which have been set aside; or in the event that the contract for procurement has already been awarded, to order the contracting authority to pay to an applicant costs reasonably incurred for the purposes of the procurement.

Other checks include regular mandatory internal and external audits of the procurement process at least once every year by the Government's Auditor-General. These Audit reports by the Auditor General Office are made available to the public. Documentation regarding the procurement proceedings has to be kept by the procuring entity for a minimum of three years.

### **6.4 Advocacy**

Singapore also recognises the importance of continuously raising the awareness of procurement officers of competition issues in public procurement. Procurement officers are often the frontline staff best placed to identify problematic situations and alert competition authorities of their suspicion. Therefore, a regular series of monthly seminars and workshops are conducted by CCS to procurement officers across government agencies. These sessions are compulsory for all new public procurement officers. It is envisaged that by building their knowledge of bid-rigging practices in their scope of work and equipping the officers with skills to spot bidding patterns and practices that suggests the possibility of bid rigging, these officers will be alert to these bid rigging dangers in the course of their daily work and in the long run, serve as an invaluable asset in the fight against bid rigging.

In this regard, the OECD Design and Detection checklist approved by the OECD Competition Committee in February 2009 will be an invaluable tool for such advocacy efforts.

Further, another tool used in the education strategy is to teach people how to react in situations that can give rise to corrupt conduct. This is where codes of conduct such as the civil service codes of conduct have an important function in imbibing the public service values of integrity, service and excellence. Public officers who can be held to account for corrupt conduct are also informed of the relevant laws and consequences.

## **7. The issue of signalling**

An e-procurement web portal such as the GeBIZ website improves the efficiency of the public procurement process as it provides a common electronic platform for suppliers and procurers across international boundaries with streamlined electronic processes. This web portal helps reduce costs, increase deal/contracting speed, improve transparency and provide costs savings through bulk purchasing. Although it is recognised that the efforts to streamline processes and improve transparency is a useful tool to curb corruption, it may be argued that there is a risk that information transparency such as readily available information on identity of successful bidders and awarded bid prices increases the risks of collusion and anti-competitive behaviour as it has a price signalling effect.

However, these risks are alleviated to a certain extent by the structure of the tender system itself. GeBIZ as a web portal allows for the maximisation of potential participation of competing bidders

worldwide; it encourages both local and foreign participation in procurement, reduces the costs of bidding and put in place participation requirements that do not unreasonably limit competition and thereby reduces the possibility of collusion. Further, the government allows smaller firms to form a consortium and tender for bigger projects to allow more firms, including small and medium enterprises to participate in such tenders. Transparency on prices also allows benchmarking across firms and therefore facilitates competitive bidding. Moreover, the easy availability and access to information via an electronic forum by which tender and award information is provided allows for ease of monitoring and policing by the authorities. Competitors can request for information on tender selection to review evaluation results and competition authorities can detect bid rigging activities via analysis of bid history patterns and other bid data.

## **8. Conclusion**

The introduction of the electronic medium for public procurement has brought about many benefits such as greater efficiency, transparency, cost savings and opportunities for small and medium businesses. However, e-procurement is but a tool and is underpinned by Singapore's three principles of transparency, open and fair competition and value for money. These principles govern the public procurement process in Singapore and are vigorously enforced by comprehensive laws and procedural safeguards.

## SLOVAK REPUBLIC

### 1. Size and policy objectives

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

The aim of public procurement is to simulate competition, where it could be weakened – in situations where public sector is a buyer. Within public procurement to which private and public sector participate, the procurer does not decide on its own, but on public funds and discretion power exists. It may cause that the best bid is not chosen, but it will be affected by corruption, or procurer will be not sensitive to the fact, that through collusion a price for state may increase. Considering the fact that state – *principal* buys through *agents* – procurers from private firms, this creates known *agent-principal* problems, area for corruption on procurers` side and collusive incentives on undertakings` side, among others.

### 2. Corruption

#### 2.1 *What is the cost of corruption?*

Apart from negative impacts on ethics and morals of the society corruption causes the following problems:

- Decisions, made in public interest, are affected by internalities (by private incentives of people who are authorised to adopt decisions in public interest). Subsequently, it causes that there is interest to maintain or to extend scope of activities, where it is decided on “other people's money”, there is pressure on extension of regulations, redistribution. Labyrinth of various regulation interventions together with discretion power in decision making creates area for corruption. Higher involvement of the state in economy has at the same time a potential to distort competition.<sup>1</sup>
- If it is decided on public funds on a basis of private motives, sources are not allocated optimally and competition is distorted. Inefficient transfers may occur; sources are shifted from efficient subjects and activities to advantage of inefficient ones. Allocation efficiency of economy is worsening. It means that the best entrepreneurs are not supported, conditions for their increase are not created, but advantages are given to entrepreneurs, which have the strongest “lobby”. Undertakings are focused on rent seeking, not on profit seeking. Thus, not the creation of wealth but its redistribution is supported. It results in decrease of all wealth of a country.<sup>2</sup>

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<sup>1</sup> Tanzi (1998) states many examples, where opportunity for corruption is connected with excessive regulation. For example he states that the harder is to understand tax laws the easier is to corrupt, because there is higher discretion power for decision makers. Similarly, Zemanovicova and collective (1998) introduces many regulation barriers in conditions of transition economies, which distort competition conditions.

<sup>2</sup> Many researches (for example Wei, 2001) indicate that negative correlation between extension of corruption and economic increase exists.

- Corruption, non-transparent rules cause higher transactions costs. The environment is favourable for corruption if rules are unclear, ambiguous and complicated. This, at the same time, creates barriers for undertakings in the form of transactions costs. Analysis of licenses, permits, concessions, subsidies and grants shows that rules for their granting are not defined clearly. This provides discretion power in decision making on one hand and creates uncertainty for undertakings on other hand. Moreover, if rules are unclear, uncertainty induces undertakings to gain advantage and certainty by bribe.
- Uncertainty of the manner how rules will be applied increases investment risk, creates barriers to entry market. If undertakings are not sure that rules and acts are respected and enforced or if they are coming to such an environment where the run of the business need giving bribes, their investment risk increases. Undertakings consider high degree of corruption as a barrier to entry to the market in the given country.
- Corruption causes that economy does not use its potential and thus consumer gets less than he/she could get at given level of sources. Prices increase and on other hand quality and availability of goods and services decrease in environment of corruption. For example an undertaking which gets public contract by bribe, includes bribe into the price paid by consumer. Estimates show that it may come to surcharge of public contracts up to 30% in environment of corruption.
- Corruption may affect extent and structure of public expenses. For example according to some studies<sup>3</sup> corruption tends to increase extent of public investments, to reduce their efficiency and affects structure of public expenses.
- Apart from economic and social consequences it is necessary to consider also wider political impacts. In environment of corruption citizen loses confidence in state, rule of law; equality before law as well as democracy itself are questioned and moral decreases. Corruption also causes inequality of citizens according to the fact whether they have sources for bribe or not, what separates citizens into ones which have access for example to education, quality health services. However, also into triable and non-punishable according to the fact whether they can ensure “favourable” settlement of legal process by bribe for themselves.

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

According to R. Klitgaard corruption formula may be framed:

$$\text{Corruption} = \text{Monopoly} + \text{Discretion power} - \text{Transparency.}$$

Corruption flourishes in situation where profit from corruption is high and risk of detection is low. It relates to formal and informal rules.

As for formal rules an area for corruption arises, if there is imbalance between supply and demand, there is monopoly. Also if rules do not exist, if they are unclear or unpredictable. Those facts allow discretion power and subjectivism. Also if the rules are not enforced, if legislation in force and law enforcement cause that risk of detection and withstanding of consequences is negligible or low comparing to benefit. Not only repression is important, but also prevention, thus such system changes, which restrict area for corruption.

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<sup>3</sup> Tanzi and Davoodi (1997).

Also informal rules are very important, because softer rules, moral system and acceptance of ethics and moral values also act as regulator of conduct. If tolerance of citizens for corruption is high, effective pressure on change does not exist. Public pressure may create political will and may lead to system changes, which restrict area for corruption and ensure both detection corruption and effective punishment. Experience shows that corruption prospers less in the countries with the active civil society.<sup>4</sup> Creation of informal rules is long-lasting process, which is affected by historic, cultural, economic conditions. Informal rules unlike formal rules cannot be changed quickly; they have their own natural inertia.

**2.3 *How do transparency programs help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?***

Transparency is the one of the most effective and the cheapest tools of restriction of corruption. In the Slovakia context, for example adoption of the Act on Free Access to Information in the year 2000 has significantly changed system of public administration, which had been closed until then.

To restrict corruption the changes in prevention area are required:

- Transparency of rules, processes, institutions, funding of political parties;
- As well as reforms for example in health care, education, because corruption prospers in imbalance between supply and demand.

Functioning control and repression systems are also important, namely control systems, police, prosecutor's office and courts.

Within informal rules it is important to increase awareness of citizens to corruption issues, interest in public affairs, to introduce issues relating to public administration, ethics, corruption and anticorruption programs to education, etc. Anticorruption strategy is spiral movement, when public pressure arouses required reaction of politicians towards acceptance of system changes restricting area for corruption and making repression more effective.

Public opinion –> political will –> rules –> implementation- > control –> public opinion<sup>5</sup>

**2.4 *Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.***

Bidders in a given tender do not officially certify that they have not bribed.<sup>6</sup>

In the Slovak Republic corruption (taking as well as offering bribes) can be prosecuted on the basis of the Criminal Code, the Commercial Code and the Act on Public Procurement. For example depending on the gravity of the conduct an imprisonment up to 15 years may be imposed for corruption. The Commercial Code considers bribery to be the one of the forms of unfair competition (§49). The Act on

<sup>4</sup> See, for example Putman (1993).

<sup>5</sup> For further information see Zemanovicova, D., Beblava, E.: *Krajinka rovných a rovnejších*, Kalligram (Country of the Equals and the More Equals), 2003.

<sup>6</sup> From incentive of non-governmental organisation the Anticorruption Charter was prepared, having been signed by more than 30 firms and having been supported by business associations. It includes also commitment not to offer bribes and not to coordinate bids within public procurement; sanctions for breaching the commitment are agreed in it.

Public Procurement in the article 26 states that corruption behaviour constitutes barrier to participate in public procurement (in conditions of participation relating to personal status it is stated that bidder must prove that he/she or his/her statutory body was not convicted of corruption).

**2.5 *Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?***

In the Slovak Republic, corruption constitutes in the meaning of the Criminal Code delict, which is investigated by law-enforcement agencies. The competition authority has no powers in prosecuting corruption cases.

**3. Collusion**

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

Factors, which facilitate collusion in procurement, are namely:

- High market concentration – relatively few subjects operate in the market and it is easy to identify competitors, or when the number of firms is rather great, but small group of important suppliers exists here and other ones are “marginal” operating only in the small part of market;
- Repetitive bidding - competitors repeatedly meet within more tenders, which allows for them to agree on a “win-win” solution for all in a certain timetable. Environment is favourable for collusion, if competitors meet each other and have created also platform for regular contacts, for example on the association ground;
- Product character – if product is homogeneous, not liable to frequent innovation, technological changes;
- Relatively high barriers to entry;
- High level of market transparency exists – although obligatory publishing of information allows better orientation in the market for competitors, detection of corruption, but it may also support collusion, because it eases control of the fact whether “agreed action” is met and whether someone is not “cheating”.

Investigation of the Office focuses mainly on sectors, where products are homogeneous, in the market operate a small number of companies, there are a repetitive bidding and barriers to entry, stable market conditions and no dynamic technological changes. Sectors which may be affected by this practice are mainly the ones, where volume of public contracts is high, for example transport infrastructure. According to study by J. Pavel (2009) investments into transport infrastructure in the Slovak Republic have been stabilized during the years 2001 – 2007 at level of 1,7% GDP.

**3.2 *What sectors in your jurisdiction were 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?***

The Office has not dealt with many cases of bid rigging so far.

In the year 2006 it issued decision concerning of bid rigging and imposed a total fine in the amount of 1 349 290 000,- SKK (44 788 222 EUR) to the six building companies for coordinating their bids in tender for realization of a section of the motorway D1. The decisive proof was the price bids concordance (of the indexes of unit prices of particular items) of particular participants to this tender, which is marked, non-standard and it has not been possible objectively to explain otherwise. This fact has been proved by many independent sources – the procurer standpoint, expert standpoint, economical analysis of bids in similar tenders and their comparison with this tender. And also no participant to the proceedings submitted any relevant proofs, which would logically explain this concordance.

The Regional Court cancelled the decision of the Council of the Office for reasons, which the Office considers to be non-consistent with the European jurisprudence – it obliged the Office in the case of agreement restricting competition to state place, time and manner of conclusion of an agreement in the operative part of the decision so the act could not be confused with another one. The Office submitted an appeal to the Supreme Court claiming that the act in the decisions of the Office (definition of participants, relevant market, description of conduct and time period) is identified sufficiently not to be confused with another one.

Apart from decision-making activities the Office has actively commented drafts of amendments of the Act on Public Procurement.

**3.3 *Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?***

Certificates of independent bid determination (CIBD) have not been used in the Slovak Republic so far.

Pursuant to the Act on Public Procurement only bidders who have not been convicted of breaching professional obligations within last three years can participate in tenders. Mainly participation in agreement restricting competition in public procurement and other serious breach of the law or serious breach of contractual obligations, which may be proved by final decision of relevant public power body, are considered to be serious breach of professional obligations. Time period begins on the day, when a decision becomes final. Real impact is doubtful because the courts are deciding on appeal even several years.

**4. *Fighting collusion and corruption***

**4.1 *What cases from your jurisdiction have involved both corruption and collusion in public procurement?***

We have not dealt with cases, where corruption and collusion in public procurement have been reviewed in parallel in the Slovak Republic. The biggest case in the matter of bid rigging is mentioned in point 3.2.

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

Empirical data indicate that perception of corruption in public procurement is very high. According to survey realised by FOCUS agency of March 2006 in the Slovak Republic 60% of respondents think that corruption behaviour in public procurement occurs often, 22% nearly always, 10% only exceptionally and

only 1% thinks that it never occurs. According to surveys corruption occurs in the Slovak Republic both at the central and also local level.<sup>7</sup>

#### **4.3 What methods and techniques for fighting corruption would aid the fight against collusion?**

Both collusion and also corruption have serious anticompetitive impacts. While collusion is realised horizontally and its aim is to manipulate bids of undertakings in the manner that the best bid from value for money view would not win, but that “win-win” solution for participants to cartel would be agreed. Thus the winner is agreed in advance and compensations for the others may be various – for example win in next tenders, subcontracts, financial compensations. The result is inefficient use of public funds (estimates point to surcharge up to 20%<sup>8</sup>) and distortion of competition conditions.

As for corruption it is vertical relation between procurer and one of bidders, which causes that unbiased selection of the best bid will not happen, but undertaking determined in advance will acquire contract. The manners of preferring may be various – setting the criteria favouring bidder, limited information on tender, applied tender method, selection criteria, provision of further information, or agreed conclusion of supplements to contracts. Alike, the result is inefficient use of public funds (estimates point to surcharge up to 30%) and distortion of competition.

In the markets, where corruption and cartel behaviour are applied in the long time period it may come to the fact that firms with correct behaviour cannot operate in the market and it may act also as barrier to entry.

There are some techniques that can help to fight corruption and also collusion:

Increase of number of bids may hinder both corruption transactions and also cartel agreements and their stability. According to many studies higher number of bids means also decrease of price for public sector.<sup>9</sup> Study by J. Pavel<sup>10</sup>, which analysed contracts in transport infrastructure area in the Slovak Republic during the years 2005 – 2009 confirmed inversely related relation between number of bids and price. Each additional bid brings in participation of two to five subjects within tender price decrease within 5 – 8% of anticipated price.<sup>11</sup>

Clear, non-discriminating requirements and specifications focused on outputs and outcomes rather than description of concrete product extend number of bidders and at the same time hinder corruption transactions.

Joint procurement may hinder conclusion of collusion. Although, higher contract value provide an incentive for firms to offer bribes and for officials to take them, various anti-corruption and anti-collusion

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<sup>7</sup> For further information see [www.transparency.sk](http://www.transparency.sk).

<sup>8</sup> A. Capobianco: *OECD Guidelines for Fighting Bid Rigging in Public Procurement, International Seminar on Competition Enforcement*, Bratislava, 2009.

<sup>9</sup> For example, Kuhlman – Johnson (1983): *The number of Competitors and Bid Prices*. Southern Economic Journal. 1983, vol. 50. No. 1., Gomez-Lobo-Szymanski (2001): *A Law of Large Numbers: Bidding and Compulsory Competitive Tendering for Refuse Collection Contracts*. The Review of Industrial Organisation. 2001. vol. 18, No. 1.

<sup>10</sup> J. Pavel: *Ako ovplyvnuje pocet uchadzacov o verejnu zakazku cenu?* (How does the number of bidders for public contract affect the price?) Transparency International Slovakia, 2009.

<sup>11</sup> It is significantly more than it was identified in USA (2%) and about same also in the Czech Republic.

tools may be concentrated on big procurements, for example CIBD, Integrity pacts and other control mechanisms. Big tenders are usually more monitored by media.

E-procurement may have anti-corruption and anti-collusion effects; Slovakia has not had many experiences in it.

Efficient control system of use of public funds would motivate procurers to find savings through intensive competition of bids without corruption and collusion. Active cooperation with competition authorities in disclosure of cartels can be assumed. For example, according to survey,<sup>12</sup> which was focused on measures, which have been accepted by procurers, in which the Supreme Audit Office and the Office for Public Procurement found breach of the Act on Public Procurement, it was found out that only 64% of subjects react to findings of control bodies by appointment of responsible person and even less (53%) adopt remedies, which would prevent from breaching the Act on Public Procurement in the future.<sup>13</sup>

#### **4.4 *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?***

Yes. Conditions of leniency are regulated only by the Act on Protection of Competition and it does not set such condition (that it cannot be bribery, corruption). The Office has not dealt with such case so far.

## **5. Advocacy**

### **5.1 *How do regulatory or institutional conditions help facilitate bid rigging and corruption?***

Formal rules that facilitate corruption and bid rigging are described in 2.2 and 2.3.

If control of efficiency of public funds expenditure is only formal, it does not motivate procurers to cooperate in disclosure of collusive conduct, which increase price of public contracts. Alike, there is not pressure on procurers to set tenders in the manner, that they minimize price through maximizing the competition (for example extension of number of bidders, application of competition procurement methods).

As it is difficult to prove corruption and collusion in public procurement, we consider it important that relevant institutions can ensure effective disclosure and sanctioning, thus that risk of disclosure of such dangerous conduct is high and real. For example in the Slovak Republic there is a problem with the judicial review of the Office's decisions. For example, if real sanctions for collusion do not impend, because the judicial review requires the standards of criminal law, then this creates conditions facilitating bid rigging, because risk of sanctioning is very low.

Low transparency, non-existence of accountability mechanisms and low public control hinder disclosure of corruption cases and do not act as prevention. As corruption cases in big public contracts are connected also with financing political parties it is necessary that clear political message to disclosure and sanctioning corruption is sent.

<sup>12</sup> Realised by Transparency International Slovakia of the year 2009.

<sup>13</sup> For further information see Efficiency of Functioning of Control Systems of Public Procurement in Slovakia, Transparency International Slovakia, 2009.

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

Competition authorities may actively participate in creation of public procurement legislation. For example in 1991 the Office initiated the Governmental Resolution on Establishment of Public Procurement. The Office actively comments submitted amendments to the Act on Public Procurement.

Interventions against bid rigging are the main tool of competition authorities.

**5.3 *What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? 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 your jurisdiction and what have been the results?***

In the Slovak Republic for example joint procurement of some items was tested through pilot projects, some goods and services are procured in this manner nowadays. The Office pressed the fact that it should be opened system, thus if procurer finds more favourable bid comparing to conditions within general contracts, it could procure independently.

In the Slovak Republic on a basis of incentive particularly by non-governmental organisation many analyses relating to public procurement<sup>14</sup> were realised and many anti-corruption tools in this area<sup>15</sup> were suggested. Integrity Pacts – agreements concluded by procurers with bidders, aim of which is to ensure transparency and exclusion of anticompetitive conduct in the tender, were the one of the suggested measures. Both undertakings and also procurers commit themselves not to offer or take bribes. Apart from other commitments bidders commit themselves that they made and will make no agreements or other forms of coordinated conduct with other participants to given tender. Commitments are accepted both by procurers and also bidders, they agree also on sanctions for not meeting them (for example rejecting contract before its ratification, exclusion from next procurements organised by the same procurer).

Problem in the Slovak Republic is that information how public procurement system could be improved exist, but it is not used and is not enforced and supported by politicians and procurers. Hence, it would be appropriate to discuss establishment of certain obligatory minimal standards for public procurement area at international level from anti-corruption and anti-collusion effects view.

**5.4 *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?***

As it was stated, both corruption and collusion lead to inefficient use of public funds and restrict competition; therefore it is necessary to find balanced solutions. Requirement of maximal transparency is key issue to fight against corruption efficiently. Important indications of corruption are additional increase of contractual price, protraction of fulfilment, conclusion of supplements to contracts, non-enforcement of contractual penalties, what constitute information, which is not so sensitive from collusion view. To prevent from publishing information, which may ease collusion it is possible to consider, which information and in what form will be provided to participants to tender and to the public. For example, it

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<sup>14</sup> For example studies How to Proceed within Public Procurement, Monitoring Public Procurement at Local Level, Transparency of Public Procurement Market in the Slovak Republic, Assessment of Transparency Rate of Public Procurement, Efficiency of Functioning of Control Systems of Public Procurement, Information Minimum of Public Procurement Process, Ethical Code in Public Procurement. Transparency International Slovakia.

<sup>15</sup> For further information see for example [www.transparency.sk](http://www.transparency.sk).

can be considered that information, which is sensitive from collusion view, would be accessible in individualized form to control institutions (in the Slovak Republic, for example the Office for Public Procurement, the Supreme Audit Office) and publicly accessible in modified form, which allows control of corruption. In this respect it would be appropriate to create best practices in this area.

**5.5 *Has your competition agency undertaken competition advocacy in this area?***

Office has prepared Indications of Anti-Competitive Conduct of Undertakings within Public Procurement, which has been published on its website and sent to all relevant procurers with request to cooperate. The Office presented this topic at many conferences focused on public procurement area. The Office has offered also cooperation to the Office for Public Procurement. However, the Office has received no incentive on suspicious conduct within public procurement from procurers or the Office for Public Procurement; it has not received information on the fact that some procurer would like to consult non-standard situations. Lack of interest and low motivation of procurers are the problem.

**5.6 *If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?***

The Antimonopoly Office of the Slovak Republic is authorised to proceed only in collusions, it is authorised to prohibit such conduct and to impose sanction up to 10% of turnover.

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## SOUTH AFRICA

### 1. Introduction

Given that public procurement accounts for between 11 and 15% of GDP<sup>1</sup>, the South African government actively utilises public procurement as a policy instrument to promote economic development to the benefit of those who had been discriminated against during apartheid.

The South African Constitution specifically provides that a preference system to advance previously disadvantaged individuals be located within a “fair, competitive, transparent and cost-effective procurement system”. Consequently, there has been a flurry of activity in policy-making and law-making to give effect to these principles. Although these policies and laws do not make specific references to bid rigging, in the antitrust sense, they are based on principles that recognise the value of competition in bringing down prices, improving quality and ensuring ‘value for money’.

Collusive tendering is a *per se* prohibition in South Africa’s Competition Act (1998). In the recent past, the authorities have seen a significant increase in bid rigging cases. This is partly due to the prioritisation of enforcement in the construction sector, where the practice appears most prevalent.

There has also been greater use of the corporate leniency policy (CLP). During January 2010, the Commission was considering 66 applications for corporate leniency, 59 of which involved collusive tendering. A further 122 marker applications, the majority in construction, had been received. Three cases involving bid-rigging are currently being prosecuted before the Competition Tribunal. These, and a fourth case which was settled, are briefly discussed below. The next section will outline government policy and legislation on procurement, and the paper concludes with a discussion of the Commission’s advocacy work.

### 2. Government Policy and Legislation

- The *Green Paper on Public Sector Procurement Reform* (1997), still referenced today by policy makers, sets the framework for subsequent policy and legislation. The Green Paper emphasised continuous monitoring and vigilance by government departments to eliminate and counter corruption.
- The *Public Finance Management Act* (1999) seeks to ensure transparency, accountability and sound management in government spending. It designates the heads of government departments and agencies as “accounting officers” who are legally obliged to ensure good governance in financial management. Accounting officers are specifically required to put into place fair tendering procedures that safeguard against corruption. The *Municipal Finance Management Act* (2003) does same for local authorities.

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<sup>1</sup> Department of Environmental Affairs and Tourism, United Nations, and United Nations Environment Programme. 2008. Final report of the national roundtable on sustainable consumption and production. Available from URL <http://www.environment.gov.za/Services/documents.html#>.

- The *Preferential Procurement Policy Framework Act* (2000) sets out criteria and procedures to ensure transparency in awarding tenders using a preference points system that favours firms owned by previously disadvantaged individuals. Regulations to this *Act*, published for comment in 2009, include a signed declaration that the information in tender documents is true and correct; and requires bidders to provide proof on request.
- A *Policy Strategy to Guide Uniformity in Procurement Reform Process in Government* (2003) provides for Treasury to set standards and publish guidelines and practice notes to ensure uniform and competitive tender procedures at all levels of government.
- *General Procurement Guidelines* proclaims “Five Pillars of Procurement”: value for money, open and effective competition, ethics and fair dealing, accountability and reporting, and equity.
- The *Framework for Supply Chain Management* (2003) prescribes a governance framework for awarding government contracts and appointing consultants. It requires separate bid adjudication and bid evaluation committees in the tender process. Members of bidding committees have to declare conflicts of interest. Firms that appear on the list of restricted suppliers do not qualify as bidders and bids from firms who have engaged in corrupt practices may be rejected.
- Treasury publishes and manages a *List of Restricted Suppliers*. Accounting officers are required to check the prohibition status of bidders prior to awarding contracts. Treasury also maintains a *List of Tender Defaulters*, which is a statutory obligation in terms of *The Prevention and Combating of Corrupt Activities Act* of 2004. This act provides that companies convicted of tender fraud may be restricted from doing business with the public sector for up to 10 years.
- In July 2009, the government established a *Ministerial Task Team* to “scrutinise public expenditure trends and propose cost-cutting measures as part of the government’s response to the economic meltdown and the negative impact of the current recession on the national fiscus.” Its objectives include preventing fraud and corruption, although it makes no specific mention of bid-rigging. The task team includes representatives from the National Treasury, Receiver of Revenue, Auditor General, Special Investigations Unit, and the Financial Intelligence Centre.

### **3. Competition Commission Cases**

#### **3.1 Concrete Infrastructural Products**

A CLP application revealed a cartel in the supply of pre-cast concrete infrastructural products to mainly government institutions and municipalities. The Commission found<sup>2</sup> that cartel members coordinated their quotations and agreed to share and allocate contracts amongst themselves to maintain agreed-upon market shares not only in South Africa but also for the Southern African region. There was also evidence of collusive tendering for contracts with two state owned entities, namely, Portnet, which controls commercial ports, and Gautrain, a government initiative to introduce a rapid rail link system in the Gauteng province of South Africa. In one instance, competitors sought to share the market by collectively bidding through “the railway sleepers’ joint venture” in circumstances where they could have bid independently

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<sup>2</sup> The Competition Commission vs Rocla, Infraset, Empowa, Grinaker-LTA, Southern Pipelines, Concrete Units, Craig Concrete, Cobro, Cape Concrete, DND Concrete, Concrit Walls and Grallio (Case number: 2008Mar3595).

The holding company of one of the parties, Aveng, settled with the Commission with an administrative penalty of ZAR46.3m (€4,1m). It also undertook to put into place a compliance programme and agreed to co-operate with the Commission's investigation. The case against the remaining members of the cartel is currently pending before the Tribunal.

### **3.2 *Pharmaceutical Supplies to Public Hospitals***

The Commission initiated an investigation<sup>3</sup> into collusion over State Tender Contract RT299, for the supply of large volume intravenous solutions and related products to public hospitals across South Africa. One of the parties subsequently applied for corporate leniency and provided detailed information about its role and the role of its competitors in the collusive tendering. The competitors had collaborated and agreed on prices prior to the submission of their respective tenders. The firms also agreed that winning firms would cede portions of their business arising from Contract RT299 to one or other of the losing firms in certain proportions.

All the members of this cartel have settled with the Commission with admissions of guilt and administrative penalties totalling ZAR55m (€4,9m). In addition the parties have agreed to implement compliance programmes.

This case drew the attention of the Department of Health to the losses it could incur through bid-rigging. The department's representative at the Tribunal hearing was keen to claim damages in terms of the Competition Act, but this has not been pursued. The experience did, however, prompt the department to review its procurement processes.

Contract RT299 was put to tender again in 2009, and interestingly the Department of Health allowed members of the cartel to bid. The department's view was that the exclusion of the firms would have been counterproductive as it would dampen competition in an oligopolistic market. One of these firms, which subsequently won part of the tender, voluntarily informed the Commission of measures it had taken, in terms of its compliance programme, to ensure an independent bidding process.

### **3.3 *Buyers of Scrap Metal***

The Commission initiated an investigation<sup>4</sup> into possible collusion in the scrap metal industry following its prohibition of a horizontal merger in the industry in February 2006. The merger documentation implicated parties in anti-competitive behaviour in the collection and supply of ferrous and non-ferrous scrap metal. The Commission found evidence of collusive tendering in the 2007 auction of wagons, coaches, and tankers by state owned rail transport entity, Spoornet (now known as Transnet Freight Rail).

There was a general understanding amongst competitors to not push up the purchase prices at local auctions or to bid against each other. The evidence indicated that the cartel had also enlisted the co-operation of an insider in Spoornet.

The acquiring firm to the merger that triggered the investigation, Reclam, has since settled with the Commission, with an administrative penalty of ZAR146m (approximately €13m), representing 6% of its

<sup>3</sup> The Competition Commission vs Adcock Ingram Critical Care (AICC), Tiger Food, Fresenius Kabi South Africa (FKSA), Thusanong Health Care (Thusanong) and Dismed (Criticare) (2005Jan1404 and 2007Nov3376).

<sup>4</sup> The Competition Commission vs The New Reclamation Group (Reclam), Aberddac Group, Amalgamated Metals Recycling, Ben Jacobs Metals, Power Metals, SA Metal and Universal Recycling (2007Aug3121).

annual turnover in the affected markets. Reclam also agreed to implement a compliance programme and co-operate in the Commission's prosecution of the remaining members of the cartel. This case will be referred to the Tribunal for adjudication.

### **3.4 *Plastic Pipes for Water and Sanitation***

Another collusion case<sup>5</sup> which emerged from a merger review was in the market for plastic pipes used mainly by municipalities in the provision of water and sanitation. The acquiring firm to the merger has also since applied for corporate leniency and has furnished the Commission with evidence of the existence of collusion in the markets for the pipe products. The alleged collusion involved price fixing, collusive tendering and the allocation of markets or customers. In allocating contracts between themselves, the cartel considered pre-existing market shares and their pre-existing relationships with customers. This matter was referred to the Tribunal for adjudication in February 2009 and the hearing is pending.

## **4. Interaction with Government**

The Commission has engaged in advocacy at various levels of government to create awareness of bid rigging. It works closely with National Treasury which is the custodian of policy for public procurement. The Commission has made submissions to National Treasury proposing the incorporation of a *Certificate of Independent Bid Determination* (CIBD) in its procurement processes. This is currently under consideration.

The Commission has also held workshops with state owned electricity utility, Eskom, which had identified bid rigging as one of its key risks. Eskom is currently undertaking a major infrastructure expansion programme. On the Commission's recommendation, Eskom is now using CIBDs in its tender processes.

Several presentations and workshops to identify, detect and report bid rigging have been held with a total of 235 procurement officials and bid adjudicators from national and provincial government departments. The Commission plans to expand its advocacy work with government departments, including a joint project with the OECD.

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<sup>5</sup> The Competition Commission vs DPI Plastics, Petzetakis Africa, Marley Pipes System, Swan Plastics, Amitech South Africa, Flo-Tek Pipes & Irrigation, Macneil Agencies, Andrag and Gazelle Plastics (Case number 2008Mar3596).

## SWEDEN

Corruption causes markets to function ineffectively. Where there is corruption cartels may occur, and where cartels exist there is an increased risk of corruption. The definition of corruption is wide but at the centre of corruption is the abuse of a position of power. Research has shown that corruption may occur as well in developed as in less developed economies and that the relationship between corruption and GNP is less evident when it comes to corruption in the tendering process. May it be that the risk of corruption is greater than what has previously been estimated?

The Swedish Competition Authority is currently giving high priority to the fight against bid-rigging cartels in public procurement. In this context, the Authority commissioned the Swedish National Council for Crime Prevention to elaborate a report on the subject of cartels and corruption. The report, called Cartels and Corruption – Unlawful Influence on Public Procurement, was presented in December 2009.

The purpose of the study has been to identify risks for cartels and corruption in connection with public procurement and the main questions it aimed to answer were:

- Which are the reasons for cartels and corruption in connection with public procurement;
- At which steps of the process are these risks present;
- Which actors, professions and sectors in particular risk being involved in cartels and corruption;
- Which similarities and differences are there between cartels and corruption;
- What can be done in order to neutralise cartels and corruption?

The Swedish National Council for Crime Prevention has conducted interviews with individuals who have great knowledge of public procurement, representing supervising authorities, public procurers and tendering undertakings. For obvious reasons it has focused on identifying where the risks for cartels and corruption are present and not where infringements actually occur.

It is clear from the report that cartels and corruption in connection with public procurement is an issue that has to be taken seriously. Despite the importance of public procurement in the Swedish economy, there is a great lack of knowledge of competition law and cartels among practitioners.

Further, the report shows that sectors facing particular risks in this regard include construction, pharmaceuticals, IT, medical equipment, transport, cleaning services, travel, stationery, provisions and laundry sectors, and that the motives behind unlawful business methods are complex. However, this report shows that some infringements may be based upon “good intentions”.

Procurers have been pointed out as running the greatest risk of being exposed to unlawful influence. The most obvious situation where there is a risk of corruption in the sense of favouring local undertakings is where the purchase is conducted directly without a previous tender.

As stated above, the main purpose of the report has not been to reveal ongoing cartels, but to identify risks for cartels and corruption with regard to public procurement. The purpose was also to discuss which counter measures could be taken in order to fight this unlawful behaviour. In this regard, the report has contributed to the Competition Authority's continuous efforts to raise awareness of competition law, fight cartels and promote an effective tendering process.

## CHINESE TAIPEI

Chinese Taipei's Fair Trade Act was enacted in 1992. The Act covers a wide range of issues related to antitrust as well as unfair competition. The antitrust part of the Act includes the abuse of dominant market position; mergers; horizontal agreements; resale price maintenance; and vertical restraints which are likely to restrain competition or obstruct fair competition.

Based on its enforcement experience, the Fair Trade Commission (FTC) has disposed of over 30 cases involving public procurement complaints from 1994 to 1998, for which the types of violations included bid-rigging and illegal collaborative bidding. After taking into consideration the likelihood that the Government Procurement Act would be enacted in May 1999 by the competent authority, i.e., the Public Construction Commission (PCC), the FTC consulted with the PCC regarding the application of the Fair Trade Act and the Government Procurement Act on competition issues related to government procurement on 21 December 1998, and the results were as follows:

- Following the enforcement of the Government Procurement Act, any competition issues to do with government procurement that are regulated under the Government Procurement Act are to be handled by the competent authority in regard to the Government Procurement Act or by other regulatory authorities in accordance with the Government Procurement Act.
- Following the enforcement of the Government Procurement Act, government agencies that plan or authorise infrastructure, such as transportation, energy, environmental protection and travel facilities, shall implement the procedures for selecting bid winners under the Government Procurement Act if the enterprises are given permission by the regulatory authorities to invest in and build such infrastructure. The Government Procurement Act's applications may, however, be excluded in deference to other regulatory authorities when other relevant laws govern.
- If the actions of the bid winner and other subcontractors related to the competition regulation are not regulated under the Government Procurement Act, such actions should still comply with the Fair Trade Act.

In other words, the FTC will intervene in the procurement conduct of government authorities only when the disputes among the bid winner and other subcontractors are related to the Fair Trade Act, following the enforcement of the Government Procurement Act on 27 May 1999. In regard to other disputes related to government procurement, the competent authority in relation to the Government Procurement Act or other regulatory authorities will be responsible for those practices based on the above consultations. It should be noted that current bid-rigging activities are subject to criminal punishment under the Government Procurement Act, which is implemented by the PCC.

## **1. Size and policy objectives in Chinese Taipei**

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

According to the PCC statistics regarding government procurement awards, the average yearly total of the contract awarding reached 1,275.5 billion New Taiwan Dollars (NTD) from 2007 to 2009, and this amount was about 10% of GDP in Chinese Taipei.

Article 1 of the Government Procurement Act provides that “this Act is enacted to establish a government procurement system that has fair and open procurement procedures, promotes the efficiency and effectiveness of government procurement operation, and ensures the quality of procurement.” In other words, the policy objectives of public procurement are fairness, openness, efficiency, quality, and incorruptibility.

## **2. Corruption**

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

The factors that facilitate corruption are mainly incorrect thoughts and strategies of enterprises, and the ethical conduct of each of a minority of public servants.

### ***2.2 How do transparency programmes help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?***

The Government Procurement Act has been launched to establish a government procurement process that is open and transparent. This Act stipulates that information with respect to invitations to tender and awards of contract should be made available on the information network. It also provides a protest and complaint system for bidders, a system to avoid conflicts of interest, as well as penal provisions for illegal acts. All those approaches help fight against corruption. In regard to the details regarding the avoidance of conflicts of interests, Article 15 of the Government Procurement Act provides the following:

*“Former procurement personnel and procurement supervision personnel shall be prohibited from contacting the entity that they previously worked for either for their own sake or on a supplier’s behalf for three (3) years following their resignation for matters related to their former duties within five (5) years prior to their resignation.*

*The procurement personnel and procurement supervision personnel shall withdraw themselves from procurement and all related matters thereof if their spouses, relatives by blood or marriage within three degrees, other relatives who live and share the property with them have interests involved therein.*

*Upon finding that any of the procurement personnel or procurement supervision personnel failed to withdraw themselves for any cause of withdrawal provided for in the preceding paragraph, the head of the entity shall order such an official to withdraw and reappoint another official for replacement.*

*A supplier shall not participate in the procurement of a procuring entity in the event that the relationship between the head of the procuring entity, and the supplier itself or its person involves the situation as that mentioned in Paragraph 2. This requirement may be waived provided that the enforcement of it is against fair competition or public interests, and that an approval for such a waiver has been obtained from the responsible entity.*

*The procurement personnel and the procurement supervision personnel of an entity shall report their properties status pursuant to relevant requirements of the Act Governing the Property-Declaration by Public Officials.”*

**2.3 *Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.***

The PCC formulated and published the “Sample Declaration for Suppliers Participating in a Tender.” Paragraph 2 of Article 59 of the Government Procurement Act provides the circumstance regarding whether or not a supplier did, does, or will induce the procuring entity to sign a contract by giving others a commission, percentage, brokerage, kickback, or any other benefits. The Public Construction Commission had this circumstance listed in the sample declaration as one of the items that must be reported when a supplier participates in a tender.

With regard to illegal acts that affect the fairness of procurement, such as corruption, the Government Procurement Act includes provisions on punishments against these acts. The relevant provisions on punishments are Article 31 (Bid bonds shall not be refunded), Articles 48 and 50 (Tenders may not be opened or awarded), and Articles 101 to 103 (Refusal of tenders involving offending enterprises).

Moreover, Article 122 of the Criminal Law and Article 11 of the Anti-Corruption Statute provide imprisonment and fines for any person who offers, promises, or gives a bribe or other improper benefits.

**2.4 *Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?***

The judicial authorities are responsible for prosecuting corruption cases in Chinese Taipei. However, the FTC has no jurisdiction in this area.

**3. Collusion**

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

The main factor that facilitates collusion in procurement is that, in cases involving large amounts of money and high profits, enterprises may attempt to use improper means to bid. Therefore, cases involving the construction industry seem especially vulnerable to bid rigging.

**3.2 *What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?***

With respect to the procurement systems that guard against collusion (bid rigging), there already are relevant provisions in the Government Procurement Act. These provisions include: Article 27 (Publishing a Notice of invitation to tender), Article 31 (Bid bonds shall not be refunded), Articles 48 and 50 (Tenders may not be opened or awarded), Articles 87 and 92 (Punishments of acts involving bid rigging), Article 93-1 (Electronic receipt of tender documentation and submission of tender), and Articles 101 to 103 (Refusal of tenders against offending enterprises).

**3.3 *Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?***

We all know that the bidders are required to disclose Certificates of Independent Bid Determination when they submit a bid or tender. The bidders declare relevant information in this document, such as they bid independently, and had no contracts, agreements, or other forms of mutual understanding with other competitors. In Chinese Taipei, to draw the attention of bidders to these things and prevent disputes from occurring, the PCC formulated and prepared documents regarding “Possible Legal Responsibilities for Participation in Public Construction Projects by Enterprises” and the related format of affidavit. In addition, the PCC sent letters and informed each government agency that the agency was to provide these items to enterprises as it handles bids. This approach allows enterprises to state by themselves that they have already understood relevant legal liabilities, such as criminal and civil liabilities, and that they are willing to comply with laws with certainty.

If a procuring agency finds that the enterprises meet one of the circumstances provided in each subparagraph of Paragraph 1 of Article 101 of the Government Procurement Act and the results of said circumstances, it will refuse tenders against those enterprises, and these enterprises may be prohibited from participating in tendering, or being awarded or subcontracted for a period of one to three years. The circumstances, for example, are where “the supplier allows any others to borrow its name or certificate to participate in a tender” (Subparagraph 1); “the supplier borrows or assumes any other’s name or certificate or uses forged documents or documents with unauthorised alteration to tendering, contracting, or performing a contract” (Subparagraph 2); “the supplier has committed any of the offenses prescribed in Articles 87 to 92 hereof, and has been sentenced by a court of the first instance” (Subparagraph 6); or a contract is rescinded or terminated by the procuring agency (Subparagraph 12).

**4. *Fighting collusion and corruption***

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

Information regarding invitation to tenders and awards of tenders in government procurement should be open and transparent. Such an approach can assist in combating corruption and collusion.

**5. *Advocacy***

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

Through the establishment of the special law, the Government Procurement Act, public procurement procedures are regulated in detail in regard to the invitation to tender, awards of contracts, administration of contract performance, inspection and acceptance, and protest and complaint procedures. It also stipulates punishments for illegal acts, such as unfair contracts; jointly monopolised bids through mutually binding actions; bid rigging; and where the bidder lends (borrows) a license to participate in the bidding project. The enforcement of the Act reduces abuses in public procurement, and improves the efficiency of public procurement through clear regulations.

- 5.2** *What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? 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 your jurisdiction and what have been the results?*

Chinese Taipei adopts relevant measures to improve the efficiency of the public procurement process, including electronic procurement, the information network, and cooperative supply contracts. Please refer to the explanations in Part II and Part III mentioned previously for relevant measures concerning the reduction of collusion and corruption in public procurement.



## TUNISIA

### Introduction

Because of its economic and financial importance, public procurement is a sensitive area which is given special attention by the Tunisian Government, which has provided the sector with double protection through a particular regulatory mechanism which has been amended repeatedly (Decree No. 2002-3158 of 17 December 2002).

This decree lays down three fundamental principles: equality, transparency and competitive procurement.

Implemented through stringent competitive procurement rules, these foundations reflect the authorities' determination to ensure optimal competition.

In putting these principles into action, public buyers take responsibility not only for efficient procurement but also for the competitive operation of a significant share of the national economy.

But it is not always easy to chart a competitive course, especially in a sector in which the characteristics of demand, which is limited in both time and space, are apt to prompt businesses to adopt anticompetitive behaviours. The realm of public procurement is not exempt from the competition legislation that seeks to protect overall market equilibrium.

This dual protection is further consolidated by the standard legislative arsenal applicable to the persons responsible for public procurement - an arsenal that includes laws on corruption and the obligations of State civil servants.<sup>1</sup>

In addition, any civil servant or official of the State, public administrative institutions or local government, or any director, officer or employee of a public company who commits a management offence against an ordinary legal entity that is subject to public accounting rules, or against a public company, shall be held accountable to the Court of Suppression of Fraud. As a rule, a management offence may be deemed to be any act of management that is committed in violation of any law, decree or regulation governing the revenue collection or expenditure of the State, a public administrative institution or a local government (which encompasses public procurement).<sup>2</sup>

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<sup>1</sup> Section 87 bis of the Tunisian Criminal Code provides that “*Any civil servant or comparable official who unlawfully obtains for himself or for any another person, either directly or indirectly, any gifts or promises of gifts or presents or advantages of any sort with a view to granting another person an unjustified advantage by means of an act that is contrary to legislative or regulatory provisions instituted to ensure freedom of participation and equal opportunity in procurement by public establishments, public enterprises, offices, local authorities or companies in which the State or local authorities hold a direct or indirect equity interest, shall be subject to five years in prison and a fine of five thousand dinars.*”

<sup>2</sup> See the judgements of the Court of Suppression of Fraud on the website of the Tunisian Court of Accounts <http://www.courdescomptes.nat.tn/indexsite.php> (Judgement No. 192 of 25 November 2005; Judgement

This contribution will focus essentially on the rules against collusion in public procurement as stipulated in the decree on public procurement and the law on competition and prices.

## **1. The Decree Regulating Public Procurement: A Guarantee of Procedural Compliance**

The attribution of government contracts is governed by the principles of equality of candidates in public procurement as well as equal opportunity, procedural transparency and competitive procurement.

These principles are implemented through compliance with rules of non-discrimination between bidders, adherence to clear and detailed procedures at all steps of the contract attribution process, timely information to bidders about those procedures and widespread disclosure of replies and explanations in response to bidders' comments and requests for clarification.

### ***1.1 At the Level of Stipulating Requirements***

Contract specifications must:

- State the purpose of the contract and the terms for carrying it out;
- Establish the conditions for participation, selection criteria and the weighting thereof;
- State the obligations and the rights of all parties concerned;
- State the allocation rule: "In formulating contract specifications, the public buyer must take account of the capacities of entrepreneurs, producers, service providers and design engineers."

Services must be stated clearly:

- They must be set forth in reference to pre-established technical specifications and any explicitly designated national or international standards that may apply;
- Any indication of brand names or of any other elements apt to limit competition or steer an order towards a given product is forbidden.

### ***1.2 At the Level of Selecting Contract Attribution Procedures:***

- Contracts must be in writing;
- It is forbidden to split public procurement contracts. It is formally prohibited to split orders so that they are no longer subject to:
  - The written contract requirement;
  - Review by the competent contracts committee.

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No. 193 of 25 November 2005; Judgement No. 194 of 25 November 2005; Judgement No. 196 of 30 December 2005; Judgement No. 252 of 23 June 2006.)

Calls for tender constitute the general rule for public procurement. Nevertheless, contracts may also be awarded through either an expanded consultation process or a negotiated contract, subject to prior authorisation:

- By decree in respect of contracts under the jurisdiction of the High Contracts Committee;
- By order of the Minister concerned in respect of contracts under the jurisdiction of other contracts committees.

Such authorisation is granted on the basis of a duly justified report and upon the advice of the competent contracts committee.

Contracts may be awarded through competitive procurement in the form of the expanded consultation procedure only in such cases as are listed on the decree.

In cases where the expanded consultation procedure is used, public buyers must consult with the maximum number of suppliers, depending on the purpose of the contract, and adhere to a written procedure that ensures equality amongst participants, equal opportunity and transparency in selecting the supplier.

Negotiated contracts may be used only for the procurement of work or supplies of goods, services or research that may be performed exclusively by a particular supplier or service provider. The public buyer must adhere to a written procedure.

### ***1.3 At the Level of Reception and Opening of Bids***

- Notification of a call for tender is published at least 30 days prior to the deadline for receiving bids;
- In an emergency, the deadline may be shortened to 15 days;
- Technical bids must be submitted by registered post or by express post;
- Financial bids are submitted directly by bidders whose technical bids have been accepted.

### ***1.4 At the Level of the Joint Control Exercised by the Various Committees***

#### ***1.4.1 Opening bids: a guarantee of transparency***

- A standing committee:
  - Appointed by the public buyer;
  - A maximum of five members including the Chair (auditor of public expenditure/State auditor).
- Bid-opening sessions are open to the public;
- The bid-opening committee meets a first time to open bids containing technical bids;

- After a review of the report on the opening of technical bids by the competent contracts committee, the bid-opening committee meets a second time to receive and open bids containing financial bids submitted directly by bidders whose technical bids have been accepted;
- Bidders are invited to submit their bids ten business days before the meeting is held.

#### 1.4.2 *Reviewing bids and selecting the supplier: the important role of audit bodies*

The bid-opening committee checks bids against contract specifications and then analyses them, referring to stated criteria, and proposes which firm should be awarded the contract:

- Ordinary services: the lowest bidder;
- Complex services: the best bidder.

In the event of obvious collusion between the bidders, or between some of them, it is imperative that the call for tender be declared unsuccessful and a new bidding process undertaken, unless this is materially impossible or in the event of an utmost emergency, in which case the expanded consultation process is used.

In addition, the public buyer must inform the minister for trade of the financial bids eliminated because of excessively low pricing in distortion of fair competition. In this case, the minister for trade may file a complaint with the Competition Council regarding the tenderers of these bids, pursuant to the provisions of Act No. 91-64 of 29 July 1991 on competition and prices.

In an emergency, the minister for trade may require that provisional measures be taken.

#### 1.4.3 *The role of the contracts committees*

Contracts committees examine the compliance of competitive-procurement and contract-attribution procedures, as well as the fairness and transparency of procurement procedures.

They also ensure that administrative, financial and technical conditions are acceptable.

Prior advice from the contracts committees is required regarding:

- Before competitive procurement:
  - Draft contract specifications in respect of open calls for tender, invitations for proposals and consultations;
  - Members of the jury and of bid-opening committees in respect of procurement under the jurisdiction of the High Contracts Committee;
  - Terms of reference and pre-selection reports in respect of calls for tender preceded by pre-selection.
- After bids have been opened:
  - Bid-opening reports and reports by proposal juries;

- Draft contracts in the event of a negotiated contract or insertion of any (even partial) amendment to one or more clauses of a contract in respect of which a bid-opening report was first submitted to the committee for review.
- During and after the contract period:
  - Proposed amendments;
  - Final settlement proposals;
  - Any problem or dispute involving the formulation, attribution, fulfilment or settlement of contracts under its jurisdiction.

#### *1.4.4 Role of the Public Procurement Monitoring and Investigating Committee*

The Public Procurement Monitoring and Investigating Committee, set up to report to the Prime Minister:

- Monitors compliance with the basic principles governing contract attribution, including equality of bidders before public procurement, procedural transparency, competitive procurement and public disclosure;
- Reviews information concerning contract fulfilment that could materially alter the factors taken into account when the contract was awarded;
- Investigates contracts, including amendments and final settlement dossiers, primarily on the basis of data collected by the public procurement observatory;
- Reviews petitions from any person concerned by the attribution of public procurement contracts or compliance with the relevant procedures;
- Deals with contract amendments that could increase the aggregate amount of a contract by more than 50%;
- Studies a sample of awarded contracts accounting for at least (10%) of the number of dossiers reviewed by the various contracts committees, as well as any dossier that the committee deems it advisable to review for any reason whatsoever (compliance with deadlines, competitive analysis, concentration index, etc.).

## **2. Application of Competition Law to Public Procurement; Additional Protection beyond Procedural Compliance Alone**

Contracts committees play an important role by reviewing contract attribution rules, in particular to ensure compliance with the three stated principles. But this procedural watch does not provide an absolute guarantee against the risk of anticompetitive practices.

Under competition law, the matching of a call for tender and bidders' responses thereto constitutes a market in and of itself (the "relevant" market). Here, the conditions for healthy competition do not necessarily exist simply because there has been formal compliance with the rules for attribution.

The Directorate-General for Competition and Economic Surveys (DGCEE), which is represented on the majority of contracts committees, has adopted its own method for combating collusion in public procurement by detecting evidence of anticompetitive practices and formulating investigative reports that can be submitted to the Competition Council.

A number of choices that public buyers must make regarding the conditions for competitive procurement and the use of procedures may in fact run counter to the desired end of optimal competition and, without appearing to do so at first, restrict free competition. The buyer must exercise vigilance with regard to any evidence of concertation amongst bidders. The Tunisian competition authorities are also empowered by law to intervene in accordance with their methods to combat anticompetitive practices in public procurement.

The investigations carried out by the DGCEE begin by looking at any dysfunction stemming from the behaviour of certain businesses, but they make a distinction between such dysfunction and the potential dysfunction resulting from procedures implemented by public buyers, and they deploy technical or economic means that might explain apparent evidence of anticompetitive practices.

### ***2.1 Dysfunction Stemming from the Behaviour of Certain Businesses***

In contrast to other sectors of activity, public procurement features a single price submission mechanism that does not allow a bidder to position, calibrate or adjust itself vis-à-vis the competition in successive steps.

This aspect constitutes an additional element of uncertainty for operators who might be tempted to reduce the uncertainty, e.g. by exchanging information.

Exchanges of information promoting concertation between businesses for the purpose of dividing up contracts or eliminating a competitor are prohibited by Act No. 64-91 on competition and prices, as amended.

Section 5 (new) provides that “Concerted actions, collusion and express or tacit agreements shall be prohibited if they have an anticompetitive purpose or effect, or if they seek to:

- Thwart the determination of prices by free interaction between supply and demand;
- Limit the market access of other businesses or the free exercise of competition;
- Limit or control production, sales outlets, capital investment or technical progress;
- Divide up contracts or sources of supply...”

Public buyers therefore have a paramount position in the mechanism for detecting collusive practices.

In this regard, their role in many cases involves merely examining the bids and behaviour of bidders, and on occasion it can involve extensive analysis of market structures and the strategies deployed by businesses.

In most cases, the evidence likely to be uncovered can take the following forms:

- Evidence relating to bid amounts:

- Following a misunderstanding in the exchange of information, firms submit identical pricing proposals;
- There are linear coefficients of increase or decrease between the unit prices of different bidders in cases where cover bids are established by the same person;
- Each bidder submits a competitive bid for one lot and non-competitive bids for the other lots, whereas all lots are technically identical and based solely on a geographical criterion;
- The price proposed by a group is significantly below the estimate – a practice that may well reflect a desire to eliminate a new entrant or a competitor who is especially aggressive on a commercial level.

### **Box 1. Practices Used in Connection with a Call for Tender to Supply Bread**

#### **Practices Noted:**

Presentation of cover bids.

#### **Proof:**

It comes from the financial proposals submitted by bidders:

- In respect of the proposal's appearance: use of the same handwriting and fonts (documents filled out by one and the same person);
- In respect of the proposal's substance: the substance of the proposal is as follows:
  - One bid proposes a price that is lower than the two other bids (pre-designated bidder),
  - Two cover bids propose identical prices higher than those of the pre-designated bidder,
  - Hearing minutes.

#### **IV-DECISION OF THE COUNCIL: Decision No. 2145 of 25 December 2003**

Pursuant to Section 34 of Act No. 91-64 on competition and prices, the Competition Council fined the three parties concerned by the illegal agreement practice defined in Section 5 (new) of the Act.

- Evidence based on the project owner's price estimate:
  - All proposed prices exceed the administrative estimate except for one, which is slightly lower;
  - The price proposed by a group is significantly below the estimate (evidence of an eviction practice);
  - A firm enjoying a dominant position in the market proposes excessively low prices (potential evidence of predatory pricing).

**Box 2: Practices Noted in Public Procurement Involving the Supply of Red Meat to a Public Establishment**

**Target of Investigation:** Eviction pricing and cover bid practices in calls for tender involving the supply of red meat to educational institutions for the 2006/07 school year.

**Parties Involved:** Three bidders (red-meat merchants)

**Practices Noted:**

- Abuse of dominant position by bidder 1 (B1) on the relevant market;
- Collusion amongst bidders: cover bids from bidder 2 (B2) and bidder 3 (B3) to deceive the public buyer as to the level and intensity of competition.

**Decision of the Competition Council No. 81159 of 31 December 2008:**

- The Council imposed **fin**es totalling 25 000 dinars (approximately EUR 14 700) broken down as follows:
  - 15 000 dinars for B1;
  - 5 000 dinars for B2;
  - 5 000 dinars for B3.

All of these practices suggest the need to explore the ability of a project owner or lead contractor to estimate the cost of the work involved.

- Evidence relating to the content of a bid:
  - Bids having similar appearance (page layout, font, spacing between thousands and units in the presentation of prices);
  - Identical additions of a service not mentioned in the contract specifications;
  - An identical and erroneous change to the contract specifications by more than one bidder;
  - Bids featuring identical errors in prices and quantities;
  - Substantial price variances for items usually characterised by fairly similar market prices (such as concrete and steel);
  - Only the lowest-bidding firm completes all items on the price sheet, “forgetting” all sorts of materials (administrative documents, certificates, etc.) which make the bid unacceptable.
- Evidence stemming from bidders’ attitudes:
  - Disproportionate number of bids submitted in relation to the number of applications taken out;
  - Absence of bids from pre-selected firms in connection with a restricted call for tender;
  - Withdrawal of a firm after applications are taken out, after bidders are selected or after bids are submitted, citing an error in calculation or any other argument;
  - Undisclosed legal and economic ties between firms having the same officers;

- Bidders who for the most part belong to the same group and submit independent pricing bids;
- Systematic formation of groups for low-value contracts;
- A single bid received from a group with high prices relative to the estimate whereas a number of firms in the group would be capable of performing the work on their own;
- Absolute stability in the attribution of lots when a contract is renewed.
- Evidence stemming from how work is performed:
  - Groups of which one company alone performs all of the work;
  - The winner of a contract subcontracts the bulk of the work to a rival bidder.

Nevertheless, technical or economic factors may explain such empirical evidence.

After taking stock of apparent failures of competition on the part of various players in the public procurement sector, the findings should be tempered by the realisation that the behaviours observed may in some cases be the result of technical or economic factors.

If this is the case, then the observed practices are not in fact anticompetitive.

#### 2.1.1 *Explanations in the realm of prices*

It is sometimes observed that a firm will propose very different prices for an identical service, depending on the geographical sector for which it is bidding. Such a situation may be explained by the following reasons:

- Knowledge of a particular location or economic environment (delivery of the initial tranche, manager of the facility, holder of a related contract);
- The timetable set by the public buyer may constitute a constraint and generate a higher cost for which some bidders intend to charge;
- A company's backlog of orders may also prompt it to submit "aberrant" bids in the sense that it comes forward to bid but does not wish to win the contract because of its work load and contracts in progress (this may be the case in the summertime, when economic activity slows and demand for work is high);
- The heterogeneous nature of soil in respect of work requiring general excavation work;
- Constraints related to the tourist season in some areas;
- The urban or peri-urban environment of the work;
- Time needed to access the site;
- Economic conditions for supplying the site.

#### 2.1.2 *Systematic re-appointment of previous contractors and stability in the attribution of lots*

When some contracts come up for renewal, it may be noted that firms are the lowest bidders for lots that they had previously been attributed.

This renewal situation may constitute an anticompetitive practice if the bidders had held a concertation meeting before bids were submitted.

However, re-attribution may be explained by the following reasons:

- Economies resulting from knowledge of the field on the part of outgoing suppliers;
- The size of personnel and materials costs stemming from the distance from the contract locations;
- Even if firms are of nation-wide scale, they are not always in a position to bid systematically on all lots.

## **2.2 *Dysfunction Stemming from Procedures Implemented by Public Buyers***

In many cases, a well-intentioned buyer may nonetheless restrict competition or foster collusive behaviours on the part of firms as a result of the following practices:

- An excessively specific definition of needs (contract specifications too specific) or, conversely, an inadequate definition which dissuades companies from bidding or gives an advantage to firms already in place;
- Firms are required to have excessive technical qualifications unjustified by the type of contract involved;
- Concentration by all public buyers in a given sector of their purchases at the same time of the year (a practice generally fostered by budget procedures);
- Inappropriate allotment or consultation in respect of excessively large lots apt to cause some firms to abandon the idea of bidding;
- Call by the project owner for the formation of groups, whereas the technical or economic features of the contract do not require it;
- Substantial penalties in the event contract completion is delayed;
- Excessively short deadlines for studying a complex dossier or for completing the work.

## **3. Conclusion**

The Tunisian legal and institutional framework provides strong protection for public procurement through specific legislation guaranteeing the institution of optimal competition and horizontal legislation (the law on competition and prices) which seeks to prohibit anticompetitive practices, including cartels and abusively low pricing practices. Ordinary and criminal law also establish rules against corruption in public procurement. The Tunisian competition authorities play an important role in combating collusion, and the DGCEE has adopted its own investigative method to detect evidence and successfully carry out its mission.

The Ministry of Trade and Handicrafts, which is represented on all tender committees, through the Directorate-General for Competition and Economic Surveys and the Regional Trade Directorates in particular, is available to public buyers for any advice regarding procedural optimisation or competitive procurement clauses, and to examine and act upon any evidence of collusive concertation or restriction of competition.

## TUNISIE

### Introduction

En raison de son poids économique et financier, les marchés publics constituent un domaine sensible qui bénéficie d'une attention particulière de la part du gouvernement tunisien qui a procédé à une double protection de ce secteur par une réglementation spécifique qui a subi multiples modifications (le décret n° 2002-3158 du 17 décembre 2002).

Ce décret énonce trois principes fondamentaux à savoir l'égalité, la transparence, le recours à la concurrence.

Déclinés à travers des règles de mise en concurrence très strictes, ces fondements expriment la volonté du pouvoir public d'assurer, une mise en concurrence optimale.

Les acheteurs publics, dans la mise en œuvre de ces principes, portent non seulement la responsabilité d'un achat efficace, mais aussi celle du fonctionnement concurrentiel d'une partie conséquente de l'économie nationale.

Mais la recherche d'un comportement concurrentiel n'est pas toujours facile, notamment dans un secteur où les caractéristiques de la demande, circonscrite dans le temps et l'espace, sont susceptibles d'engendrer de la part des entreprises, des comportements anticoncurrentiels. Le domaine des marchés publics n'échappe pas à l'application de la législation de la concurrence visant la protection de l'équilibre général du marché.

Cette protection double est en outre consolidée par les règles de droit commun applicables aux responsables des achats publics relatives notamment à la corruption et aux obligations des fonctionnaires de l'État.<sup>1</sup>

En outre, tout fonctionnaire ou agent de l'État, des établissements publics administratifs et des collectivités publiques locales, tout administrateur, dirigeant ou agent des entreprises publiques, auteur de fautes de gestion commises au détriment des personnes morales de droit public soumises aux règles de la comptabilité publique et au détriment des entreprises publiques, est justiciable de la Cour de Discipline financière. Et d'une manière générale, peut être considéré comme faute de gestion, tout acte de gestion passé en infraction à des lois, décrets et règlements applicables en matière d'exécution des recettes et des

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<sup>1</sup> L'article 87 bis du code pénal tunisien prévoit : « est puni de cinq ans d'emprisonnement et d'une amende de cinq mille dinars , tout fonctionnaire ou assimilé qui aura agréé , sans droit, soit pour lui-même , soit pour autrui, directement ou indirectement , des dons ou promesses de dons ou présents ou avantages de quelques nature que ce soit en vue d'octroyer à autrui un avantage injustifié par un acte contraire aux dispositions législatives et réglementaires ayant pour objet de garantir la liberté de participation et l'égalité des chances dans les marchés passés par les établissements publics, les entreprises publiques , les offices, les collectivités locales et les sociétés dans lesquelles l'État ou les collectivités locales , participent directement ou indirectement a son capital. »

dépenses de l'État, des établissements publics administratifs et des collectivités locales ( le cas des marchés publics).<sup>2</sup>

Cette contribution portera essentiellement sur les règles réprimant la collusion dans les marchés publics à travers le décret relatif aux marchés publics et la loi relative à la concurrence et aux prix.

## **1. Le décret réglementant les marchés publics ; une garantie de respect des procédures**

La passation des marchés publics est régie par les principes de l'égalité des candidats devant la commande publique et l'égalité des chances, la transparence des procédures et le recours à la concurrence.

Ces principes sont consacrés à travers le respect des règles de non discrimination entre les candidats, le suivi de procédures claires et détaillées de toutes les étapes de conclusion du marché et l'information des candidats de ces procédures à temps, et la généralisation de la communication des réponses et explications quant aux observations et éclaircissements demandés par les candidats.

### **1.1. Au niveau de la définition des besoins**

Les cahiers des charges doivent :

- définir l'objet du marché ainsi que les conditions de son exécution ;
- fixer les conditions de participation, les critères de choix et leur pondération ;
- indiquer les obligations et les droits des parties concernées;
- définir la règle de l'allotissement : « L'acheteur public doit, lors de l'élaboration des cahiers des charges relatifs au marché, prendre en considération la capacité des entrepreneurs, des producteurs, des prestataires de services et des bureaux d'études ».

Les prestations doivent être clairement exprimées :

- elles doivent être définies par référence à des spécifications techniques préalablement établies et éventuellement à des normes nationales ou internationales nommément désignées ;
- toute indication de marque ou d'éléments susceptibles de limiter la concurrence ou d'orienter la commande vers un produit déterminé est interdite.

### **1.2. Au niveau du choix de la procédure de passation :**

- obligation de passer un marché écrit ;
- interdiction du fractionnement de la commande publique : Il est formellement interdit de fractionner les commandes de façon à les soustraire :

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<sup>2</sup> Voir les arrêts de la cour de discipline financière disponible sur le site de la Cour des comptes tunisienne <http://www.courdescomptes.nat.tn> (Arrêt n°192 du 25 novembre 2005 ; Arrêt n°193 du 25 novembre 2005 ; Arrêt n°194 du 25 novembre 2005 ; Arrêt n°196 du 30 décembre 2005 ; Arrêt n°252 du 23 juin 2006.)

- à la passation de marchés écrits,
- à leur examen par la commission des marchés compétente.

L'appel d'offres constitue la règle générale de passation des marchés publics. Toutefois, il peut être passé des marchés soit par voie de consultation élargie soit par voie de marché négocié, et ce, après autorisation préalable :

- par décret pour les marchés relevant de la compétence de la Commission Supérieure des Marchés ;
- par arrêté du ministre concerné pour les marchés relevant de la compétence des autres commissions des marchés.

Cette autorisation est accordée sur la base d'un rapport dûment justifié et après avis de la commission des marchés compétente.

Il peut être passé des marchés après mise en concurrence par voie de consultation élargie uniquement dans des cas dont la liste est indiquée par le décret.

L'acheteur public doit, dans les cas où il est fait recours à la procédure d'une consultation élargie, consulter le maximum de fournisseurs selon l'objet du marché et observer une procédure écrite garantissant l'égalité des participants, l'équivalence des chances et la transparence dans le choix du titulaire du marché.

Il ne peut être passé de marchés négociés que pour les marchés de travaux, de fournitures de biens ou services et de recherche dont l'exécution ne peut être confiée qu'à un fournisseur ou prestataire de services déterminé. L'acheteur public doit observer une procédure écrite.

### ***1.3. Au niveau de la réception et de l'ouverture des plis***

- L'avis d'appel à la concurrence est publié 30 jours au moins avant la date limite fixée pour la réception des offres
- En cas d'urgence 15 jours
- Les offres techniques doivent être envoyées par la poste et recommandées ou par rapide poste
- Les offres financières sont remises directement par les candidats dont les offres techniques ont été acceptées.

### ***1.4. Au niveau du contrôle collégial exercé par les différentes commissions :***

#### ***1.4.1 L'ouverture des plis : une garantie pour la transparence***

- Une commission permanente :
  - désignée par l'acheteur public,
  - maximum 5 membres dont le président (contrôleur de dépenses publiques/ contrôleur d'État).

- Les séances d'ouverture des plis sont publiques
- La commission d'ouverture des plis se réunit une première fois pour l'ouverture des plis contenant les offres techniques
- Après examen du rapport de dépouillement des offres techniques par la commission des marchés compétents, la commission d'ouverture se réunit une deuxième fois pour la réception et l'ouverture des plis contenant les offres financières remis directement par les candidats dont les offres techniques ont été acceptées
- Les candidats sont invités à remettre leurs offres 10 jours ouvrables avant la tenue de la séance.

#### *1.4.2 L'examen des offres et du choix du prestataire : rôle important des organismes de contrôle*

La commission de dépouillement examine la conformité des offres aux Cahiers des Charges et procède à l'analyse de celles-ci en se référant aux critères annoncés et propose l'entreprise attributaire :

- prestations courantes: moins-disant ;
- prestations complexes: mieux-disant.

Dans le cas d'entente manifeste entre les participants ou certains d'entre eux, il y a lieu de déclarer impérativement l'appel d'offres infructueux et de procéder à une nouvelle mise en concurrence, sauf cas d'impossibilité matérielle ou d'urgence impérieuse, il est fait recours à la consultation élargie.

En outre, l'acheteur public informe le ministre chargé du commerce des offres financières éliminées en raison des prix excessivement bas entachant la concurrence loyale. Dans ce cas, le ministre chargé du commerce peut saisir le conseil de la concurrence d'une requête à l'encontre des soumissionnaires de ces offres conformément aux dispositions de la loi n° 91-64 du 29 juillet 1991 relative à la concurrence et aux prix.

En cas d'urgence, le ministre chargé du commerce peut requérir la prise de mesures provisoires.

#### *1.4.3 Rôle des commissions de marchés*

Les commissions de marchés examinent la régularité des procédures de recours à la concurrence et de l'attribution des marchés et la sincérité et la transparence dans les procédures de passation des marchés.

Elles s'assurent également du caractère acceptable des conditions administratives, financières et techniques.

Sont soumis à l'avis préalable des commissions de marchés :

- Avant l'appel à la concurrence :
  - les projets des cahiers des charges des dossiers relatifs aux appels d'offres ouverts, aux appels d'offres avec concours et aux consultations ;
  - la composition du jury et des commissions de dépouillement pour les dossiers relevant de la compétence de la commission supérieure des marchés ;

- les termes de références ainsi que les rapports de présélection relatifs aux appels d'offres précédés de présélection.
- Après dépouillement des offres :
  - les rapports de dépouillement et les rapports de jury de concours ;
  - les projets de contrats de marchés en cas de recours à la passation d'un marché négocié ou en cas d'insertion d'une quelconque modification même partielle d'une ou de plusieurs clauses du projet du marché dont le rapport de dépouillement a été soumis au préalable à l'examen de la commission.
- Au cours et après l'exécution du marché :
  - les projets d'avenant ;
  - les projets de règlements définitifs ;
  - tout problème ou litige relatif à l'élaboration, la passation, l'exécution et le règlement des marchés relevant de sa compétence...

#### 1.4.4 *Rôle du Comité de suivi et d'enquête sur les marchés publics*

Le Comité de suivi et d'enquête sur les marchés publics crée auprès du Premier Ministre est chargé de :

- suivre le respect des principes de base régissant l'attribution des marchés et notamment l'égalité des candidats devant la commande publique, la transparence des procédures, le recours à la concurrence et la publicité ;
- examiner les données relatives à l'exécution des marchés qui sont de nature à altérer les éléments ayant été pris en compte lors de l'attribution du marché ;
- enquêter sur les marchés y compris les avenants et les dossiers de règlement définitifs, principalement sur la base des données collectées par l'observatoire des marchés public ;
- examiner les requêtes émanant de toute personne concernée pour l'attribution des marchés publics et le respect des procédures y afférentes ;
- les avenants aux marchés qui sont de nature à engendrer une augmentation du montant global du marché de + 50 % ;
- étudier un échantillon de marchés conclus représentant au moins ( 10% ) du nombre des dossiers examinés par les différentes commissions des marchés ainsi que tout dossier que le comité juge opportun d'examiner pour quelque motif que ce soit (Respect des délais, analyse concurrentielle, indice de concentration,...)

## **2. L'application du droit de la concurrence aux marchés publics ; une protection complémentaire au delà du simple respect des procédures**

Les commissions de marchés jouent un rôle important à travers l'examen des règles de passation, notamment pour assurer le respect de trois principes énoncés. Mais cette veille procédurale ne constitue pas une garantie absolue contre le risque de pratiques anticoncurrentielles.

Au sens du droit de la concurrence, le croisement d'un appel d'offres et des réponses de candidats constitue un marché par lui-même (marché « pertinent »). Sur celui-ci, les conditions d'une saine concurrence ne sont pas nécessairement réunies, du simple fait du respect formel des règles de passation.

La direction générale de la concurrence, représentée dans la majorité des commissions des marchés, a adopté sa propre méthode de lutte contre la collusion dans les marchés publics en détectant les indices des pratiques anticoncurrentielles et en élaborant des rapports d'enquêtes qui peuvent être soumis au conseil de la concurrence.

Mis à part un certain nombre de choix, auxquels l'acheteur public est amené à procéder, quant aux conditions de la mise en concurrence, et à l'utilisation des procédures, pouvant, aller à l'encontre du but recherché qui est la mise en concurrence optimale et restreindre, sans qu'il y paraisse au premier abord, le jeu concurrentiel. La vigilance de l'acheteur s'exerce à l'égard de tout indice de concertation entre soumissionnaires. Les autorités de concurrence tunisiennes sont aussi légalement habilitées à intervenir selon leurs méthodes pour lutter contre les pratiques anticoncurrentielles dans les marchés publics.

Les enquêtes menées par la DGCEE partent des dysfonctionnements liés aux comportements de certaines entreprises tout en distinguant ces dysfonctionnements de ceux liés aux procédures mises en œuvre par les acheteurs publics et en employant des éléments techniques ou économiques susceptibles d'expliquer les faits observés au stade de l'indice.

### **2.1. Les dysfonctionnements liés aux comportements de certaines entreprises**

Contrairement aux autres secteurs d'activités, les marchés publics se caractérisent par une remise de prix unique ne permettant pas à un soumissionnaire de se positionner et de s'étalonner ou s'ajuster par approches successives par rapport à ses concurrents.

Cet aspect constitue une incertitude supplémentaire pour les opérateurs qui pourraient être tentés de la réduire en procédant notamment à des échanges d'informations.

Ceux qui ont pour objet une concertation des entreprises dans un but de se répartir les marchés ou d'évincer un concurrent sont prohibés par la loi n°64-91 modifiée relative à la concurrence et aux prix.

L'article 5 - (nouveau) prévoit que « sont prohibées, les actions concertées, les collusions et les ententes expresses ou tacites ayant un objet ou un effet anticoncurrentiel, et lorsqu'elles visent à :

- faire obstacle à la fixation des prix par le libre jeu de l'offre et de la demande;
- limiter l'accès au marché à d'autres entreprises ou le libre exercice de la concurrence;
- limiter ou contrôler la production, les débouchés, les investissements, ou le progrès technique;
- répartir les marchés ou les sources d'approvisionnement... »

Les acheteurs publics détiennent donc une position de premier plan dans le mécanisme de détection de pratiques collusives.

Leur rôle, à cet égard, relève fréquemment d'un simple examen des offres de prix et du comportement des soumissionnaires, occasionnellement d'une analyse approfondie des structures de marché et des stratégies mises en œuvre par les entreprises.

Le plus souvent les indices susceptibles d'être détectés peuvent prendre les formes suivantes :

- Les indices relatifs au montant des offres
  - A la suite d'incompréhensions dans l'échange d'information, les entreprises remettent des propositions de prix identiques
  - Coefficients linéaires de majoration ou de minoration entre les prix unitaires des soumissionnaires dans le cas où les offres de couverture sont établies par la même personne
  - Chaque candidat propose une offre compétitive pour un lot et des offres non concurrentielles pour les autres lots, alors que tous les lots sont identiques techniquement et fondés uniquement sur un critère géographique
  - Offre de prix d'un groupement sensiblement inférieure à l'estimation. Pratique susceptible de constituer une volonté d'évincer un nouvel entrant ou un concurrent particulièrement agressif sur un plan commercial.

#### **Box 1. Pratiques mise en œuvre dans le cadre d'appel d'offre relatif à la fourniture de pain**

##### **Les pratiques relevées :**

La présentation d'offres de couverture.

##### **Les preuves :**

Elles concernent les offres financières émanant des candidats :

- au niveau de la présentation de l'offre : utilisation de la même écriture et police de caractère (documents remplis par la même personne) ;
- au niveau du contenu de l'offre : le contenu des offres se présente comme suit :
  - une soumission qui présente une offre de prix moindre que les deux autres soumissions (soumissionnaire pré désigné),
  - deux soumissions de couverture qui présentent des offres de prix identiques plus élevés de l'offre du soumissionnaire pré désigné,
  - les pv d'audition.

#### **IV-DECISION DU CONSEIL : Décision n° 2145 du 25 décembre 2003**

Sur la base de l'article 34 de la loi n° 91-64 relative à la concurrence et aux prix le conseil de la concurrence a infligé des amendes pécuniaires aux trois parties concernées par la pratique d'entente illicite édictées à l'article 5 (nouveau) de la loi.

- Les indices fondés sur l'estimation de prix du maître d'ouvrage
  - Ensemble des propositions de prix supérieures à l'estimation administrative à l'exception de l'une d'entre elles légèrement inférieure
  - Offre de prix d'un groupement sensiblement inférieure à l'estimation (indice de pratique d'éviction)
  - Offres de prix excessivement basses déposées par une entreprise bénéficiant d'une position dominante sur le marché (indice pouvant être la manifestation d'un prix prédateur).

**Box 2. Pratiques constatées dans le cadre d'un marché public  
d'approvisionnement d'un établissement public en viande rouge**

**Objet de l'indice:** Pratique de prix d'éviction et offres de couverture par des soumissionnaires dans les appels d'offres relatifs à la fourniture de viandes rouges pour des établissements d'enseignement pour l'année scolaire 2006-2007 .

**Parties concernées:** Trois soumissionnaires (commerçants de viandes rouges)

**Les pratiques relevées:**

- Abus de position dominante du soumissionnaire 1(S1) sur le marché pertinent ;
- Collusion entre soumissionnaires : offres de couverture des soumissionnaires 2 (S2) et 3 (S3) pour tromper l'acheteur public sur le niveau et l'intensité de la concurrence.

**Décision du C.C n 81159 du 31/12/2008 :**

- Le conseil a infligé des **sanctions pécuniaires** s'élevant au total à 25 milles dinars (environ 14,7 Milles Euros) et se répartissant de la manière suivante :
  - 15 000 dinars pour S1,
  - 5 000 dinars pour S2,
  - 5 000 dinars pour S3.

Cet ensemble de pratiques nécessite une réflexion sur l'aptitude du maître d'ouvrage ou d'œuvre à évaluer le montant des travaux.

- Les indices relatifs au contenu de l'offre
  - Présentations similaires de l'offre (mise en page, police de caractères, espacement entre les milliers et les unités dans la présentation des prix)
  - Rajouts identiques d'une prestation non prévue par le cahier des charges
  - Modification identique et erronée du cahier des charges par plusieurs soumissionnaires
  - Offres présentant des erreurs identiques dans les prix et les métrés

- Importants écarts de prix pour des postes caractérisés habituellement par des prix de marché assez semblables (béton, acier)
- Seule l'entreprise moins disante remplit sérieusement tous les postes du bordereau de prix des "oublis" de toute nature (documents administratifs, attestations...) rendant l'offre inacceptable.
- Les indices relatifs à l'attitude des soumissionnaires
  - Disproportion entre le nombre de dossiers retirés et les offres déposées
  - Absence de soumissions de la part d'entreprises présélectionnées dans le cadre d'un appel d'offres restreint
  - Entreprise se désistant après le retrait des dossiers, après la sélection des candidats ou après la remise des offres en invoquant une erreur de calcul ou tout autre argument
  - Liens juridiques et économiques non déclarés pour des entreprises ayant les mêmes dirigeants
  - Les soumissionnaires appartiennent pour la plupart à un même groupe et remettent des offres de prix indépendantes
  - Constitutions systématiques de groupements pour des marchés de faible montant
  - Une seule offre reçue d'un groupement avec des prix élevés par rapport à l'estimation alors que plusieurs entreprises de ce groupement ont la capacité de réaliser seules les travaux
  - Stabilité absolue dans l'attribution des lots à l'occasion du renouvellement d'un marché.
- Les indices relatifs aux modalités d'exécution des travaux
  - Groupements pour lesquels la totalité des travaux est réalisée par une seule entreprise
  - L'attributaire d'un marché sous-traite la majeure partie des travaux à un concurrent soumissionnaire.

Toutefois il y a des éléments techniques ou économiques susceptibles d'expliquer les faits observés au stade de l'indice.

Après avoir recensé les dysfonctionnements de concurrence émanant des différents intervenants du secteur des marchés publics, il convient de nuancer en précisant que les comportements observés peuvent dans certains cas s'expliquer par des considérations techniques ou économiques.

Dans cette hypothèse les pratiques constatées ne revêtent pas un caractère anticoncurrentiel.

### 2.1.1 *Explications dans le domaine des prix*

Quelquefois il est observé qu'une entreprise remet des prix très différents pour une prestation identique selon les lots géographiques auxquels elle soumissionne. Cette situation peut s'expliquer par les raisons suivantes :

- connaissance des lieux ou de l'environnement économique (réalisation de la première tranche, gestionnaire de l'installation, titulaire d'un marché connexe) ;
- le calendrier fixé par l'acheteur public peut constituer une contrainte et engendrer un coût plus élevé que certains soumissionnaires entendent faire payer ;
- le carnet de commandes des entreprises peut également les conduire à remettre des offres "aberrantes", dans le sens où elles se portent candidates mais ne souhaitent pas obtenir le marché compte tenu de leur charge de travail et des marchés en cours (c'est éventuellement le cas en été, où l'activité économique est moindre et les besoins en travaux importants) ;
- la nature hétérogène des sols pour des travaux nécessitant un terrassement ;
- les contraintes liées à la saison touristique dans certaines zones ;
- l'environnement urbain ou périurbain des travaux ;
- le temps d'accès au chantier ;
- l'importance économique du chantier ;
- les conditions économiques d'approvisionnement du chantier.

#### *2.1.2 Reconduction systématique des anciens titulaires et stabilité dans l'attribution des lots*

Lors du renouvellement de certains marchés il peut être constaté que les entreprises sont les moins disantes pour les lots dont elles étaient précédemment attributaires.

Cette situation de reconduction d'une entreprise est susceptible de constituer une pratique anticoncurrentielle, lorsqu'une réunion de concertation des soumissionnaires s'est tenue préalablement à la remise des offres.

Cependant la reconduction peut également s'expliquer par les raisons suivantes :

- les économies résultant de la connaissance du terrain dont bénéficient les entreprises sortantes ;
- l'importance des coûts en personnel et en matériel tenant à la distance des lieux d'intervention ;
- même si les entreprises sont de dimension nationale, elles ne sont pas toujours en mesure de soumissionner systématiquement à l'ensemble des lots.

#### *2.2. Les dysfonctionnements liés aux procédures mises en œuvre par les acheteurs publics*

Souvent par souci de bien faire, l'acheteur peut restreindre le jeu de la concurrence ou favoriser des comportements collusifs de la part des entreprises, lesquels résultent notamment des pratiques suivantes :

- une définition trop pointue des besoins (cahiers des charges trop précis) ou inversement une définition insuffisante qui dissuade les entreprises de soumissionner. ou donne un avantage aux entreprises déjà en place ;

- la demande aux entreprises d'une qualification technique trop pointue alors que la nature du marché ne l'exige pas ;
- la concentration par tous les acheteurs publics d'un même secteur, de leurs achats, à une même période de l'année (pratique favorisée en général par les procédures budgétaires) ;
- un allotissement inadapté ou une consultation concernant des lots trop importants susceptible de conduire certaines entreprises à renoncer à soumissionner ;
- la sollicitation par le maître d'ouvrage de la constitution de groupements, alors que les caractéristiques techniques ou économiques du marché ne l'exigent pas ;
- la fixation de pénalités importantes dans l'hypothèse d'un retard dans l'exécution des travaux ;
- la fixation de délais trop brefs pour étudier un dossier complexe ou de délais trop courts pour la réalisation des travaux.

### **3. Conclusion**

Le cadre juridique et institutionnel tunisien assure une protection rigoureuse des achats publics à travers une législation spécifique garantissant une mise en concurrence optimale et une législation horizontale (loi relative à la concurrence et aux prix) visant l'interdiction des pratiques anticoncurrentielles notamment les ententes et l'offre ou la pratique des prix abusivement bas. Le droit commun et notamment pénal prévoit aussi des règles réprimant la corruption en matière des marchés publics. Les autorités de concurrence en Tunisie jouent un rôle important dans la lutte contre les collusions, la DGCEE a adopté sa propre méthode d'enquêtes afin de détecter les indices et de bien mener sa tâche.

Le Ministère du Commerce et de l'Artisanat, à travers notamment la Direction Générale de la Concurrence et des enquêtes économiques et les Directions Régionales du Commerce, présent dans toutes les commissions d'appels d'offres, est à la disposition des acheteurs publics pour tout conseil en matière d'optimisation des procédures ou clauses de mise en concurrence et pour examiner et prendre en charge tout indice de concertation collusive ou de restriction de la concurrence.



## TURKEY

### 1. Introduction

Public procurements hold a privileged position in the economies of all countries. Various reasons may be listed for this importance. First of all, financial policies, in addition to monetary policies also have an important role to play in the economic policies of countries. When the fact that monetary policies are generally carried out by the independent central banks is taken into account, financial policies become the most important tool that governments can use. Within the scope of financial policies, income policies and cost management can be seen as two fundamental elements. The first, consisting of taxes, is mainly under the control of a few state institutions charged with gathering income, while in the cost management area many institutions may intervene. This is due to the fact that goods and services procurements by public institutions and organisations are not carried out centrally; instead, each institution or organisation makes its purchases within its allocated appropriation, in accordance with its relevant legislation. Consequently, in public procurements, the state acts as a buyer within the economy and directly intervenes in the economy. In other words, public procurements have an important place in the economic lives of nations, since they are financial policy instruments which may be characterised as direct interventions in the economy.

Secondly, public procurements are important because they involve the use of the taxes collected from the citizens for their funding. It is a requirement of democracy that governments spend properly the taxes they collect from their citizens based on their sovereign rights. This is because expenditures are made on behalf of the citizens and citizens decide, through the members of the parliament, on where the money should be spent. For that reason, public procurements, which are funded by the taxes paid by the citizens, must be made in an efficient manner.

Another point that reflects the importance of public procurements is their share within the economy. Statistically, public procurements constitute 15% of the Gross Domestic Product (GDP) in OECD states, while this ratio is even higher in other countries. Some numbers from Turkey may be beneficial in explaining why public procurements are important. According to the Public Procurement Authority (PPA) (2009) report<sup>1</sup>, public procurements of about 84 billion TL were made in 2008. This corresponds to around 8.8% of the GDP of Turkey for the year 2008, which was listed as approximately 950 billion TL in the Turkish Statistical Institute (TSI) (2009) data<sup>2</sup>, and it demonstrates more clearly the importance of public procurements for the country's economy. According to another piece of data from PPA<sup>3</sup>, annual sum of public procurements in Turkey corresponds to about 10% of the GDP.

Considering they use a significant portion of the country's income, lightening the burden of public procurements on the state budget and ensuring their efficiency is closely related to the establishment and protection of competition. As a matter of fact, Article 5 of Act no 4734 (Public Procurement Law) lists the basic principles to be followed in public procurements as follows: transparency, competition, equal

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1. PPA, Public Procurements Monitoring Report 2008.
  2. TSI, News Bulletin, Issue 52.
  3. [http://www.tbmm.gov.tr/develop/owa/dosya\\_p.indir?pDosyaAdi=F1902048463\\_pbk23112009.pdf](http://www.tbmm.gov.tr/develop/owa/dosya_p.indir?pDosyaAdi=F1902048463_pbk23112009.pdf), p.9, paragraph 4.

treatment, reliability, secrecy, public supervision, meeting the needs under fair terms and in a timely manner, and efficient use of resources.

Ensuring competition in public procurements depends on properly analysing the product and market conditions and designing the tender in a way most appropriate for the existing conditions. Also, obtaining an efficient result in the tender process depends on absolute prevention of competitors from engaging in anti-competitive agreements during the tender processes. In other words, preventing collusive bidding by the competitors is very important in order to obtain the expected benefits of the tender. This is because it is beneficial for public welfare to ensure competition in a market that corresponds to at least 10% of the country's GDP.

## **2. Tender Markets and Competition in Turkey**

Collusive bidding has a very significant place in competition law. When collusive practices which are among the gravest infringements of competition occur, especially in public procurements, their damage extends to the society at large. Therefore, worldwide competition authorities watch tenders more vigilantly. Likewise, the Turkish Competition Authority (TCA) works with an aim to protect competition in public procurements as well and has made important decisions. Below some decisions by the Competition Board, the decision making body of the TCA, will be given, together with a discussion of their implications.

### **2.1 *Medical Consumables Decision*<sup>4</sup>**

In the said decision of 2007, the fact that the undertakings selling miscellaneous medical consumables refrained from participating in tenders opened by hospitals was deemed as setting of supply conditions outside of market. This is because, when hospitals opened tenders to purchase consumables, undertakings operating in the market were concerned that the tender procedure would lower prices and decrease their profits, and they consequently decided to boycott the tenders. In compliance with the boycott decision, the undertakings did not bid in the tenders and the hospitals faced difficulty in purchasing their urgent needs. Hence it becomes clear that, collusive bidding may not only damage the economy but also, more importantly, human life and health.

### **2.2 *Medical Laboratory Decision*<sup>5</sup>**

The decision taken during the last days of 2008 involves many of the infringements of competition that may occur in tender markets. The allegations that the undertakings that were found to have infringed the Competition Act by this decision were engaged in:

- Making collusive bids while determining the estimated cost prior to a tender;
- Submitting “cover bids” in favour of one another in tenders<sup>6</sup>;
- Making collusive bids in tenders;

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4. Competition Board Decision dated 16.3.2007 and numbered 07-24/236-76.

5. Competition Board Decision dated 19.12.2008 and numbered 08-74/1180-455.

6. Cover bid is a concept frequently used by undertakings that participate in a tender. It suggests that, a bidding undertaking asks another undertaking that is normally not going to participate in the tender or does not intend to win the contract, to submit an artificial bid to give the impression that there is competition in the tender. Thus, the first undertaking submits a so-called competitive bid by offering a lower bid than the cover bidder.

- Entering into subcontracting agreements among themselves after winning contracts;
- Participating in the tender both on their own behalf and on behalf of another undertaking which they jointly own, were examined and there were findings that substantiated these allegations.

One thing in common between this decision and the previous one is the assistance received from the prosecutors' offices. The most important evidence used in both of the cases was based on the information and documents obtained by the prosecutors' offices during prosecutions for bid rigging offenses<sup>7</sup>. It must be said at this point that competition authorities, public procurement authorities and prosecutors' offices should work in close co-operation. In fact, in every case, information from the public authorities that lay down regulations in the market concerned by the tender is also very helpful. For instance, in the Medical Laboratory decision, the information obtained by the Ministry of Health Inspection Committee during their investigation on the matter was also used by the TCA.

### 2.3 *Medicine Decision*<sup>8</sup>

Similar to the Medical Consumables decision, undertakings boycotting the tenders by hospitals for purchasing medicine and serum were found to violate the Competition Act and were imposed fines. With respect to this decision, it should be emphasised that undertakings that decide to boycott tenders that are vital for patients' life and health do not create only economic harm.

As it is seen, the three decisions mentioned above are related to the health sector. Although there are many undertakings party to those decisions, the number of participants in the tenders that are the subjects of the decisions decreases and there are usually three or four participants in the tenders.<sup>9</sup> The most important reason for this is the fact that the number of undertakings reduces at the regional level. In other words, few undertakings participate to hospital tenders in various regions, however as the number of regions increases, the number of undertakings also increases. Moreover, it should be noted that the number of manufacturers is limited in the tenders especially in medicine, consumables and laboratory equipment, in the health sector. The dealers of those manufacturers participate to the tender; consequently, the number of competing brands at the tender base is limited. Therefore, one of the most important reasons for the difficulties in the health sector is the oligopolistic structure.

As of the beginning of the year 2009, the TCA examined 34 files related to tenders. 17 of those files were subject to investigation whereas 12 of them were closed after the preliminary inquiry stage. Most of the investigations are carried out in the health sector (medical device, medicine, laboratory equipment and consumables). Cement, ready-mixed concrete, refractory, transportation, fertiliser, accumulator, bread, traffic signalisation, milk and automotive can be listed among other sectors.

## 3. **Corruption**

Corruption is often encountered in public procurement tenders. Many researches show that corruption is a widespread phenomenon in public procurement along with customs, licences, and construction (Acar

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7. Besides being an infringement of competition under the Competition Act, collusive bidding also constitutes a bid rigging offense under the Turkish Penal Code (numbered 5237) (Article 235, (2), d.).

8. Competition Board Decision dated 19.1.2007 and Numbered 07-07/43-12.

9. [http://www.rekabet.gov.tr/dosyalar/images/file/Ekonomi/pamukkale2009/ucar\\_aygun.ppt#283,27](http://www.rekabet.gov.tr/dosyalar/images/file/Ekonomi/pamukkale2009/ucar_aygun.ppt#283,27), Sonuç ve Öneriler [Conclusion and Recommendations]. In a study on the health sector (laboratory equipment), the number of participants is less than three in 237 of 310 tenders.

and Emek, 2008).<sup>10</sup> The Public Procurement Law contains significant provisions on probity and anti-corruption. It already contains the mandatory exclusion requirements of the latest EC Directives on selection, and also defines and prohibits other forms of bribery and corruption in a separate article. The Public Procurement Law also provides for sanctions and penalties in the event of discovery, which apply to both individuals and companies and can lead to temporary or permanent disbarment, depending on the severity or frequency of the crimes. In the event of criminal activity, the Public Procurement Law provides for action by the public prosecutor and the criminal authorities (SIGMA, 2009). Allegedly corrupted contracts of procurement have been investigated by independent inspection boards which are embedded and widely distributed in the administrative system. These boards are related to various entities such as Turkish Parliament, Presidency, Prime Ministry and line ministries.

The public procurement has long been singled out by the public and its officials as one of the most corruption-prone areas in need of an urgent and comprehensive reform.<sup>11</sup> Arguably, the EU decision to grant Turkey candidate status during Helsinki Summit in 1999 and the economic reform program ‘Strengthening the Turkish Economy’, which was put into implementation right after 2000-2001 financial crisis, significantly contributed to the hands of the reformers desiring to enhance anti-corruption efforts, including preparation and adaptation of a new Public Procurement Law (Acar and Emek, 2008). As stated in the Ninth Development Plan: ‘new procurement law with competitive and transparent tender rules and in conformity with international norms aims, among others, to increase effectiveness and to prevent corruption’ (SPO, 2006: 28).

Although the TCA does not have any authority to investigate corruption, it is required to notify the relevant authorities, which are mainly the prosecutor or the inspection departments of the relevant government agencies in case it obtains any findings on corruption. For instance, in the Medical Laboratory decision mentioned above, because the information received by the TCA also included allegations of corruption they were sent to the prosecutors.

Corruption in tenders usually occurs while the tender specifications document is prepared. Existence of terms that seems to restrict competition in the tender specifications document, which determines the characteristics of those who could participate in the tender, may sometimes be the result of corruption. In other words, tender specifications may be prepared in such a way that they may designate a certain undertaking aimed to be the winner as a result of the tender via a secret agreement between the authorised personnel of the undertakings and the public officials. The public official, who prepares the tender specifications document in favour of the relevant undertaking, may obtain illegal advantages. The prosecutors and other government agencies carry out examinations about the public official and the authorised personnel of the undertakings under these circumstances. Moreover, the relevant tender may also be cancelled. According to Article 12 of the Public Procurement Law, tender specifications document should not include terms that restrict competition or designate a specific brand or model or specify features or definitions indicating any brand or model. For instance, PPA decided in a decision<sup>12</sup> taken in 2003 that the fact that a certain model had been designated in the tender specifications document was unlawful.

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10. According to Ministry of Construction in Turkey quoted in an OECD study “[u]ntil the enactment of the new Public Procurement Law in 2003, Turkey has suffered exceptionally high construction costs by international comparison. For instance, the cost of construction for 1 km of highway was US\$ 10 million in Turkey, compared to international reference price of a US\$ 4 million’ (Gönenç et al., 2005).
  11. For example, the Seventh Development Plan envisioned in 1995 that “public procurement legislation would be changed to provide competition and transparency ..., and would be harmonised with EU Directives” (SPO, 1995).
  12. Decision dated 5.1.2003 and numbered 2004/UK.Z-10 is available via <http://vatandas.ihale.gov.tr/karargoster.asp?k=393&metin=>

Moreover, the Public Procurement Law sets out appropriately the content of tender documents and tender notices. In this respect, Public Procurement Law's qualification criteria largely reflect those of the EC Directives, including the more recent mandatory exclusion provisions. Besides, under the Public Procurement Law, the open procedure is the basic procedure; other procedures restricting competition such as restricted and negotiated procedures may only be applied when special conditions for their use have been fulfilled. Although there are concerns about the compatibility of the Public Procurement Law with the current EU legislation, as highlighted by SIGMA (2009) it is fair to say that the current Public Procurement Law has many significant similarities with EU procurement legislation on which it was closely modelled.

#### **4. Conclusion and Suggestions**

As it is known, collusive bidding is a subject seriously emphasised in competition law. There are many studies which only discuss the analysis of collusive bidding according to competition rules. A market corresponding to 15% of the GDP in average for OECD countries and approximately 10% of the GDP for Turkey deserves being monitored in detail by competition authorities. Thus, competition authorities whose task is to protect competition spend significant amount of work for preventing the restriction of competition by undertakings in tenders in every country.

Support by other institutions and agencies is also important in terms of tender markets to which competition authorities devote considerable time. Public procurement authority of the country and judicial authorities should be the primary institutions with which the competition authorities should co-operate. Especially, competition authorities that do not have the power to wiretap should get support from agencies that have such power. Most of the evidence is collected by judicial agencies in tenders where the most secret cartels are formed in Turkey as well. Providing competition authorities with access to data concerning tenders plays an important role in fighting with collusive bidding. Accordingly, the TCA and PPA concluded a co-operation protocol on 14.10.2009.<sup>13</sup> The said protocol aims to increase the co-operation between two agencies that work for establishing and protecting competition in tenders. Moreover, the TCA provides training in public institutions and agencies as well as in the private sector in order to prevent possible competition infringements in tenders. In addition to this, a guideline, which public institutions and agencies can easily comprehend and benefit from, is currently under preparation within the TCA.

Consequently, the TCA closely examines tenders in order to prevent collusive bidding. There are important decisions on this subject. Moreover, it co-operates with public authorities, particularly with PPA and the public prosecutors' office.

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13. <http://www.rekabet.gov.tr/dosyalar/images/file/RK-K%C4%B0K%20Protokol%2014%2010%202009.pdf>.

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## UNITED KINGDOM

This paper provides responses from the UK Office of Fair Trading (OFT) to the questions set for the roundtable discussion on Collusion and Corruption in Public Procurement. It should be noted at the outset that the OFT does not investigate corruption cases and more attention has therefore been given to answering the questions on collusion in public procurement.

The OFT works closely with the police and the Serious Fraud Office (SFO) on criminal investigations, concerning both competition and consumer issues. The SFO is the lead agency in the UK for investigating and prosecuting cases of domestic and overseas corruption and fraud. If the OFT were to receive any information suggestive of corruption in public procurement during the course of its own competition enforcement investigation, it would notify the matter as appropriate.

### 1. Executive Summary

The UK government devotes a large share of public spending to public procurement– with an estimated £221bn<sup>1</sup> spent on public procurement in 2008/2009 for the purchase of goods and services from road building to housing. The 2008 Julius Review<sup>2</sup> found that in 2007/8 the UK public service industry<sup>3</sup> had a turnover of £79 billion, generating £45 billion in direct value added and employing over 1.2 million people. It also indicated that, over a 12 year period to 2007, the public service industry grew at an average annual rate of over 5 per cent in real terms.

Collusion in public procurement can therefore have significant detriment for the procuring public authority, including government and public authorities, and ultimately for taxpayers.

The Office of Fair Trading (OFT) has alerted government to the risk of collusion in public procurement, and has worked with procurement officials in an effort to fight bid-rigging more effectively. The OFT, together with the UK public body responsible for the provision of advice on public procurement, the Office of Government Commerce (OGC), has therefore provided guidelines for public procurement officials to help them identify any signs of potential collusion. In addition, the OFT has worked with the UK government in promoting a better understanding of how bidding procedures can be designed in order to make it more difficult for competitors to collude. There may however be a tension - certain formal public procurement measures which seek to minimise the risk of corruption can increase the risk of collusion. For example, information on the terms and conditions offered by winning and losing bidders is sought to ensure the fair treatment of bidders and provide information on expenditure of public funds. However, collusion is more easily sustained where there is greater transparency about potential bidders and details of bids. The OFT has previously advised how the risk of collusion can be mitigated.

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<sup>1</sup> See the Public Expenditure Statistical Analysis, 2009 [http://www.hm-treasury.gov.uk/pespub\\_pesa09.htm](http://www.hm-treasury.gov.uk/pespub_pesa09.htm).

<sup>2</sup> [www.berr.gov.uk/files/file46965.pdf](http://www.berr.gov.uk/files/file46965.pdf).

<sup>3</sup> The term 'public service industry' refers to firms involved in providing public services on behalf of the UK government.

In addition, the OFT's report on *Government in Markets*<sup>4</sup> and its market study *Assessing the impact of public sector procurement on competition*<sup>5</sup> provide advice to policymakers on how public procurement can affect the structure of the market and the incentives of firms to compete in the long run. The purpose of these reports is to highlight how an effective procurement policy can promote efficiency and can ensure that those who offer best 'value for money' are awarded contracts, thus avoiding mismanagement of public funds.

At the same time, the OFT has successfully pursued instances of collusion in public and private procurement by pursuing civil competition law infringements, most recently in the *Construction* case which resulted in the imposition of financial penalties totalling £129.2 million on one hundred and three companies found to have engaged in bid-rigging activity including associated 'compensation payments' in relation to building projects worth in excess of £200 million. At the time the decision was published, the OFT together with the OGC, provided further advice on how procurement officials can detect bid rigging and design procurement processes so as to minimise the risk of collusion. This included providing reference to recent OECD guidelines on these issues.

In addition, the UK has seen its first criminal cartel convictions for bid-rigging and other cartel activity in the *Marine Hose* case which involved both public and private contracts.

Through these cases, and previous OFT decisions into bid-rigging, the OFT has sent a clear message that collusion in procurement is a serious breach of competition law attracting substantial penalties for the companies and individuals involved.

The OFT's increased enforcement action, along with education of procurement officials in detecting signs of collusion, is designed to have a significant deterrent effect.

In addition, to its enforcement and advocacy work the OFT is seeking to understand how more compliance can be achieved. The OFT is currently working with business and their lawyers to understand the drivers of compliance and non-compliance, to identify current best practices in competition law compliance and to identify further steps which the OFT could take to encourage compliance.

One of the early themes that are emerging from this project is that businesses have integrated compliance agendas which are part of an overall business ethics and corporate responsibility approach. By working with business and their lawyers in identifying best practices, greater compliance generally can be achieved including compliance in competition law and anti-corruption.

## **2. Competition Enforcement - Bid Rigging**

Since the UK Competition Act 1998 came into force in 2000, the OFT has investigated a number of civil competition infringements involving bid rigging affecting both public and private procurement.

The OFT's most recent bid rigging investigation into the construction industry is described in detail below.

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<sup>4</sup> See the OFT website: [www.of.gov.uk/shared\\_of/business\\_leafllets/general/OFT1113.pdf](http://www.of.gov.uk/shared_of/business_leafllets/general/OFT1113.pdf).

<sup>5</sup> See the OFT website for a copy of the market study: [http://www.of.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/completed/procurement](http://www.of.gov.uk/advice_and_resources/resource_base/market-studies/completed/procurement).

## 2.1 *The OFT Construction Investigation*

On 21 September 2009 the OFT issued an infringement decision imposing fines of £129.2 million (after reductions for leniency) on 103 companies for bid rigging comprising predominantly ‘cover pricing’ in the construction industry in England including associated ‘compensation payments’, following one of its largest ever investigations<sup>6</sup>.

Cover pricing describes a situation where one or more bidders collude with a competitor during a tender process to obtain a price or prices which are intended to be too high to win the contract. The tendering authority, for example a local council or other customer, is not made aware of the contacts between bidders, leaving it with a false impression of the level of competition and this may result in it paying inflated prices. The associated compensation payments that were uncovered involved the successful bidders paying an agreed sum of money to the unsuccessful bidders.

The firms were found to have engaged in illegal anti-competitive bid-rigging activities on one hundred and ninety nine tenders during the period 2000 to 2006. The OFT found that in eleven tendering rounds, the lowest bidder faced no genuine competition because all other bids were cover bids, and which is likely to have resulted in the client having unknowingly paid an inflated price. The OFT also found six instances where successful bidders had paid compensation payments of £2,500 to £60,000, which were facilitated by the raising of false invoices.

The infringements affected building projects across England worth in excess of £200 million including building projects for schools, universities, hospitals, and numerous private sector projects including the construction of apartment blocks and housing refurbishments. Eighty six out of the one hundred and three firms received reductions in their penalties because they admitted their involvement in cover pricing prior to the OFT's infringement decision. Thirty three of the companies received reductions for leniency.

The OFT's investigation originated from a specific complaint in the East Midlands in 2004, but it quickly became clear from the evidence that the practice of cover pricing was widespread. The industry itself described the practice as ‘endemic’ and the OFT's investigation included dawn raids on fifty seven companies in the period from November 2004 to March 2006. The range of infringements therefore included the East Midlands as well as neighbouring areas Yorkshire and Humberside and other areas in England.

The OFT also received evidence of cover pricing implicating many more companies on thousands of tender processes, which presented challenging case management issues and a call for innovative solutions. The OFT prioritised and focused its investigation to a more limited number of infringements by using objective prioritisation criteria, with a view to reaching a decision comparatively swiftly, while still ensuring that the scale and scope of the investigation reflected the ‘endemic’ nature of the practices in question so as to maximise the deterrent effect of its investigation. The OFT's case strategy and management is discussed in further detail in the two textboxes below.

Following the OFT investigation, the UK Contractors Group and National Federation of Builders jointly launched a competition law code of conduct to help avoid breaches of competition law by the construction industry. Although the OFT has not formally endorsed the code of conduct, it is a welcome initiative in response to the OFT's investigation.

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<sup>6</sup> Further information including the OFT's Decision can be found on the OFT website: [www.of.gov.uk/shared\\_of/business\\_leaflets/general/CE4327-04\\_Decision\\_public\\_1.pdf](http://www.of.gov.uk/shared_of/business_leaflets/general/CE4327-04_Decision_public_1.pdf).

**Box 1: Case Strategy and Case Management: Prioritisation**

The OFT narrowed the scope of the case by firstly categorising the initial evidence according to ‘evidential weight’ in order to focus on those parties where evidence of bid rigging was greatest and strongest.

Secondly, the OFT proceeded to investigate only those companies where there were reasonable grounds to suspect their involvement in bid rigging on at least five tenders.

This resulted in a range of suspected infringements and parties that reflected the endemic nature of the practices in question, in that it covered:

- A broad spread of companies, in terms of size (with turnover ranging from around £100,000 to over £2.5 billion);
- A broad spread of companies in terms of location (with companies operating from various different regions of England, as well as nationally).

In addition, it was necessary to pursue both companies that had and companies that had not received leniency to ensure that companies are not deterred from coming forward as leniency applicants (with 70 companies that had not applied for leniency as well as the 33 that had applied).

For each of these companies, the OFT selected five tenders for further investigation and then proceeded to interview witnesses (estimators and managers employed by the leniency applicants) in respect of those tenders. The OFT also contacted the procurers to ensure that it based its investigation on accurate information regarding the bids made for each tender.

**Box 2: Case Strategy and Case Management: Availability of Leniency and ‘Fast Track’ Offers**

In order to limit and focus its investigation, the OFT also decided in the beginning of 2007 to close the door to any further leniency applications so as to keep the investigation manageable and to proceed in an efficient and timely manner. At the same time the OFT launched a ‘Fast Track Offer’ to those companies that had not applied for leniency but remained under investigation.

If other companies had applied for leniency, it would not have been possible for the OFT to progress the investigation in an efficient and timely manner due to the need to investigate fresh allegations and to make a further selection of tenders and companies for investigation.

Notwithstanding the decision to close the door to further leniency applicants, the OFT nevertheless wished to put the non-lenieny parties on notice that they were under investigation, to inform them of the tenders in respect of which they were suspected of engaging in bid rigging activities, and as part of its ongoing investigation to give them an opportunity to provide a voluntary admission of liability. In exchange for any admissions, the parties were offered a 25 per cent reduction of any financial penalty that the OFT ultimately imposed in respect of any suspect tenders for which admissions were received. This constituted the OFT’s ‘Fast Track Offer’.

The OFT did not provide the non-lenieny companies with the evidence against them at this stage, but the companies were given the opportunity to provide the OFT with the identity of the companies with whom they had engaged in bid rigging on each tender, thereby providing independent corroboration of the OFT’s existing evidence.

Of the eighty five non-lenieny Parties that were sent Fast Track Offer letters by the OFT, forty five admitted engaging in bid rigging activities in all or some of the suspect tenders identified by the OFT. This led to significant procedural efficiencies and resource savings for the OFT’s investigative team, allowing it to conclude the investigation more efficiently and comparatively quickly.

### 3. Roofing Investigations

Prior to the OFT *Construction* investigation the OFT investigated collusion in the roofing industry in various parts of the UK. The OFT issued several decisions between 2004 and 2006 fining companies for cover pricing and provision of compensation payments in the roofing industry, as follows:

- March 2004 – West Midlands flat roofing – fines of £300k after leniency imposed on 9 companies<sup>7</sup>. This decision was appealed to the Competition Appeals Tribunal, which upheld the OFT’s decision on liability in its entirety but made a small reduction to the penalty imposed on one of the parties;
- March 2005 – North East flat roofing – fines of £470k after leniency imposed on 7 companies;<sup>8</sup>
- March 2005 – Scottish roofing – fines of £87k after leniency imposed on 4 companies;<sup>9</sup>
- July 2005 – Scottish roofing II – fines of £138k after leniency imposed on 6 companies;<sup>10</sup>
- February 2006 – Mastic asphalt – fines of £1.55 million after leniency imposed on 13 companies throughout England and Scotland<sup>11</sup>. This decision was appealed to the Competition Appeals Tribunal, which upheld the OFT’s decision on liability in its entirety.

The UK has also seen its first criminal cartel convictions for bid-rigging and other cartel activity in the *Marine hose* case which involved both public and private contracts.

### 4. Marine Hose Cartel<sup>12</sup>

In 2008 three UK businessmen were sentenced to between 20 and 30 months’ imprisonment for cartel offences under the Enterprise Act 2002. All three were also disqualified from acting as company directors for periods of between five and seven years. In addition over £1m were confiscated under the Proceeds of Crime Act 2002.

These are the first convictions for a cartel offence since criminal prosecution powers were given to the OFT under the Enterprise Act 2002 which makes it a criminal offence for two or more individuals dishonestly to agree to make or implement (or cause to be made or implemented) cartel arrangements between two or more undertakings which fix prices, divide markets or customers, limit or prevent production or supply, or rig bids, in each case in relation to supplies in the UK. Unlike the civil regime, the criminal cartel offence is therefore targeted at individuals rather than businesses.

The offence carries a maximum sentence of five years’ imprisonment and/or an unlimited fine. In addition, where an offence has been committed in connection with the management of a company, the offender may be disqualified for up to 15 years from being a company director or in any way concerned in the management of a company. Further, in cases where the offender has benefitted financially from the

<sup>7</sup> [www.offt.gov.uk/shared\\_offt/ca98\\_public\\_register/decisions/westmidlandsroofing.pdf](http://www.offt.gov.uk/shared_offt/ca98_public_register/decisions/westmidlandsroofing.pdf).

<sup>8</sup> [www.offt.gov.uk/shared\\_offt/ca98\\_public\\_register/decisions/ner.pdf](http://www.offt.gov.uk/shared_offt/ca98_public_register/decisions/ner.pdf).

<sup>9</sup> [www.offt.gov.uk/shared\\_offt/ca98\\_public\\_register/decisions/scot.pdf](http://www.offt.gov.uk/shared_offt/ca98_public_register/decisions/scot.pdf).

<sup>10</sup> [www.offt.gov.uk/shared\\_offt/ca98\\_public\\_register/decisions/scotroof.pdf](http://www.offt.gov.uk/shared_offt/ca98_public_register/decisions/scotroof.pdf).

<sup>11</sup> [www.offt.gov.uk/shared\\_offt/ca98\\_public\\_register/decisions/flatroof.pdf](http://www.offt.gov.uk/shared_offt/ca98_public_register/decisions/flatroof.pdf).

<sup>12</sup> For more information, see the OFT website: <http://www.offt.gov.uk/news/press/2008/72-08>.

offence, the court may order the confiscation of assets under the Proceeds of Crime Act 2002 up to the value of the benefit or, where less, the value of the available assets.

The three individuals pleaded guilty to dishonestly participating in a worldwide cartel involving all the major manufacturers of marine hose, in which the global market was divided among the manufacturers according to agreed market shares and bids on individual contracts were rigged, by reference to a common price list. In addition, it was also agreed that contracts emanating from a manufacturer's 'home territory' should be reserved to that manufacturer.

It was accepted by the defendants that the cartel is likely to have resulted in higher prices for customers in the UK. These included a UK government department, the Ministry of Defence, who had used public procurement processes.

## **5. Exclusion from Bidding in Public Procurement Auctions**

As a general principle, the OFT considers that, where this is lawful to do so, excluding companies found guilty of illegal bid-rigging from public procurement auctions for a period of time, would act as an additional deterrent to such conduct, and could therefore strengthen efforts to eradicate such illegal activity.

Notwithstanding this, the OFT concluded, following extensive consultation with the OGC, that automatically excluding the parties found to have engaged in bid rigging would not be appropriate in the particular circumstances of the *Construction* case.

The endemic nature of the practice within the UK construction industry suggested that many other companies were likely to have been involved in bid rigging, even though such activity remained undetected. For this reason, it cannot be assumed that the parties to the investigation were the only companies that may have engaged in such activity. In those circumstances, the OFT and the OGC recommended in a note to procurers<sup>13</sup>, issued at the time of the issue of the OFT's infringement decision in September 2009, that the parties should not be excluded automatically from future tenders, on the grounds that they were parties to the OFT decision, or be the subject of similar adverse measures making it more difficult for them to qualify for such tenders. Rather, it was a matter for individual procurers to decide what action, if any, they should take in their own particular circumstances, having taken appropriate legal advice as necessary.

Public authorities were advised to consider the specifics of their procurement, as well as the points outlined below, in deciding the most appropriate course of action on a case by case basis, namely that:

- The parties to the OFT's infringement decision had received significant financial penalties appropriate to the infringement findings in the OFT's infringement decision;
- It would be wrong automatically to assume that construction companies that were not named in the decision had not also been involved in bid rigging;
- As a result of the OFT's investigation, the parties could be expected to be particularly aware of the competition rules and the need for compliance and, if anything, are more likely to be compliant; and

<sup>13</sup>

[www.offt.gov.uk/shared\\_offt/business\\_leaflets/general/Information-Note2.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/general/Information-Note2.pdf).

- Many of the parties had co-operated fully with the OFT's investigation and a significant proportion had taken measures to introduce or reinforce formal compliance programmes and to ensure that their staff are aware of their competition law obligations.

The OFT added for the avoidance of doubt, however, that this recommendation was only intended to apply to this case and that it should not be assumed that the OFT would take a similar view in future cases.

## 6. Wider Advocacy Efforts to Improve Efficiency of Public Procurement

Our experience in the UK is that competition authorities can play an active advocacy role in advising other parts of government on procurement. They can assist in at least three ways:

- *Advice on designing public procurement processes:* First, they can provide a framework for identifying how different procurement approaches might affect competition, and hence provide general advice on designing public procurement processes. For example, they can contribute to overall procurement guidance issued by central government.
- *Detailed analysis of particular markets:* Second, competition authorities can carry out more detailed analysis of particular markets, giving specific advice on procurement approaches in those sectors. This is likely to be more appropriate in cases where new markets are being opened up to private sector involvement, or where there are particular competition concerns.
- *Guidance and training to public procurers involved in running procurement processes:* Third, they can provide guidance and training to public procurers involved in running procurement processes, to help identify particular competition problems – particularly the possibility of bid rigging and collusion.

The following paragraphs give more detail on the first two points.

### 6.1 General framework advice: 2004 market study

The OFT market study *Assessing the impact of public sector procurement on competition*<sup>14</sup> aimed to provide a framework for analysing the effects of procurement on competition and markets. At a high level, it identified three broad ways in which procurement processes can affect competition:

- *Short term effects*, relating for example to the level of participation in a tender, the similarity of bidders and the ability of bidders to engage in tacit collusion. In general, more bidders imply higher competition. However, there may be valid reasons for restricting competition if evaluating bids is costly, or if a large number of bidders lead to higher prices when participants bid more cautiously. Competition is likely to be stronger when bidders are similar, for example where they are similar in terms of size, cost structures, ownership, degrees of vertical integration etc. It is easier to sustain collusion if bids are transparent, bidders interact periodically, and demand is stable and predictable.
- *Long term effects*, capturing changes in investment, market structure and technology as a result of procurement decisions. Public procurement can have long term consequences for example by changing the number of firms in the market, increasing the gap between market leaders and other suppliers and creating incumbency advantages for contractors, thus eroding competition. Such

<sup>14</sup> See the OFT website for a copy of the market study: [http://www.of.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/completed/procurement](http://www.of.gov.uk/advice_and_resources/resource_base/market-studies/completed/procurement).

concerns might suggest strategies such as awarding multiple contracts and selecting a different bidder for each of these contracts, or by helping new entrants become established in other ways.

- *Knock-on effects*, where the public sector's procurement decisions affect other buyers in the market. For instance, if public sector contractors gain advantages over firms that do not supply to the public sector, this can lead to restricted or distorted competition for other (non-public sector) buyers and low prices for the public sector.

The market study then applied these general principles to some specific procurement practices that affect potential bidders. These included:

- *Restrictions on participation and increased participation costs*: It was found that formal public sector procurement practices can reduce participation by and increase participation costs for, small bidders. For example, this might be through excessive information requirements, restricted communication of contract opportunities or overly narrow qualification criteria. It is important for the public sector to strike a balance between the costs and benefits of increasing participation.
- *Contract aggregation*: Public sector procurement often involves contract aggregation, which is bundling contracts into fewer larger contracts that are tendered less frequently. This entails savings in the cost of conducting and managing tenders as well as lower prices due to economies of scale and scope. But, it can dampen competition by excluding small firms that cannot meet all the requirements, removing in-contract competition by moving demand between contractors at the margin, and amplifying incumbency advantages. There may also be a risk that discussions between sub-contractors on a large contract might facilitate collusion. On the other hand, it may promote competition by reducing the scope for tacit collusion through repeated interaction, helping firms overcome entry barriers by assuring demand to the bidder and stimulating investment.
- *Self-supply*: Often the public sector has the option to self supply rather than procure. This can affect competition as the decision not to procure externally limits the size of the market for other buyers. The public sector needs to ensure that self supply is indeed the cheaper option, but price comparison may not be easy in a non-competitive market. Thus there is a danger that self-supply is favoured when in fact this would be inefficient due to an incorrect evaluation or assessment of the costs underlying self-supply.

Overall, the OFT found that the competition effects of procurement are complex and depend on the particular procurement settings. However a general framework can provide a useful basis for a more specific and detailed analysis. One of the results of the study was to identify areas of public procurement that might raise particular competition concerns, which then allowed us to follow up with more specific advice.

## **6.2 Specific Advice: 2006 Report on Waste Procurement**

Following the 2004 procurement report, the OFT sought to identify certain key sectors where it might be able to offer specific advice on the procurement method being applied. One of these was waste procurement. Local authorities at the time were required to devise new waste management strategies in order to meet the government's landfill reduction targets. The OFT, together with the OGC and the Department for Environment Food and Rural Affairs (Defra), produced a report on public procurement and competition in the municipal waste management sector.

The report made a number of recommendations to enhance competition at various stages of waste management which are described in the textbox below.

**Box 3: Advice on Procurement Methods: Waste Management**

- The length of contracts for waste collection services should be set to enable suppliers to recover sunk costs and a reasonable return on their investment, but no longer (and generally no longer than five years);
- Procurement should be open, free from overly restrictive criteria in order to encourage more bids;
- Procurement should ensure fair competition between self-supply and private sector bidders (see paragraph 29 above);
- Joint procurement of collection with other waste management services must be carefully considered and the risks of collusion should be recognised.

Waste disposal is more capital intensive than collection, and often large private firms are seen to supply integrated waste management services. The report therefore recommended that local authorities should remain open to the option of consortia bids including smaller firms with relevant experience, and should try to arrange sites and planning permission prior to tendering so as not to deter bidders, however the risk of collusion should be recognised in order to be able to identify instances of collusion. Fair competition between private and public bidders should be maintained and care should be taken when aggregating contracts. Waste treatment facilities that meet the needs of local authorities as well as private demand should be considered.

## 7. Regulatory or Institutional Conditions that can help Facilitate Bid Rigging and Corruption

The 2004 OFT market study on public procurement found that the design of public procurement processes can affect the likelihood of collusion.<sup>15</sup> Accordingly, there may be steps that procurement authorities can take to reduce the risk of bid rigging in particular cases.

The market study noted that it is more difficult to sustain collusion as the number of bidders increases, and as bidders become more dissimilar (for example in terms of size, cost structure, ownership, degrees of vertical integration). Other factors that may impact on the likelihood of collusion include:

- *Transparency:* Collusion is more easily sustained if bidders can observe when other firms are trying to charge prices below the collusive level. The more likely such under-bidding would be detected, the more effective is the threat of retaliation by other firms which ultimately sustains the collusive outcome. This means that increased transparency such as information about the terms and conditions offered by winning and losing bidders in a competitive tender may increase the risk of collusion. What might be considered beneficial for other public policy grounds (minimising the risk of corruption and ensuring fair treatment of bidders, information on expenditure of public funds) can in fact increase the risk of collusion.
- *Frequency of interaction:* Collusion is more easily sustained when bidders interact repeatedly, either in the same market over time, or in different markets, because repeated interaction allows for more effective punishment of firms trying to charge prices below the collusive level. This means that splitting up a contract across multiple tenders can increase the risk of collusion.

<sup>15</sup> OFT (2004), paragraph 1.22.

- *Stability of demand:* Collusion is more easily sustained in markets where demand is relatively stable and predictable. This is because demand volatility makes it more difficult to detect attempts by firms to grab a larger share of the market by charging lower prices, and the incentives to under-bid competitors are larger if demand is large at present, but expected to fall in the future. This means that a constant, predictable flow of demand from the public sector may increase the risk of collusion.

It follows that, for example, greater transparency about potential bidders and details of bids, might facilitate collusion or bid rigging. More generally there might be a tension between measures to avoid corruption by ensuring fair treatment of bidders, and measures to increase competition.

Formal rules governing public procurement which are designed to avoid any abuse of discretion by the public sector in selecting and evaluating bids can make communication among rival companies easier, promoting collusion among bidders.

In some cases, procurers may be able to design procurement processes to influence some of these factors and hence reduce the risk of bid rigging. For example, the OFT report considered the likely competition impacts of including a self-supply option in a procurement contest (see paragraph 0 above). The report found that a self-supply option could sometimes provide an effective fall-back position for the public sector to purchasing from external suppliers. This can impose a competitive constraint, and allow the public procurer to benchmark private bidders and possibly make it easier to identify bid rigging. For example, in a case study on procurement of contracts for building and operating prisons, it was found that having a ‘public sector comparator’ which allows the procurer to consider whether bids are significantly above the likely cost, could be a good way of undermining collusion incentives.<sup>16</sup>

As discussed in the report, there could be other negative consequences of having a self-supply option, particularly for example if there is not perceived to be a level playing field between the in-house bid and external competitors. For example, because the self-supply bid does not fully take into account all possible costs which should properly be allocated to the self-supply bid. In these cases, allowing self-supply can deter entry to the procurement process and hence reduce the overall level of competition. In practice therefore, there are complex trade-offs that need to be made. However, the overall message is that the approach to procurement can have an impact on incentives for collusion, and indeed on wider competition in the market.

## **8. Certificates of Independent Bid Determination**

Many procurers use certificates of independent bid determination of their own accord in the UK. There is no prescribed format for such certificates although the OFT has made available templates to any company that requests it. In 2006 the OFT worked with the OGC to issue guidance on maximising competition in procurement<sup>17</sup>. This guidance included advice on detecting and preventing bid rigging, including at paragraph 58 the following advice:

*“Think of using non-collusion clauses and/or certificates of independent bids (self-certification by the supplier that they have not colluded with others, containing warnings exposing those who make false declarations to legal action: OFT can provide recommended text.”*

The OFT has provided templates to several procurers since the publication of this document. The OFT considers that self-certification alone may not be sufficient to deter parties from bid rigging, unless it is

<sup>16</sup> OFT (2004), paragraph 5.39.

<sup>17</sup> See [www.ogc.gov.uk/documents/CP0144MakingCompetitionWorkForYou.pdf](http://www.ogc.gov.uk/documents/CP0144MakingCompetitionWorkForYou.pdf).

accompanied by the threat of effective enforcement action by the competition authority. During the investigation into bid rigging in the construction industry the OFT found numerous instances where such certificates had been completed and yet the companies had engaged in bid rigging. However, they can potentially open up, under civil or criminal law, an alternative or complementary ground for parties to recover damages, and if used can increase the deterrence.

## **9. OFT's Drivers of Compliance Project**

In addition, to its enforcement and advocacy work the OFT is seeking to understand how more compliance can be achieved. The OFT is currently working with business and their lawyers to understand:

- The drivers of compliance and non-compliance;
- Identifying current best practices in competition law compliance; and
- Further steps which the OFT could take to encourage compliance.

By working with business and their lawyers on these issues, greater compliance could be achieved generally, including in the areas of competition law and anti-corruption.

The OFT does not expect to find simple patterns of compliance and non-compliance driven by a small number of factors but rather we expect to see multiple factors to be driving compliance. Below we have set out some of the themes that are emerging from our project, including some 'drivers of compliance' that have been identified.

- Many businesses have integrated compliance agendas that are part of an overall business ethics and corporate responsibility approach.
- Business place great importance to their company image and reputation. Businesses that trade fairly can help their companies win business.
- Strong and unambiguous commitment to compliance is needed from senior management. Where support is not strong, individuals may take compliance risks in order to meet business objectives.
- Some companies have emphasised the positive benefits of knowing the 'rules of the game' so that they have the benefit of competing vigorously without falling foul of rules.
- Individual sanctions have been identified as important. This can include internal disciplinary sanctions, criminal sanctions and director disqualifications.

Current best practices that are emerging include:

- Conducting a risk audit to assess appropriate activity in order to mitigate against risks. This could include an evaluation of risk where staff hold roles which require contact with competitors or customers, new staff (especially if they previously worked for a competitor), trade association meetings, and business units that have been the subject of previous investigations.
- Regular evaluation of activities for example by re-testing employees.

Examples of some activities that are being undertaken include:

- Formal competition compliance programmes;
- Bespoke competition law compliance training;
- Written materials providing to employees;
- Help-lines run by in-house or external lawyers;
- Mock dawn raids;
- Competition law compliance audits;
- Internal whistle-blowing facilities;
- Internal procedures designed to pick up and escalate possible risks;
- E-compliance tools developed by law firms in conjunction with behavioural psychologists.

The OFT will draw on its findings on what drives compliance and non-compliance, and on any current best practices in order to determine what action it should take to encourage competition law compliance. A report on its project is due to be published later this year.

## UNITED STATES

### Outreach and Training Programmes

In the United States, attorneys at the U.S. Department of Justice Antitrust Division (DOJ) have for many years spent considerable time conducting outreach and training programmes for public procurement officials and government investigators, including investigators who work for other government agencies that solicit bids for various projects. These outreach programmes help develop an effective working relationship between the DOJ officials who have the expertise concerning investigating and prosecuting bid rigging, and public procurement officials and government investigators who are in the best position to detect and prevent bid rigging on public procurement contracts. DOJ officials advise procurement officials on how their procedures can be changed to decrease the likelihood that bid rigging will occur and on what bidding patterns and types of behaviour they and their investigators should look for to detect bid rigging. In turn, procurement officials and investigators often provide the key evidence that results in a successful bid-rigging prosecution. Our experience has been that this team effort among public procurement officials, government investigators, and DOJ attorneys has contributed to a significant decrease in bid rigging on public procurement in the United States over the last twenty to thirty years.

This paper provides an overview of the Antitrust Division's public procurement outreach and training programmes. Part 1 sets forth the purposes of these programmes. Part 2 describes the use of publications – brochures, newsletters – as tools of outreach programmes. The key features of an effective outreach presentation are laid out in Part 3. Part 4 describes the Certificate of Independent Price Determination, a critical tool in preserving competition in public procurement, and Part 5 notes the relationship between corruption and bid-rigging violations. Part 6 describes a recent DOJ training initiative aimed at safeguarding the ongoing economic stimulus programme, and Part 7 concludes.

#### 1. Purposes of Public Procurement Outreach and Training Programmes

Public procurement outreach and training programmes serve a number of purposes. First, these programmes help educate public procurement officials and government investigators about the costs of bid rigging. Because bid-rigging conspiracies often last for many years, government purchasers, and therefore taxpayers, pay much more for goods and services than they should because they were deprived of the full benefits of competition. Furthermore, if companies are successful in rigging bids on one type of product or service, they may be tempted to rig bids on other products and services, causing additional harm to government purchasers.

Second, outreach programmes help educate public procurement officials and government investigators about what they should look for in order to detect bid rigging and various types of fraud with respect to government procurement. This enables procurement officials and investigators to detect illegal conduct earlier and more frequently, resulting in more successful prosecutions and greater deterrence. In the United States, procurement officials have frequently provided the initial evidence of bid rigging or other procurement violations based on indications of illegal conduct that they observed. Some of these cases are discussed in more detail in paragraph 15 below.

Third, outreach programmes educate public procurement officials about what they can do to protect themselves from bid rigging or other procurement violations. Antitrust agency officials provide advice about techniques that procurement officials can use to make it less likely that their programme will become the victim of a bid-rigging scheme. For example, in certain circumstances DOJ attorneys have advised procurement officials to combine work into larger contracts so that competitors outside the local geographic area will decide that it is profitable to bid on the contracts, resulting in more competition for each contract. DOJ attorneys also advocate that all government purchasers require bidders to submit and sign a Certificate of Independent Price Determination. The details of this certificate and why it should be used are discussed in more detail in paragraphs 17-18 below.

Fourth, outreach programmes help develop a close working relationship between public procurement officials, government investigators, and antitrust agency officials. This is a critical goal of an outreach programme. Procurement officials are sometimes reluctant to report illegal activity partly because they think they will be blamed for its occurrence on their watch. During outreach programmes, antitrust agencies should assure procurement officials that if bid rigging occurs they will be the victims of a conspiracy that was carried out in secret without their knowledge; procurement offices and antitrust agencies have the same interest in trying to prevent and prosecute bid rigging. The statistics indicate that the joint efforts of public procurement officials, government investigators, and DOJ attorneys have reduced the amount of bid rigging on public procurement in the U.S. In the 1970s and 1980s, a majority of overall criminal antitrust prosecutions in the U.S. were for bid rigging, primarily involving public procurement. Most notable in terms of the number of cases was bid rigging on the construction of roads and on the sale of milk to schools. During this time period, the Antitrust Division filed hundreds of cases involving bid rigging on road building and the sale of milk. More recently, the proportion and total number of bid-rigging prosecutions has declined.

Finally, as will be discussed more fully below in paragraphs 19-20, sometimes public procurement officials are in fact involved in bid rigging and other illegal conduct that undermines competition, in the form of kickbacks or other remuneration received from companies that submit bids. Outreach programmes serve to warn any procurement officials who are tempted to participate in this type of conduct that the government will vigorously prosecute such violations and to encourage honest procurement officials to report violations by corrupt co-workers.

## **2. The Use of Publications to Make an Outreach Programme More Effective**

Brochures – In the United States, DOJ attorneys provide brochures to public procurement officials and government investigators to make outreach programmes more effective. These documents explain the antitrust laws and what procurement officials and investigators should look for to determine if bid rigging or other procurement violations are occurring. Copies of these brochures can be obtained using the Internet: 1) “Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What To Look For” (“Bid Rigging Brochure”) can be found at <http://www.justice.gov/atr/public/guidelines/211578.pdf>; and “An Antitrust Primer For Federal Law Enforcement Personnel” can be found at <http://www.justice.gov/atr/public/guidelines/209114.pdf>.

Newsletters – Offices within the Antitrust Division publish newsletters that discuss certain cases that have been prosecuted during the previous year and various issues of importance to public procurement officials, government investigators, and others. For example, a four-page, colour newsletter published by the Chicago Field Office in the fall of 2008 was distributed to about 1,700 recipients, including federal, state, and local public procurement officials and government investigators.

### 3. Key Features of an Effective Outreach Presentation

Explain the legal standard for a violation – In the United States, this means an emphasis on the fact that under U.S. law the *agreement* to rig bids is the crime. In other countries, the legal standard may be different, but it is important for antitrust agency officials to educate public procurement officials and government investigators about what conduct constitutes the violation. If the procurement officials and investigators do not clearly understand this, they will not know what to look for and report to the authorities. In U.S. outreach programmes, DOJ attorneys also explain the differences between bid rigging, price fixing, and market allocation, and what procurement officials and investigators should look for with respect to each violation.

Explain how antitrust investigations are conducted – During outreach programmes, antitrust agency attorneys explain the procedures used to conduct an investigation. In the United States, these procedures include taping conversations with the assistance of co-operating witnesses, using search warrants and wiretaps, conducting unannounced “drop-in” interviews, and using grand jury subpoenas for documents and testimony. Also, DOJ attorneys discuss the Corporate Leniency Policy which may enable a co-operating company to avoid prosecution.

Discuss Penalties for Bid Rigging and Other Antitrust Violations – Outreach programmes provide an opportunity to explain the maximum penalties which companies and individuals can receive for bid rigging and other procurement violations. It is useful to cite specific examples of successful prosecutions: instances in which companies have received substantial fines and individuals have been sentenced to lengthy jail terms.

Discuss Indicators of Bid Rigging – A key part of U.S. outreach programmes is a discussion of factors suggesting that bid rigging may be taking place. For example, a pattern where company A wins a contract one year, and company B wins the next year, with each taking turns in subsequent years, may reveal that the companies are engaged in a bid-rotation scheme. Another indicator of bid rigging occurs when the same errors (misspelled words and typographic or arithmetic errors) are evident in bids submitted by allegedly competing companies. This, of course, suggests the companies prepared the bids in concert. Yet another indicator involves the situation where a new company enters the bidding unexpectedly, and at a much lower price than the bids of the other companies that traditionally submit bids on a contract. This pattern may indicate that the new entrant was bidding competitively and that the traditional companies had been rigging their bids and winning contracts at high, non-competitive prices.

Encourage procurement officials to report anything suspicious – As previously discussed, public procurement officials may be reluctant to report their suspicions that illegal conduct is occurring. Antitrust agency officials should encourage procurement officials and investigators to contact them if procurement officials or investigators have *any* concerns that bid rigging or other procurement violations may be occurring. Antitrust agency officials should also assure procurement officials that they are always willing to talk about procurement concerns. Sometimes antitrust agency officials will decide that there is insufficient evidence to open an investigation based on what the procurement official or investigator has observed, but other times they will investigate and develop a case.

Give examples of matters in which procurement officials have played a key role – It is very useful to provide specific examples of actual cases that have been developed with the assistance of public procurement officials. This will demonstrate to procurement officials that action will be taken when they report their suspicions. Each country will have its own examples to use, but in the United States, DOJ attorneys have used the following examples in outreach programmes:

- Two companies supplied nylon filament for paintbrushes made by prisoners at a federal prison. There were ninety contracts over seven years. The two companies co-ordinated their bidding such that each company won fifty percent of the contract each year. This pattern was identified by two procurement auditors when they happened to discuss these contracts over lunch. They reported their concerns, and after an investigation by the DOJ, the companies and their executives were successfully prosecuted for bid rigging;
- Two companies submitted bids for the repair of certain government equipment damaged by a storm. Each company submitted a cover letter with its bid expressing its interest in performing the work. A procurement official noticed that each cover letter contained the same typographical error (an unnecessary word), which was as follows: “Please give us a call **us** if you have any question.” The procurement official was concerned that the companies had colluded on their bids and he reported his concerns to the Antitrust Division. Following a full investigation, the companies and individuals involved were prosecuted and convicted for bid rigging and other violations;
- The government sought to buy four types of gloves: 1) women’s dress gloves; 2) women’s outdoor gloves; 3) men’s dress gloves, and 4) men’s outdoor gloves. The government intended to award four contracts, one for each type of glove. Four companies submitted bids on these contracts. A government procurement official noticed that the bids submitted resulted in each company winning one of the contracts. The official believed that the contracts had been allocated among the companies submitting bids and reported his concerns. Following a DOJ investigation, the companies and culpable individuals were successfully prosecuted for bid rigging.

Discuss Other Crimes Which May Be Prosecuted – In U.S. outreach programmes, DOJ attorneys explain to public procurement officials and government investigators that the DOJ prosecutes various types of fraud and other violations in addition to violations of the antitrust laws. This is important for a couple of reasons. First, some violations that severely undermine the procurement process, such as kickback schemes, may not be violations of U.S. antitrust laws; such conduct can only be prosecuted as fraud or other non-antitrust violations. Second, when the DOJ investigates these schemes it may determine that bid rigging is occurring and that procurement officials are being paid a kickback or bribe to facilitate the collusion. The prosecution of kickback schemes with respect to government procurement is discussed in more detail below in paragraphs 19-20.

#### **4. Certificate of Independent Price Determination – What It Is and Why It Is Important?**

A Certificate of Independent Price Determination has been used in the United States for government procurement by federal (but not necessarily state or local) agencies since 1985. Basically, this document requires each company that submits a bid to sign a statement under oath that it has neither agreed with its competitors about the bids which it will submit nor disclosed bid prices to any of its competitors or attempted to convince a competitor to rig bids. The key part of the certificate states:

- The offeror certifies that –
  - The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered,
  - The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a

sealed solicitation) or contract award (in the case of a negotiated solicitation), unless otherwise required by law, and

- No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

Under U.S. law, evidence that a company lied in its Certificate of Independent Price Determination is a criminal violation. This is very important because it means that the company can be prosecuted if the only evidence is that it disclosed bid prices to its competitors or attempted to convince its competitors to rig bids, even if there is insufficient evidence to prove that the competitors actually agreed on prices or on who would win the project for which bids were submitted.

## **5. Investigations Involving Kickbacks and Other Improper Conduct by Procurement Officials**

In some cases, there may be evidence that kickbacks or bribes are being paid to procurement officials who are responsible for awarding contracts. In the initial stages of the investigation, it may not be clear whether the companies involved are also engaged in bid rigging. However, in a number of cases DOJ attorneys have developed evidence that corrupt procurement officials were paid off to facilitate a bid-rigging scheme.

It is important to determine whether corrupt procurement officials are assisting collusion among bidders. Kickbacks and bribes typically leave a paper trail showing money passing from the person paying the kickback or bribe to the corrupt procurement official. These types of cases are important because of the need to remove corrupt public procurement officials and to assure the public and suppliers that the bidding process is legitimate.

## **6. Proactive Initiative to Safeguard Large Government Expenditures: Antitrust Division Programme to Protect Economic Recovery Stimulus Programmes from Fraud, Waste, and Abuse**

In May 2009, the Antitrust Division announced the details of an initiative aimed at preparing government officials and contractors to recognise and report efforts by parties to unlawfully profit from stimulus projects that are being awarded as part of The American Recovery and Reinvestment Act of 2009. The Recovery Act, a multi-billion dollar economic stimulus programme, was signed into law by President Obama on Feb. 17, 2009 as an effort to jumpstart the economy and to create or save jobs. The Antitrust Division's Recovery Initiative involves training procurement and grant officials, government contractors, and agency auditors and investigators, on techniques for identifying the "red flags of collusion" before stimulus awards are made and taxpayer money is unnecessarily wasted. The initiative makes available to agencies Antitrust Division competition experts who can evaluate procurement and programme funding processes. These Division experts make recommendations on "best practices" that may be adopted by the agencies to further protect processes from fraud, waste and abuse and maximise open and fair competition. Finally, the initiative commits the Antitrust Division to playing a significant role in assisting agencies to investigate and prosecute those who seek to or succeed in defrauding the government's efforts to maximise competition for stimulus funds.

The Antitrust Division's Recovery Initiative has had a significant impact. Since March 2009, in partnership with agency Inspector Generals handling stimulus funds, the Antitrust Division has already assisted in training thousands of federal and state procurement, grant and programme officials nationwide, with thousands more scheduled to be trained in the coming months. The Antitrust Division has also launched a Recovery Initiative Web site through which consumers, contractors and federal, state and local

agencies, can review information about the antitrust laws and the Division's training programmes, request training, and report suspicious activity. The Web site is located at [http://www.justice.gov/atr/public/criminal/economic\\_recovery.htm](http://www.justice.gov/atr/public/criminal/economic_recovery.htm). This Web site is linked to [www.recovery.gov](http://www.recovery.gov), the official website of the Recovery Accountability and Transparency Board. The board is responsible for overseeing federal agencies to ensure that there is transparency and accountability for the expenditure of Recovery Act funds.

## **7. Summary and Conclusion**

A comprehensive outreach and training programme for public procurement officials and government investigators can significantly increase the effectiveness of efforts to prevent and punish bid rigging on public procurement. Public procurement officials and government investigators can greatly assist antitrust agencies in investigating and prosecuting bid rigging. In order for that to happen, antitrust agency attorneys need to educate procurement officials and investigators about the harm caused by bid rigging and how to detect and prevent it. Antitrust agency officials also need to encourage procurement officials and investigators to work with them to investigate and prosecute those who rig bids.

The ultimate goal of an outreach and training programme is to encourage public procurement officials, government investigators, and antitrust agency attorneys to work together as a team to deter bid rigging through successful prosecutions, increased vigilance, and better-designed public procurement programmes.

**Mr. DAVID LEWIS**  
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**1. Introduction: defining the terms**

Bid rigging is a very large subject, the more so given its close interface with corruption. So it's as well to clarify at the outset the sense in which I will use the terms 'bid rigging' (or 'collusion') and 'bid corruption' (or 'corruption').

When I use the term 'bid rigging' I refer to a private agreement between competitors designed to determine the outcome of a putatively atomised, individualised bidding process. The agreement may cover price, market and/or customer allocation and the identity of the winner of the bid, and frequently also the payback to the losers. This is bid rigging in its normal antitrust meaning and which most competition statutes prohibit *per se* along with other price and market allocation agreements. Notionally competing suppliers are not competing on the merits, they are not offering the lowest priced, best quality goods and services that they are capable of supplying. They are rather putting in an offer that is the product of a clandestine agreements amongst themselves, an agreement that by its very nature will include not only the agreed, supra-competitive winning price but also the identity of the winner and, naturally, of the losers.

I distinguish this from 'bid corruption' which is the solicitation by, or offer to, a public official of something of value in order to influence the outcome of a bid. This is characteristically the province of the criminal justice system, although it may also be subject to sanction by the procurement authorities, that is, administrative bodies, who, in many jurisdictions, are empowered to disbar a firm from public procurement tenders, may sue for damages and void agreements.<sup>1</sup>

Although it is conceivable, and it undoubtedly does occur, that bid corruption may upset the best laid plans of colluding suppliers, I will focus on bid rigging (as defined above) and will consider bid corruption when it operates in tandem with bid rigging, when they complement each other. For reasons that are elaborated below this combination of bid collusion and bid corruption is particularly toxic.

I will not however deal with the interface between corruption and what may be termed 'exclusion' even though the competition implications and effects of the exclusion that arise from corruption are undoubtedly severe. This is the interface explicitly captured by the World Bank's broader definition of bid rigging whereby '*government officials manipulate the bidding process to exclude other (presumably cheaper) competitors.*' The fact is that, as the World Bank definition recognises, in relation to public procurement every act of corruption in the bidding process will always embody potentially grave

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<sup>1</sup> Note well that the World Bank, in its manual on the 'Most Common Red Flags of Fraud and Corruption in Procurement in Bank-Financed Projects', uses a much broader definition of bid rigging that explicitly takes in, is indeed principally directed at corruption. It defines bid rigging as a practice designed 'to ensure that the contract will be awarded to the bribe-paying firm (whose prices are now inflated to cover the costs of the bribe)' whereby 'government official manipulate the bidding process to exclude other (presumably cheaper) competitors.'

competition implications even if the bid is not the outcome of a collusive agreement between competitors. Firm A will pay a bribe to a state procurement official in order to secure a contract that A has chosen to contest, not on the merits, but rather by the payment of a bribe intended to persuade the buyer to reject the offering of A's rivals, no matter that their offering is superior. The upshot of 'pure' bid corruption (that is, bid corruption that involves no collusion) is that millions of consumers the world over are denied the benefits of the best quality, lowest price goods, which is precisely the objective of antitrust enforcement. However, in instances of bid corruption this has occurred because of the *corrupt* vertical relationship between a public procurement official and a producer of goods or services rather than as a result of *collusion* between horizontally related competitors.<sup>2</sup>

This Forum may want to consider whether there is, at competition law, an impeachable vertical agreement or even impeachable unilateral conduct arising from 'pure' bid corruption. As already intimated this poses the reverse of the usual vertical practice problem: consumer harm will not usually be difficult to identify and prove, but does the harm arise from an impeachable transgression of competition law? I will not deal with this issue although I will take note of exclusion where collusion and corruption interface precisely to extend an advantage to the cartel through the exclusion of a maverick or any other bidder who is not part of the cartel. Of course corruption may support a cartel in other ways as well, for example, in order to protect the cartel from detection, or to enhance the internal stability of the cartel. However when discussing the various interfaces between bid rigging and bid corruption I will occasionally draw on examples from 'pure' bid corruption cases. I will try, wherever possible, to illustrate issues in bid rigging, and, where appropriate, bid corruption by reference to actual cases.

But first a number of preliminary remarks. Firstly why '*collusion and corruption in public procurement*'. In particular is there a quality, a character, to collusion in public procurement that distinguishes it from any other form of collusion? Certainly the abiding character of public procurement is that it takes the form of the public issue by procurement authorities of tenders that specify the goods and services that are required by a public authority. Prospective sellers of the good or service in question then submit bids that offer to supply the specified products or services at a stated price. However, if there was to be collusion in the submission of these bids, how does this differ from any purchaser, public or private, approaching a range of widget manufacturers individually only to find that each offers, in consequence of a collusive relationship, an identical price and discount?

We should recognise at the outset that tenders issued by public procurement authorities cover anything from the supply of pens and pencils to government offices to the provision of a turnkey nuclear power station. That is, the variety of tenders will cover a range from the purchase of 'off the shelf' products whose specifications are easily established and described to immensely complex engineering projects or ICT products and services that require concomitantly detailed, complex and customised specifications. In the nature of things, by volume of tenders issued it will be the standardised products that dominate whether these be in the area of pharmaceutical products, building products or stationery products, although it is likely that the massive, highly specified armaments purchases or power stations or software systems loom larger when public procurement tenders are measured by value.

We should also recognise that, increasingly, procurement by means of tender is employed in the private sector as well. However this session of the forum is explicitly concerned with '*collusion and corruption in public procurement*'. Although, many competition statutes make specific reference to price fixing, market allocation *and* bid rigging in those sections dealing with the *per se* prohibition of particular types of horizontal agreement, suggesting that in the perception of many legislatures bid rigging represents

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<sup>2</sup> The bid corruption literature often refers to the vertical relationship between a procurement official and a bidder, as 'collusion' between buyer and seller.

collusion of a particular type, I know of no legislation that distinguishes the rigging of public tenders from the rigging of privately issued tenders. I will however focus on public procurement tenders although occasional reference will be made to private procurement tenders.

So what is special about ‘collusion and corruption in public procurement’?

## 2. Why bid rigging in public procurement?

If hard-core cartel conduct is understood to be the most egregious antitrust offence, then bid rigging in public procurement is possibly the most egregious form of hard-core cartel conduct.

Firstly, as already intimated, it frequently operates in tandem with corruption thus drawing public servants into what is otherwise – that is, in characteristic price fixing or market allocation cartels – purely private conduct. Society is thus hit with a double whammy of criminality or law breaking - on the part of private sector players pursuing their private interests through collusion, and then by the extension of this criminality and self-interested conduct into the ranks of those public servants entrusted precisely with protecting the interests of the public. As we know while collusion is not always a criminal offence, it is generally prohibited *per se* in competition statutes. Corruption is, on the other hand, always a criminal offence.<sup>3</sup> I should emphasise that this is not to suggest that all collusive conduct in relation to public procurement necessarily involves corruption. As already intimated the intervention of corruption may upset a well organised cartel and make it more susceptible to detection. However, that there is frequently a relationship between corruption and collusion in tendering is sufficient to place it in a category of anti-competitive offences that demands particularly close attention.

Secondly, bid rigging hits the consumer with a double whammy. He not only suffers the characteristic consequences of hard core cartel conduct – higher priced products of inferior quality - but he pays an additional price because of the reduction it involves in the value of his tax dollar. He is, in other words, hit *qua* private consumer, and *qua* tax payer. He pays top dollar for an inferior good from a public agency which has used his tax dollars to purchase the inferior or over-priced product and then sell it back to him, say in the form of supra-competitive public transport fares or water charges.

Thirdly, we should recognise that most collusive conduct in relation to procurement by way of public tender is, in most of its essential aspects, indistinguishable from any of the other familiar forms that collusion takes insofar as its essential mechanisms involve the fixing of a price and the allocation of a market. Because the form that the purchase takes is that of a public tender, it presupposes that the colluding firms agree which firms will participate in the tender, will bid for the contract (market allocation), and the minimum price or maximum discount (price fixing) that will be tendered by those firms who are designated as the losers of the bid, in order to ensure that the pre-determined winner, does indeed triumph. Hence, when all is said and done for the most part the rigging of a bid in response to a public tender is concerned with familiar questions of price fixing and market allocation.

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<sup>3</sup> At least this is true of the recipient of the bribe. Regrettably it is not always true of the bribing party. Notoriously, until recently in several European countries bribes were tax deductible expenses, at least if paid to foreign government officials.

**Box 1: The South African Cement Products Cartel**

This is one of the most comprehensive, longest standing cartels yet uncovered in South Africa. The cartelised products included pre-cast concrete pipes, culverts and manholes with a variety of applications including road building and maintenance, the construction of storm water systems and water reticulation infrastructure and sewage systems. The vast majority of the products were procured by public tender either by the public sector itself or by firms under contract to the public sector. The cartel leaders were both South African based – Rocla a subsidiary of the giant Murray and Roberts Group and Infraset a division of the Aveng group – and are sub-Saharan Africa’s leading suppliers of cement products. Rocla applied for and was granted leniency and the Commission filed charges against 10 other companies, several of whom, including Infraset, have entered into consent decrees with the Commission.

The modus operandi of this cartel, which operated for 35 years and which covered the South African, Swaziland, Botswana, Namibia, Zimbabwe, Mozambique, Zambia and Tanzanian markets was the fixing of prices and the allocation of contracts and tenders in accordance with agreed upon market shares in designated regions. The allocation occurred at monthly meetings with a cartel member known as ‘the banker’ responsible for allocating contracts and receiving reports from each of the members regarding tonnages sold in a designated period. Where the tonnages sold had the effect of distorting the agreed market shares, the banker would ensure that this distortion was corrected by subsequent allocations.

Thus, although the form of much of this cartel activity involved ‘bid rigging’ it was, for the most part, a plain vanilla price fixing and market allocation cartel that measured its success in its ability to maintain agreed market shares. However the mode of price fixing had to be geared towards competing for a bid. Accordingly, for each bid – in which the appearance of competition had to be maintained – each bidder was assigned a maximum discount off the transparent list prices, with the designated winner naturally permitted the largest discount and with the rest, the designated losers, submitting ‘cover prices’, prices which by virtue of the lower discount permitted by the cartel, exceeded the price quoted by the designated winner. In particular contracts, the compensation to the losers, generally in the form of a share of the contract, was also agreed.

It was a minutely detailed, comprehensively planned operation dependent upon significant flows of information. While the cartel undoubtedly wrought major damage in key markets there was no evidence of corruption revealed to the Commission, although it is important to add that corruption is not the Commission’s remit and this is not what it was looking for.

However, notwithstanding the essentially familiar aspects of most instances of bid rigging, the sheer scale of public sector procurement and the overwhelmingly prevalent use of public tenders as the form of procurement alone makes it worthy of particular attention. Indeed, it is, usually mandatory for the public sector to procure by way of public tender in respect of any purchase above specified thresholds. It is also a requirement of large lending agencies that provide project financing such as the World Bank, funding which is generally made through a government agency. And of course procurement by the public sector represents a very high proportion of GDP, estimated to be as high as 15% in OECD countries and certainly higher in many developing countries.

Public procurement is thus particularly vulnerable to corruption, collusion, fraud of various types and embezzlement because of the large amounts of money characteristically involved and the difficulties of supervising a large number and wide range of projects. As already noted, increasingly there are large public tenders put out by private procurers of goods and services. However, and this generalisation naturally does not hold good in all instances, the in-house skills and expertise involved in the evaluation and adjudication of a complex tender are probably more readily available in the private sector than in the public sector procurement office, if for no reason other than that the latter has to spread its monitoring and other resources over a greater number and variety of projects or has to rely on the services of outside

consultants – that is to say the information asymmetries between the buyers and sellers in a public sector procurement tender are bound to be greater than in a private sector procurement tender and the detection capabilities concomitantly smaller and more thinly stretched.<sup>4</sup> And, while public sector procurement contracts are generally shrouded in more elaborate arrangements to protect against corruption and collusion, regrettably the profit maximising incentives in private procurement are probably greater than the incentives to efficiently utilise tax payer funds. Indeed it is largely because of the absence of a direct incentive to spend tax dollars as efficiently as private dollars that bidding is so ubiquitously employed in public procurement and is subject to such elaborate administrative rules.

Bid rigging is of course particularly damaging when a country is engaged in exceptionally large infrastructural spend programmes, whether for a particular event – for example, the hosting of the FIFA World Cup – or where a government is, again as in **South Africa**, employing infrastructural spending as the major component of an economic stimulus package and as a necessary foundation for long term growth. The South African Competition Commission has explicitly identified bid rigging in construction and construction-related sectors as a strategic focus of its enforcement activities precisely in order to align itself with government's infrastructure build programme. The data pertaining to the leniency applications received by the South African Competition Commission is detailed in its submission to this forum. Suffice to say that the vast majority emanate from the construction sector and many admit to collusion in the preparation and submission of bids in response to public procurement tenders.

The submission of the **United States** outlines an initiative of the Antitrust Division aimed at preparing government officials and contractors to recognise and report efforts by parties to unlawfully profit from stimulus projects that are being awarded as part of The American Recovery and Reinvestment Act of 2009.

Fourthly, and following from this, there is a particularly offensive aspect to the wilful perversion of a mode of procurement that is ubiquitously employed in the public sector precisely in order to secure competition and public accountability. The practices of bid rigging and bid corruption do not 'merely' ensure the provision of inferior goods at supra-competitive prices, it seriously undermines a key component of sound, accountable public governance.

Moreover, the impact of public procurement bid rigging on poor consumers is disproportionately great. In fact while in an effectively operating progressive tax system the rigging of public procurement tenders may hit the rich *qua* tax payer proportionally more than it hits the poor *qua* tax payer, *qua* consumer it is inevitably the *poorest* consumers who pay the highest price for bid rigging. It is those who use *public* education facilities, *public* hospitals, *public* transport, *public* housing that pay directly for the increment in price or the lowering of quality that is the consequence of rigging a public sector procurement tender.

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<sup>4</sup> The bid corruption literature deals extensively with the problem of corruption in the procuring of consultants acting as advisers on public sector procurement, particularly when this gives them a key role in preparing the tender and in evaluating the responses.

**Box 2: Bid rigging in Health Care markets – South Africa, Turkey and Romania**

In the **South African** case of *The Competition Commission vs Adcock Ingram Critical Care (AICC) and four others*, it was established that five pharmaceutical companies had, over a period of at least fourteen years, colluded in rigging bids for the supply of intravenous solutions to the public hospitals, a tender initially issued annually and later every two years. Prices were fixed, markets worth many hundreds of millions of rands were allocated and winners and losers were determined, as was the compensation, often in the form of a post-award sub-contract, for the losers. In a statement submitted to the hearing at which the Tribunal approved the consent decree, a representative of the national Department of Health succinctly summed up the character of bid rigging and the nature of the problems that it posed:

*The Department of Health purchases large volume parenterals and administration sets through the public tender system in order to secure affordable prices, which ultimately benefit the many people who use the public health system, and as has been stated, the majority of whom are poor. The advantages for the suppliers are a guaranteed market, economies of scale and a binding contract....*

*We are committed to giving preference to local manufacturers to promote job creation, poverty eradication and skills development. However, it is difficult to pursue these objectives of promoting local manufacture when such manufacturers act in such a manner. We find it very disturbing that SMMEs that get preferential points in the tender system to enable them to gain market share, resort to this kind of behaviour...*

*These findings beg the question of whether this is the only case of collusion in the industry and there is a high possibility that this is not the only case of collusion in the industry. The challenge that we face is how does one prevent such collusive practices in the future? Tender systems, by their very nature, are at risk of collusion, especially in the pharmaceutical sector where there are usually only a handful of competitors that are known to one another.*

Note that **Turkey's submission** to this roundtable reveals that in 2009 most of the bid rigging investigations carried out by the TCA were in the health sector, including medicines, laboratory supplies and medical equipment. This appears to have included the prosecution of several cases of collusive boycotts of tenders issued by procurement authorities in the health sector. As with the South African public health official cited here, the Turkish submission ascribes the frequency of bid rigging in health markets to the oligopolistic structure of the suppliers' markets. In 237 out of 310 tenders issued in Turkey for laboratory equipment fewer than 3 suppliers responded to the tenders.

**Romania's submission** also identifies the health sector as the sector most vulnerable to bid-rigging practices. Thus, in 2008, the RCC imposed fines totalling approximately Euro 22.6 million on four pharmaceutical companies for sharing the publicly funded section of the insulin market in the context of a national tender organised in 2003 by the Ministry of Health. The collusive practice in this case aimed at sharing the diabetes product portfolio of a drug manufacturer between 3 distributors.

In another important case, 3 distributors who rigged a bid in response to a national tender issued by the Ministry of Health for the supply of dialysis products and equipment were fined Euro1,5 million.

The **Romanian submission** raises many other examples of dubious tendering and bidding practices in various markets for health products. Many of these appear to relate to the preparation of exclusionary tender specifications.

Fifthly, given the scale and concentrated nature of public procurement by way of tender, it is potentially easier for the competition authorities to enlist the purchasers as allies in identifying and apprehending collusive conduct than is the case in markets characterised by more fragmented, atomised purchasers. For example, it is striking that while the South African health department's procurement authorities in the South African *Adcock Ingram* matter (see the box above) were aware of the practice of

post-award sub-contracting to the losers, this never seemed to have aroused their suspicions although the practice is a textbook red light signalling collusive conduct. However, the good news of course is that the prospect of teaching and enabling a procurement committee to recognise cartel conduct is significantly greater than the prospect of achieving the same level of awareness amongst thousands of individual consumers. I will return to this issue below.

Moreover, when purchasing is concentrated in the form of a small number of large bids it is significantly easier to measure the actual extent of consumer harm and seek recompense than in the case of thousands of atomised consumers. In *Adcock Ingram* evidence unearthed by the Commission documents quite precisely the increment in price achieved by the bid rigging cartel in each successive tender. The estimates – partly demonstrated by what occurred when, in one tender, one of the cartel members reneged on the agreement necessitating the last minute submission of a new price by other members – vary from increments over a notional competitive price ranging from 10% to 33%, increases compounded by each successive rigged bid. Turkey’s submission cites its Ministry of Construction who is quoted in an OECD study: “[u]ntil the enactment of the new Public Procurement Law in 2003, Turkey has suffered exceptionally high construction costs by international comparison. For instance, the cost of construction for 1 km of highway was US\$ 10 million in Turkey, compared to international reference price of a US\$ 4 million “

One final point here: while, as illustrated by the *Rocla* case (see box), the fact that public procurement takes place by way of public tender does not distinguish its essential mechanisms from the price fixing and market allocation that is at the heart of most hard-core cartel conduct, cartelisation of the bidding process in true bidding markets – for example, the tendering for the building of a massive power station, a one-off project which cannot be bought off the shelf using transparent price lists and in which the winner may take all – may become immensely complex precisely because of the scale of the contract and the fact that it is unlikely to be repeated in the foreseeable future means that it may lead to massive ‘disturbance’ in the market. That is, these contracts have the capacity to disturb precisely what bid rigging, or any other form of cartel, is aimed at preserving: the stability of market shares. These are the circumstances in which the principal contractor may be required to organise a complex array of consortia and sub-contracts, precisely to ensure that a carefully organised cartel, or even series of cartels, is not disturbed by a contract of the sort described that may be characterised as part of the unusual genus of bidding market.

### **3. Bid Rigging and Bid Corruption**

However, let’s return to the interface between bid rigging and corruption. As already noted, a corrupted tendering process does not presuppose that there has also been collusive co-operation between the bidders. Quite the contrary, it will, more often than not, reflect an exclusive relationship between the corrupted officials and a single seller who has secured a place at the head of the queue through an act of corruption – drawing on family connections, or powerful political connections, or simply the payment of a bribe. In this instance, the bid is corrupted but not collusive. However, even in a non-collusive, but corrupted, bid the co-operation of the losers may well be necessary lest the corrupted pre-arranged outcome is upset by disgruntled and uniquely well-informed losers thus necessitating a degree of agreement between the private bidders. Once this happens, once other potential bidders are drawn into the corrupt conspiracy between a procurement official and a potential supplier, it would appear that – although this warrants further discussion – the loser who accepts a kickback for accepting the outcome has both abetted corruption and entered into a collusive arrangement.

By the same token, collusive bid rigging does not necessarily involve corruption, that is to say, it does not necessarily pre-suppose that the colluding bidders are in a corrupt relationship with the public officials responsible for the preparation and/or adjudication of the bid. Indeed, as already intimated, it is

not difficult to imagine how the intervention of a corrupt official may disturb a well organised cartel such as the cement products cartel outlined above.

However, it's reasonable to hypothesise that bid rigging and bid corruption will frequently work in tandem. Certainly there are powerful incentives to bolster bid rigging with bid corruption. Corrupt procurement officials may be of service to a bid rigging cartel in numerous ways. They may provide advance notice of a bid and consult the cartel organiser in the preparation of the tender specifications. This is a particularly valuable function insofar as it can be used to secure conditions favourable to cartel formation by excluding, through purposefully designed tender specifications, mavericks or non-cartel members from eligibility for the bid. In general, given that those who are managing the bid have a large measure of discretion in deciding which bidders have qualified, corrupted public officials may exercise this discretion to disqualify non-members of the cartel from the bidding process on spurious grounds. This act of corruption reduces the number of bidders and the obstacles to cartel formation and the prospect of detection. **Pakistan** cites the considerable discretion given to procurement authorities in determining the responsiveness of the bid – that is, the bids compliance with the baseline conditions for validating the bid – as a major source of both corruption and bid rigging. **El Salvador** reports that its competition authority examines public procurement from two perspectives, namely, in order to detect evidence of bid rigging and to determine whether the terms of the bid designed by a public contractor reduce or limit competition in the bid procedure.

**Box 3: Fuel procurement in Zambia and tractor procurement in Pakistan**

A recent fuel tender in **Zambia**, although apparently in favour of a single preferred buyer rather than a cartel, is an instructive example of the pertinence of influence at the bid preparation stage. Here, in a two year contract to procure crude oil worth some US\$1,4bn – a very significant act of public procurement anywhere and more so in an economy of Zambia's size – it is alleged that senior government officials directed the Zambian Public Procurement Authority to design tender specifications to accommodate a pre-selected bidder. The media, quoting an unidentified source, charges that the changes that were made to the original tender document required that '(1) bidders must own or charter in excess of 30 oil tankers at any given time; (2) the bidders must own or operate a refinery capacity in excess of 1 million barrels per day; (3) bidders must produce crude oil in excess of 1 million barrels per day and (4) bidders must trade in excess of 2 million of (sic) crude oil per month'. And then, in what appears to be ultimate act of exclusion, lest all others fail, the bidding was to close on the 18th December 2009 and the first delivery of crude oil was scheduled for a fortnight later, on the 1st January 2010! After the Zambian Competition Commission referred the matter to the Anti-corruption Commission, the tender was withdrawn and redesigned.

The Competition Commission of **Pakistan** effectively utilised its advocacy function in improving procurement practices in a Tractors Subsidy Scheme (2008-09) launched by the Government of Punjab. The CCP received complaints from a number of manufacturers and importers of tractors who claimed that only two local tractor manufacturers had been invited by the Agriculture Department of the Government of Punjab to supply tractors under the Scheme. The CCP took cognisance of this apparent exclusion of all other manufacturers, dealers/importers of tractors and informed the concerned authorities of the provincial Government that this action ran afoul of competition principles. The situation was rectified and the provincial Government started negotiations with rest of the manufacturers and importers of the tractors for the supply of tractors under the Scheme.

Another large **South African** bid rigging cartel – in this instance a purchasing cartel - appears to have benefitted from the assistance of, as the cartel leader put it in an email exchange with other members of the cartel, 'our boys' in the procurement authority of a large state owned enterprise. Here, it appears that the assistance took the form of advance information about sales of the product in question and inside information on the pricing expectations and strategies of the sellers.

Recently, much media attention has been given to a large tender put out by a large South African publicly owned utility, where a contract is alleged to have been awarded on the basis of a closed tender,

that is a tender for which selected firms are invited to bid, rather than an open tender as apparently required by the pertinent tender rules. A senior executive is alleged to have authorised the use of a closed tender system without possessing the requisite authority to override the standard operating procedures applied to tenders of this scale.<sup>5</sup> Note that the allegation here is not one of collusion – although that may yet surface. Rather it is that the purchaser assisted a particular bidder by utilising a tendering procedure that excluded potential competitors.

#### 4. What is to be done about bid rigging and bid corruption?

We have seen the anxiety expressed by the South African health department official in relation to the rigging of pharmaceutical bids. It is not misplaced. Bid rigging in public service tenders, and particularly in civil engineering and construction, appears to be such a widespread and deeply entrenched practice that one is entitled to despair at it ever being eliminated or significantly reduced.

However, the costs are so great that it justifies moving bid rigging and bid corruption to the top of the agenda for both competition enforcement authorities as well as for the authorities charged with policing corruption. The World Bank estimates that public procurement bid rigging inflates price by 20-40 per cent. Some evidence of the cost of bid rigging has been gleaned from the submissions to this roundtable and are reported above. Suffice to say that all estimates of the premium charged as a result of bid rigging in public procurement significantly exceed the rule of thumb estimate of a 10% premium which is widely accepted as the premium resulting from ‘ordinary’ price collusion. Indeed it is not surprising that price inflation in rigged bids would be higher than in other collusive activity because the winning firm has not only to ensure the monopoly rent that is the point of the collusion in the first place, but it must ensure a premium sufficient to enable the losers to be paid off and, in many instances, to enable the bribed public officials to receive their agreed pay back.

It is equally clear that bid corruption is commonplace. Moreover it appears that some of the most effective strategies available to defeat corruption are used in the formation and maintenance of cartels. Maximum transparency is generally considered to be a powerful antidote to corruption but it equally provides an important source of the information necessary to form cartels and to detect cheating. I recall responding to a bid put out by USAID for a research contract in which a specific opportunity was given to each of the qualifying bidders to pose questions to USAID aimed at clarifying aspects of the bid. The questions had to be posted on a website to which all the other bidders had access, as were the answers. The objective was clear: it was to ensure that no bidder was able to engage in *ex parte* communication with the purchaser of the service that may have enabled the passing of selective information and provided even the appearance of possible corruption.<sup>6</sup> However, the opportunities that this creates for collusion are manifest and this practice, alongside joint site visits and the like, is not uncommon particularly in the context of large and complex engineering or ICT tenders where bidders understandably are often obliged to pose clarificatory questions and request additional information before submitting a bid. It is striking how many of the competition authorities who have made submissions to this forum advocate transparency as a

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<sup>5</sup> It appears from **Turkey’s** submission that there the Public Procurement Act specifies that open tenders are the default form in which public tenders must be issued. Other forms of tendering can only be practiced when specified special conditions for their use are present. In **Singapore** open tendering is also the default option. Selective tenders limit suppliers who satisfy the conditions for participation on grounds such as financial solvency, experience and capability but limited tendering may only be used in exceptional circumstances.

<sup>6</sup> I may give USAID more credit than it deserves. The purpose may simply have been convenience – to pre-empt having to answer the same question several times over – but I don’t believe this to be the case. I understood the requirement to be aimed at promoting transparency.

mechanism to limit bid corruption without apparently appreciating the support that it may give to bid collusion.

The anti-corruption community is, as is to be expected, unanimously committed to transparency as the key weapon in the fight against corruption, including in corrupt procurement practices. However, although the quantity and character of information that anti-corruption watchdogs demand be made transparently available may cause concern to the anti-collusion watchdogs, there is no doubt that certain of the data gathered may greatly assist in the detection of collusion. For example, in the area of procurement of anti-retroviral drugs used to combat HIV/AIDS, researchers from Boston University working with the UK's DFID have developed a 'high price outlier analysis' where the 'high price outliers' are precisely likely to indicate collusion rather than corruption. Interestingly while the researchers concede that these outliers may be the consequence of 'managerial difficulties' rather than corruption, they do not seem to have contemplated the possibility of horizontal collusion.<sup>7</sup>

By the same token measures to counter bid rigging may facilitate and incentivise bid corruption. For example, a regular pattern of tendering public service contracts, as opposed to less frequent, large contracts, may facilitate collusion because it brings suppliers into more regular contact with each and it more easily enables the sharing out of contracts between the members of the cartel thus promoting the stability of the cartel. Moreover, a large contract, as opposed to a number of smaller contracts, is also more likely to attract bidders from outside of the geographical area, including international bidders.<sup>8</sup> The antitrust authority may thus urge less frequent, larger tenders upon the public procurement office in order to avoid a pattern of bidding that facilitates collusion.<sup>9</sup> However, large contracts may incentivise the paying of bribes, lower the cost of bribing (because there is only one set of procurement officials to bribe instead of several) and reduce the possibility of detection because fewer people will have knowledge of the payment of the bribe than would be the case where multiple bids had to be corrupted.

#### 4.1 *So what is to be done?*

Close co-operation between the competition authorities and those responsible for policing corruption is essential. While it is obviously not known with any precision what proportion of collusive bids also involve corruption, the incentives for these practices to operate together are sufficiently strong to justify the competition authorities and the anti-corruption authorities to proceed on this basis. However, gauging the response of several sub-Saharan African countries to public procurement bid rigging, while it is clear that there is a ready inference drawn that a rigged bid has enjoyed inside support, that it operates in tandem with corruption, it appears common practice for many competition authorities who are alerted to bid

<sup>7</sup> See Brenda Waning and Taryn Vian - *Transparency and accountability in an electronic era: the case of pharmaceutical procurements* published on the website of U4 Anti-Corruption Resource Centre ([www.U4.no](http://www.U4.no)) The U4 website is a gold mine of information in the area of corruption. It is however striking how little the site mentions collusion. When it does mention 'collusion' it usually refers to the vertical relationship between a procurement official and a bidder.

<sup>8</sup> This paper does not deal with the interface between international trade and public procurement. This is dealt with in detail in an excellent paper by Rob Anderson of the WTO and Bill Kovacic of the US FTC which has been made available to participants in this forum. (see Robert D. Anderson and William E. Kovacic *Competition Policy and International Trade Liberalisation: essential complements to ensure good performance in public procurement markets* Public Procurement Law Review (2009).

<sup>9</sup> The submission from the **United States** notes: '*Antitrust agency officials provide advice about techniques that procurement officials can use to make it less likely that their programme will become the victim of a bid-rigging scheme. For example, in certain circumstances DOJ attorneys have advised procurement officials to combine work into larger contracts so that competitors outside the local geographic area will decide that it is profitable to bid on the contracts, resulting in more competition for each contract.*'

rigging elect to simply hand over the cases to the public procurement or anti-corruption officials. One senior African competition official explained that the latter – the anti-corruption officials – enjoyed greater investigatory powers and resources than the competition authorities and are empowered to impose significantly greater sanctions. It is also likely that the anti-corruption culture is stronger than the pro-competition culture and so public appetite and support for the investigation of corruption is greater than in the case of competition violations. Moreover, the estimates of the sheer scale of corruption in public procurement are so vast that this factor alone may explain a focus on bid corruption over bid rigging. The submission by **Pakistan** cites an estimate by Transparency International that puts kickbacks in public procurement contracts at about 25% of the procurement or project budget. The World Bank is reported to have estimated the cost of corruption in public procurement alone at 15% of Pakistan's development budget for 2007/8.<sup>10</sup>

The evidence and the incentives tell us that corruption may be sufficiently useful to a bid rigging cartel that, as a matter of course, the competition authorities should always invite the anti-corruption officials to investigate possible corruption in a bid rigging cartel. By the same token, the anti-corruption officials should invite the competition authorities to explore a possible collusion angle in any case of bid corruption.

In **South Africa** the Competition Commission and the Special Investigating Unit (SIU), an independent branch of the criminal justice system responsible for policing corruption, agree that the most effective instrument for reducing bid rigging and bid corruption is robust enforcement. This has certainly reaped a rich harvest for the Commission. The data on leniency applications is cited in the Commission's submissions as is the extent of bid rigging involved in these applications, notably, although by no means exclusively, in the construction and related sectors. The flood of leniency applications is doubtlessly a product of the Commission's strong enforcement record as well as the imminent criminalisation of collusion, including bid rigging.

The SIU has also engaged in some very high profile investigations, most notably alleged bid corruption in the awarding of multi-billion rand tenders by the Department of Correctional Services. It is exploring the introduction of a plea bargaining arrangement along the lines of the Competition Commission's leniency programme.

In addition the South African Competition Commission has, in close co-operation with the National Treasury, engaged in an extensive programme aimed at assisting the various national, provincial and parastatal procurement authorities in identifying collusion. The contents of the programme are similar to those conducted by many other authorities. Hence the South African Commission's presentation to the procurement officials identifies the various forms that bid rigging traditionally takes. These include complementary bidding or cover bidding, bid suppression where bidders either withdraw a submitted bid or fail to bid at all, bid rotation whereby the bidders take turns in winning a series of tenders, sub-contracting or other forms of compensation to losing bidders or joint venture bidding. It has also identified a number of red lights that may indicate collusion in the bidding process. These include the same winning bidder for particular work, or where the same suppliers bid but take turns in winning, or bids received at the same time with similar prices and cost calculation. Other red lights include the failure on the part of an obviously qualified firm to bid on a lucrative contract, a sudden drop in the bid price upon the entry of a new or infrequent bidder, sub-contracting to a loser and suspiciously high bids without logical underlying

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<sup>10</sup> An impressionistic reading of the submissions to this forum would indicate that while anti-corruption and/or procurement authorities frequently have jurisdiction over collusive bid rigging, competition authorities never have jurisdiction over bid corruption, despite the anti-competitive implications of the latter. Nor is this surprising. It almost certainly results from the highly specialised nature of competition jurisdiction and the absence of criminal sanction in many national competition statutes.

cost differences. Bid rigging is also indicated by such prosaic features as common handwriting or fonts or common spelling errors. Sequential numbers on banking securities will indicate that a single person has gone to arrange the securities for a group of bidders.

**Box 4: A costly typographical error**

The United States submission reports a case where a combination of a simple typographical error and alert procurement officials led to a successful bid-rigging prosecution: *‘Two companies submitted bids for the repair of certain government equipment damaged by a storm. Each company submitted a cover letter with its bid expressing its interest in performing the work. A procurement official noticed that each cover letter contained the same typographical error (an unnecessary word), which was as follows: “Please give us a call us if you have any question.” The procurement official was concerned that the companies had colluded on their bids and he reported his concerns to the Antitrust Division. Following a full investigation, the companies and individuals involved were prosecuted and convicted for bid rigging and other violations.’*

The South African Competition Commission’s programme also suggests mechanisms for mitigating bid rigging. These include taking particular care in the design of the procurement process, while avoiding imposing a requirement to bid, nevertheless seeking an explanation for a failure to bid, and maintaining extensive and detailed records that will enable the detection of suspicious bidding patterns. The Commission has also proposed to the National Treasury that the submission of certificates of independent bids be made mandatory.

The Commission has also produced a booklet drawing heavily on the OECD Guidelines for Fighting Bid Rigging that is aimed at assisting procurement officials in the identification and mitigation of bid rigging. Most of the submissions report the publication of manuals that are prepared by the national competition authority aimed at assisting public procurement officials to detect bid rigging followed up by training courses to this end.<sup>11</sup>

**Box 5: US bid rigging training and outreach programmes**

The US submission outlines the DOJ’s extremely comprehensive training and outreach programmes to combat bid rigging. It reports considerable success in combating bid rigging which it attributes, in significant part, to the impact of its training and outreach programmes. It suggests that a comprehensive training programme should:

- Explain the legal standard for a violation
- Explain how antitrust investigations are conducted
- Discuss penalties for bid-rigging and other antitrust violations
- Discuss indicators of bid-rigging
- Encourage procurement officials to report anything suspicious
- Give examples of matters in which procurement officials have played a key role in the detection of bid-rigging
- Discuss other crimes that may be prosecuted, including a variety of corrupt and fraudulent practices

<sup>11</sup> See, inter alia, submission by **El Salvador**. The submission by **Brazil** reports a particularly energetic advocacy and education campaign around bid rigging.

Date collection and collation is a critical factor in combating bid rigging and bid corruption. We have noted the firm commitment of the anti-corruption community to transparency and the potential dangers that this portends for cartel formation. However, it is clear that transparency is so potentially effective in countering corruption that it will overcome any objection to the effect that it may support bid collusion. But effective information and data will also support efforts at countering bid collusion. I have already made mention of the 'price outlier' analysis used in combating corruption in the procurement of ARVs. It appears that the best path for competition enforcers is to engage with the anti-corruption community in identifying data that will be useful to fighting both corruption and collusion, and, concomitantly, identify those that, that if made publicly available, may abet collusion.

The submission from **Singapore** recognises that the additional transparency promoted by its e-procurement web portal may facilitate collusion. However it argues that:

*..these risks are alleviated to a certain extent by the structure of the tender system itself. GeBIZ as a web portal allows for the maximisation of potential participation of competing bidders worldwide; it encourages both local and foreign participation in procurement, reduces the costs of bidding and put in place participation requirements that do not unreasonably limit competition and thereby reduces the possibility of collusion. Further, the government allows smaller firms to form a consortium and tender for bigger projects to allow more firms, including small and medium enterprises to participate in such tenders. Transparency on prices also allows benchmarking across firms and therefore facilitates competitive bidding. Moreover, the easy availability and access to information via an electronic forum by which tender and award information is provided allows for ease of monitoring and policing by the authorities. Competitors can request for information on tender selection to review evaluation results and competition authorities can detect bid rigging activities via analysis of bid history patterns and other bid data.*

#### **Box 6: Data Gathering:**

#### **Korea's Bid Rigging Indicator Analysis System (BRIAS), Brazil's Public Spending Observatory (OPD) and South Africa's Special Investigating Unit**

**Korea** utilises data gathering and coordination in a systematic effort to detect bid rigging. Its Bid Rigging Indicator Analysis System analyses bid-rigging indicators based on data concerning bids placed by public institutions. With the data delivered online from the public institutions, the analysis system calculates the probability of bid rigging by giving weightings to various indicators like bid-winning probability, the number of bidders, bid prices, competition methods, the number of unsuccessful bids and hikes in reserve prices, transition into private contracts, etc.

Since October 1997, the KFTC has undertaken manual analyses of bidding documents obtained from some public agencies, and then in September 2006 it set up the analysis system for bid-rigging monitoring. At first, it was applied to information provided by Public Procurement Service, but the Commission has gradually expanded the application of the system until in 2008 it was mandatory for all public bodies engaged in procurement to provide information for the BRIAS. From January 2009, the KFTC has secured the legal powers ground in the MRFTA for mandating all the public bodies to provide it with bid-related information for analysis by BRIAS.

The analysis system helps the KFTC better uncover bid rigging conspiracy by enabling it to monitor tenders of the public sector chronologically and conduct on-site investigation into those with significant indication of bid rigging. It also prevents national budget waste caused by bid rigging and helps establish a fair competitive order. Furthermore, the system makes companies voluntarily stay away from bid rigging by sending a signal that the KFTC is keeping an eye on every bid for public work.

In **Brazil**, the Office of the Comptroller-General (CGU), the federal agency responsible to the President for all matters related to the defence of public assets and transparency in administration, has established the Public Spending Observatory (OPD). The OPD is a permanent intelligence unit combining the practical knowledge and experience of auditors with advanced IT tools that enable the auditors to speedily process enormous volumes of data from hitherto disparate sources. This IT based consolidation and collation transforms the utility of previously disaggregated data in the identification, prosecution and prevention of corruption, fraud and collusion in public procurement. Hence the tax administration system provides information about the corporate structure of bidding companies and its partners, while family relationships are revealed by the social security service data bases and multiple data bases register addresses.

Crossing these data, the OPD identifies ‘trails’ and patterns that require further investigation. For example, the participation of companies with common shareholders in the same procurement procedures, different bidders with the same address, family bonds and past and present employer-employee relationship between partners and directors of the bidder companies. Internal analysis of the procurement databases may also indicate suspicious patterns of bid-rotation and market division among competitors by sector, geographic area or time, which might indicate that bidders are acting in a collusive scheme. Those “trails” are automatically followed on a daily basis, resulting in “red” or “orange” warnings to the administrative or criminal authorities or even to the federal agency responsible for the problematic procurement process. Once a suspicious pattern is detected, it is loaded in an OLAP (Online Analytical Processing) tool which results in reports and management review panels. The main objective is to analyse the distribution of bidding processes of a product or service by geographic area, government agency, amount of resources involved, per year during a certain period of time.

**South Africa’s** Special Investigating Unit has also embarked on the difficult but potentially fruitful task of enabling various pertinent data bases to speak to each other. For example, data from procurement agencies may reveal patterns that indicate bid corruption which, if aligned with the data base maintained by the companies registration office may reveal the existence of shell companies or a pattern of inter-locking directorships between the bidding companies. If aligned with the data banks of the Department of Home Affairs, familial relationships between procurement officials and the directors of bidding companies may be revealed

Without exception, the submissions to this roundtable recognise the necessity for intra-governmental co-operation. A central part of the South African government’s response to the ramifications of the global economic crisis is the establishment of a high level task team to ‘effect savings’. The task team comprises the Ministers of Finance and Public Service and Administration and the Minister in the Presidency responsible for Performance Monitoring and Evaluation. ‘*Combating wastage, leakage and corruption in government, specifically in the procurement system*’ is explicitly identified as a key aspect of government’s efforts to effect savings, although collusion in the tendering process is not mentioned, despite anti-competitive procurement practices – such as preferences accorded certain state owned entities – being explicitly viewed as significant factors raising the costs of procurement. In order to tackle fraud and corruption a task team reporting to the Minister of Finance comprising the National Treasury, the Revenue Services, the Financial Intelligence Centre, the Special Investigative Unit and the Auditor General has been established with a range of enhanced enforcement sanctions and investigative resources under close consideration. As of the time of writing the Competition Commission is not represented on that committee although given the close relationship between collusion and corruption it is a clear candidate for membership.

The Special Investigative Unit and the Competition Commission are both committed to engaging with each other. As noted earlier while it is possible that the most commonly utilised mechanisms to counter bid rigging and bid corruption may sometimes work against each other, the obvious cure of this is close liaison between the agencies responsible for policing and prosecuting these closely related phenomena.

## 5. Conclusion

While bid rigging frequently utilises precisely the same mechanisms as ‘ordinary’ price fixing and market allocation cartels, there are good reasons for competition authorities to maintain a particular focus on cartelisation in the area of public procurement. In particular it is the ubiquitous, if not always necessary, relationship with corruption that warrants particularly close attention.

The relationship between corruption and collusion in public procurement immediately suggests the benefits of close co-operation between the agencies responsible for the prosecution of each offence. This has been advocated – and is often practiced – by many of the participants in this forum. In addition training procurement officials to recognise rigged bids is widely supported as is the more difficult task of ensuring that various data bases ‘speak’ to each other, the better to act as warnings of bid rigging and bid corruption. A particularly valuable product of co-operation may be the exchange of data and the design of data collection systems that do not, in the name of transparency, promote collusion.

It is imperative that the competition authorities and those directly responsible for fighting corruption remain cognisant of the tremendous cost that these offences impose on society and it is equally imperative that this be communicated to the public. The costs are not ‘merely’ micro costs imposed on selected consumers or tax payers. They are generally imposed upon the poorest consumers of the most basic products and they embody potentially powerful macro-implications.

The Economist (9<sup>th</sup> January 2010) recently noted:

*As leader of Italy’s socialists from 1976 to 1993, Craxi was among the orchestrators of a system in which the main parties, and their officials, fed off bribes from companies bidding for public contracts. The cost of those kickbacks was routinely added to the price of the work, so this system contributed to the huge public debt under which Italians and their governments now labour (my emphasis).*

Of course, the good news in that otherwise grim story of corruption and, no doubt, collusion in public procurement is that Italy also possessed magistrates sufficiently courageous and incorruptible to indict a Prime Minister. Enforcing probity and adherence to the law in public procurement will inevitably bring the enforcement authorities up against powerful individuals and interests. When that time comes it’s as well that the general public be closely informed of its deep interest in robust enforcement of pro-competition and anti-corruption rules in the area of public procurement.



**Ms. SUE ARROWSMITH  
(UNIVERSITY OF NOTTINGHAM, UNITED KINGDOM)**

# The role of transparency in addressing corruption and the need for further research

**Professor Sue Arrowsmith**

Director, Public Procurement Research Group;  
University of Nottingham  
[www.nottingham.ac.uk/law/pprg](http://www.nottingham.ac.uk/law/pprg)

## What is transparency?

- A *tool* for achieving objectives in public procurement e.g.
  - Preventing corruption
  - Achieving value for money
  - Ensuring accountability
  - Ensuring equal treatment

## What is transparency?

- Four dimensions
  - Publicity for contract opportunities
  - Publicity for the rules of each procedure
    - E.g. for selection and award criteria
  - Limits on discretion
    - E.g. disclosure of criteria and weightings etc
  - Verification and enforcement

## Limits on transparency

- Impossible to eliminate discretion
- Need to focus also on the contract execution (post-award) phase

## Costs of transparency

### 1. Can *prevent* best value for money – is “second best” approach to achieving best value for money

- *“As a strategy of organizational design, rules have a cautious character. When we design organizations based on rules, we guard against disaster, but at the cost of stifling excellence.....Government officials deprived of discretion which could produce misbehaviour are at the same time deprived of discretion that could call forth outstanding achievement”*

*(S. Kelman, Procurement and Public Management (1990), p.28)*

- Is one reason why not found to same degree in private sector (although not only one)

## Costs of transparency

### 2. Formal tendering can make collusion easier

### 3. Process costs for procuring entities and tenderers

UK: costs 10-15% higher than private sector tendering procedures

## Costs of transparency

### 4. Emphasis on transparency is distracting for regulators *and* purchasers?

Passive waste versus active waste: more than 80% is passive

- O.Bandiera, A.Pratt and T.Valletti, "Active and Passive Waste in Government Spending: Evidence from a Policy Experiment," (2009) 99 *American Economic Review* 99(4) 1278-1308

<http://www.cepr.org/pubs/dps/DP6799.asp>

## Conclusion

- Empirical research needed on the benefits and costs of *specific transparency rules*
- More focus on other aspects of public procurement policy?



**Mr. ABDESSELAM ABOUDRAR**

**PRESIDENT, CENTRAL ANTI-CORRUPTION AGENCY, MOROCCO**

 <p>الهيئة المركزية للوقاية من الرشوة Instance Centrale de Prévention de la Corruption</p>	<p><b>Royaume du Maroc</b> <b>Le Premier Ministre</b></p>
<h2><b>Forum Mondial sur la Concurrence</b></h2>	
<p><b>18 - 19 février 2010 - OCDE, Paris</b></p>	
<p><b>Session 3 : Collusion et Corruption dans les Marchés Publics</b></p>	
<p><b>Abdesselam Aboudrar</b> Président Instance Centrale de Prévention de la Corruption, Maroc <i>Vendredi 19 février 2010</i></p>	

 **ICPC**  
الهيئة المركزية للوقاية من الرشوة  
Instance Centrale de Prévention de la Corruption

## L'importance des marchés publics au Maroc

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- ✓ Les marchés publics sont une composante essentielle de l'économie marocaine:
- ✓ La masse globale des commandes de l'Etat atteint plus de 120 Md de Dh (> 10,7 Md Euros), soit plus de 15% du PIB;
- ✓ Importance stratégique de ces dépenses pour le développement du pays : Grand nombre de projets d'infrastructure et de développement dans lesquels les marchés publics jouent un rôle déterminant, en terme de répartition rationnelle et efficace de la dépense publique.

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Instance Centrale de Prévention de la Corruption

## Les risques de corruption et de collusion dans les marchés publics au Maroc

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- ✓ **Montants importants en jeu + diversité des intervenants + multiplicité des règles et leur complexité...**
  - Les marchés publics = Un domaine exposé au **risque de corruption et de collusion**

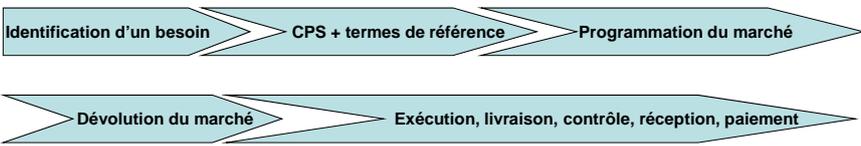
Certains types d'irrégularités dans les marchés publics :

- ✓ La corruption ;
- ✓ Le manque d'accès à l'information concernant les appels d'offres ;
- ✓ Le non respect des obligations de publicité ;
- ✓ Le clientélisme et le favoritisme dans le choix des adjudicataires ;
- ✓ La faiblesse du contrôle en matière d'attribution et d'exécution des marchés ;
- ✓ La fraude, les malversations et autres sortes de pratiques illicites.


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 Instance Centrale de Prévention de la Corruption

Les risques dans les différentes étapes des marchés Publics au Maroc

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**1- Naissance d'un marché par l'identification d'un besoin** dont la satisfaction est rendue possible par la Loi des Finances, par une décision administrative, municipale, communale, territoriale, ou de la direction d'un établissement public...

 Le besoin peut être :
 

- ✓ Fallacieux et infondé;
- ✓ Programmé à des fins de clientélisme;
- ✓ Satisfaisant un intérêt particulier....

**2- Besoin exprimé à travers un Cahier des Prescriptions Spéciales, des Termes de Références.....**

 Ces spécifications peuvent être orientées ou manipulées : **risque de collusion ou d'ententes....**


**ICPC**  
 الهيئة المركزية للوقاية من الرشوة  
 Instance Centrale de Prévention de la Corruption

Les risques dans les différentes étapes des marchés Publics au Maroc

---

**3- Programmation du marché** pour être lancé et dévolu à une date ou période donnée, après avoir passé toutes les phases de visa et d'approbation...

 La programmation peut obéir au souci d'échapper au contrôle...

**4- Dévolution du marché** à travers des procédures réglementaires et administratives, précisées par la Réglementation des Marchés Publics, par des Règlements des Achats et par des Règlements de Consultation définissant les critères de choix et de jugement des offres...

 Les principes de transparence, d'équité, de libre concurrence et d'efficacité peuvent être ignorés, manipulés ou transgressés : **Risque de corruption et de collusion.**

**5- Exécution, livraison, contrôle, réception et paiement du marché** selon des règles et des dispositions définies par des Cahiers des Charges Générales, Communes, ou Spéciales, par le Contrat....

 Ces règles et dispositions peuvent être, également, ignorées, manipulées ou transgressées.

→ Cette phase est souvent compliquée par l'intervention d'autres acteurs: Administrations ou collectivités locales, représentants locaux et centraux des maîtres d'ouvrage, architectes et bureaux d'études techniques..., services de la TGR et du CED...



الهيئة المركزية للوقاية من الرشوة  
Instance Centrale de Prévention de la Corruption

### Les principales conséquences de la corruption dans les marchés publics au Maroc

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- ✓ Le gaspillage des fonds publics dû à leur allocation irrationnelle et inefficace ;
- ✓ La réalisation de produits ou de travaux de qualité inférieure, ce qui peut causer de graves accidents, parfois mortels ;
- ✓ Le gaspillage des ressources dû au renouvellement des commandes ou au doublement des travaux lorsque ces derniers sont mal exécutés ;
- ✓ Le retardement, voire l'annulation, de plusieurs grands projets d'infrastructure et de développement ;
- ✓ Le découragement d'investisseurs étrangers et locaux ;
- ✓ Le manque de confiance des entreprises Marocaines en les établissements publics ;
- ✓ ...

➔ **Conséquences graves avec un impact sur le développement économique et social du pays...**



الهيئة المركزية للوقاية من الرشوة  
Instance Centrale de Prévention de la Corruption

### Comment lutter contre la corruption et la collusion dans les marchés publics au Maroc ?

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**1- Réforme des marchés publics**

**Importante réforme des marchés publics portant principalement sur l'amélioration de la gestion et sur la promotion de l'intégrité et de la transparence tout en luttant de façon active contre les pratiques de fraude et de corruption.**

*Les Principaux axes d'innovations de ce projet de réforme sont :*

- ✓ La consécration de l'unicité de la réglementation en matière de marchés publics;
- ✓ La simplification et la clarification des procédures ;
- ✓ Le renforcement du recours à la concurrence et de l'égalité de traitement des concurrents ;
- ✓ La consolidation du dispositif de transparence et de la moralisation de la gestion de la commande publique ;
- ✓ La modernisation de la gestion de la commande publique ;
- ✓ L'amélioration des garanties des concurrents et des mécanismes de réclamation.

## Comment lutter contre la corruption et la collusion dans les marchés publics au Maroc ?

### 2- Promotion de la transparence dans les marchés publics

#### La volonté de transparence s'exprime notamment à travers :

- ➔ Les exigences de modernité, de bonne gouvernance et d'ouverture économique qui encouragent à se doter d'une réglementation des marchés qui tient compte de l'objectif de consolidation de la transparence et des intérêts de l'Administration et du secteur privé dans le cadre d'un partenariat équilibré, en vue d'assurer des prestations de meilleure qualité et à moindre coût ;
- ➔ La conception du nouveau décret en adéquation avec la nouvelle approche de la gestion des finances publiques basée sur la responsabilisation accrue des ordonnateurs, la recherche de la performance, ainsi que sur la contractualisation des rapports entre les administrations centrales et leurs services déconcentrés ;
- ➔ La détermination des pouvoirs publics d'inscrire, de manière irréversible, la passation des marchés de l'Etat dans une logique de respect des principes de liberté d'accès à la commande publique, d'égalité de traitement des candidats, de transparence et de simplification des procédures.

## Comment lutter contre la corruption et la collusion dans les marchés publics au Maroc ?

### 3- Intervention d'une multitude d'acteurs publics et privés et séparation des tâches :

- ✓ Les services ordonnateurs sont chargés de la préparation des besoins, de la passation des marchés de leur suivi, de leur réception et de leur liquidation ;
- ✓ Les services de contrôle chargés de s'assurer de la régularité budgétaire et des procédures (respect des règles de transparence et de concurrence) ;
- ✓ Les services du comptable payeur chargés du règlement des dépenses correspondantes et de la libération des créances de l'entité publique ;
- ✓ Les opérateurs privés assurent la fourniture des prestations et la réalisation des travaux de l'administration dans un cadre contractuel organisé;
- ✓ La Commission des Marchés : Émet des avis sur les projets de textes législatifs ou réglementaires et sur les problèmes de toute nature relatifs aux marchés publics + Propose des dispositions pour compléter la législation et perfectionner les services de marchés et lancer des études pour améliorer les conditions de placement des commandes et des marchés de l'État.
- ✓ Le Conseil de la Concurrence;
- ✓ L'Instance Centrale de Prévention de la Corruption.

#### ➔ Problèmes de coordination et efficacité du contrôle?

## Comment lutter contre la corruption et la collusion dans les marchés publics au Maroc : D'autres mesures

4- Promotion de la bonne concurrence dans les marchés publics

5- Garantie des droits des entreprises

6- Recherche de la performance dans la gestion des marchés publics

7- Moralisation de la gestion des commandes publiques

8- Prise en compte des engagements internationaux pris par le Maroc

9- Renforcement des capacités de gestion

**Mr. BENNY PASARIBU**  
**COMMISSIONER, KPPU, INDONESIA**

**Corruption and Competition**  
“Collusion and Corruption in Public Procurement”

presented by Dr. Benny Pasaribu

Indonesian Competition Authority (KPPU RI)  
Commissioner

*for the Global Forum on Competition,  
Paris, 18-19 February 2010*



## Recent Development of Indonesian Economy



- Indonesian economy has been growing above 7% per year during the period of 1970 until mid of 1990s. However, since the Asian crisis in 1997-1998, followed by reformation era, Indonesian economy sharply declined and then grew in slower path. Fortunately, since 2006 the economy grew faster and achieved more than 6 % per annum. Last year Indonesian economy was able to grow above 4% despite the impact of global crisis.
- Reform Era started in 1998, symbolized by the resigning of President Soeharto, several new laws were enacted, such as the corruption eradication law and competition law, as well as the establishment of corruption court, anti-corruption agency (KPK), and the competition agency (KPPU).

2

## Recent Development of Indonesian Economy



- Last month, ASEAN-China FTA just started. Indonesia has to make a great deal of improvement in policy/regulatory reforms towards higher productivity, efficiency, good governance and law enforcement.
- However, from various survey agencies, Indonesia is still considered among the top rank of for corruption ( Transparency International, etc.).

3

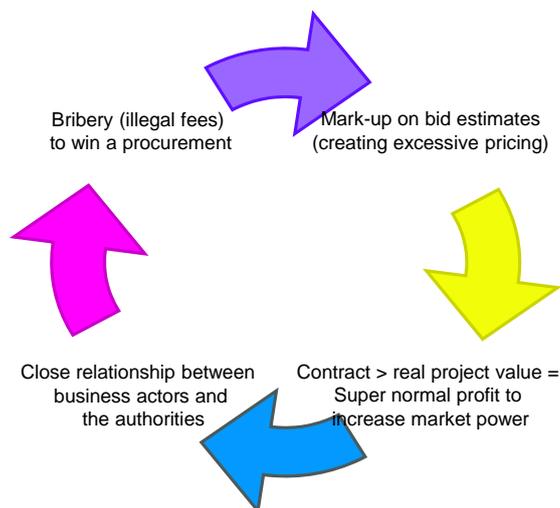
## Corruption Grows faster in Less Competitive Areas



- Aside from other forms of anticompetitive practices, Government procurement may be one of the most collusive area that brings about bid rigging activities that lead to corruption.
- Anticompetitive practices leads to accumulation of supernormal profits by which the amount of cash money is surmount available to be given to related authorities, when it is necessary, that can be considered as kick back, bribery, or other names.
- Needs more in depth studies on the correlations between competition and corruption across sectors.

4

## Corruption in procurement process



- The main characteristic of a government with high corruption level is strong relationship between those in power and business actors, which may create opportunity by business actors to freely exploit consumers by an excessive pricing in order to gain supernormal profits.
- The supernormal profit accumulated by business actors may be set aside some quite big funds that make it possible for corruption practices, in order to maintain status quo or even business expansion and hence supernormal profits.

5

## Comparison of Corruption and Competitiveness Indices in 2009

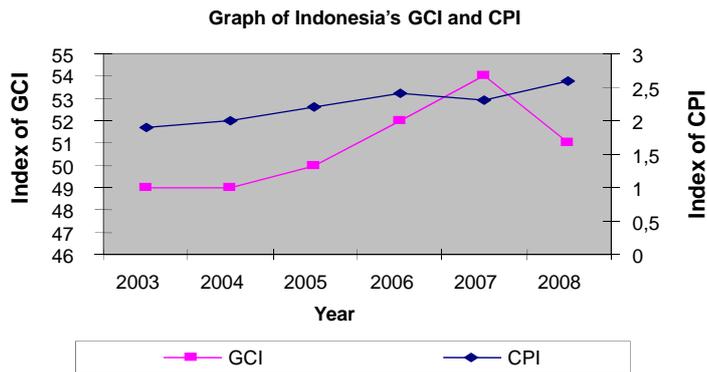


States	Corruption		Competitiveness	
	Index	Rank out of 180 states	Index	Rank out of 134 states
Singapore	9.2	3	5.53	5
Malaysia	4.5	56	5.04	21
Thailand	3.4	84	4.60	34
Brunei	5.5	39	4.54	39
<b>Indonesia</b>	<b>2.8</b>	<b>111</b>	<b>4.25</b>	<b>55</b>
Vietnam	2.7	120	4.10	70
Philippines	2.4	139	4.09	71

Source: processed from various sources

6

## Corruption perception data (CPI) and competitiveness data (GCI) 2003-2008



Source: processed from various sources

7

## KPPU and the collusion in public procurement



- KPPU has received 730 complaints in 2009 that consist of 201 reports and 529 written information. The 84% or 169 out of 201 reports is on the violation of Article 22 (bid rigging). Experiences shows cartel/collusion is maintained by guarantee a sub-contract or cooperation with bid committee in adjusting requirements for their favor.
- KPPU has made various efforts to prevent collusion in public procurement:
  1. Publish guideline on the prevention of bid-rigging;
  2. Cooperation with the Indonesian Corruption Eradication Commission;
  3. Recommend administrative actions against the officers concerned to those with higher position in their organization;
  4. Advocacy through dissemination program; and
  5. Currently putting another effort into the punishment of administrative sanctions to tender committees or principals.
- Cooperation among state agencies is a must including with:
  1. KPK (Corruption Eradication Commission)
  2. National Police
  3. Attorney General Office
  4. BPK (State Auditor)
  5. LKPP ( Government Procurement Authority)

8

## Cooperation with the Corruption Eradication Commission (KPK)



- Cooperation between the Corruption Eradication Commission (KPK) and the KPPU was agreed on February 6th 2006.
- The scope of cooperation were involving access on data, information, and coordination related to respective case findings. If there is indication of corruption in any cases handled by KPPU, then KPPU could apprehend the corruption aspect to the KPK, while KPPU continues to focus on collusion aspect and vice versa.
- Includes joint socialization of the law to stakeholders.

9



**Mr. ROBERT D. ANDERSON, Mr. WILLIAM E. KOVACIC  
AND Ms. ANNA CAROLINE MÜLLER\***

## 1. Introduction

Ensuring the effective functioning of public procurement markets necessitates addressing two distinct but inter-related challenges: (i) ensuring *integrity* in the procurement process (i.e., preventing corruption on the part of public officials); and (ii) promoting effective *competition* among suppliers, including by preventing *collusion* among potential bidders. These two challenges sometimes merge, for example where public officials are paid to turn a blind eye to collusive tendering schemes or to release information that facilitates collusion (e.g. the universe of potential bidders or the bids themselves). However, analytically, preventing corruption on the part of public officials and promoting effective competition between potential suppliers are separable challenges: the former (corruption) is first and foremost a principal-agent problem in which the official (i.e. the "agent") enriches himself at the expense of the government or the public (i.e. the "principal"); while the latter (promoting competition) involves preventing collusive practices among potential suppliers and removing barriers that unnecessarily impede healthy competition.<sup>1</sup>

The issue of ensuring integrity in public procurement processes has rightly received a good deal of attention at the international level in recent years. It is addressed by various international instruments, including: (i) the UN Convention Against Bribery and Corruption; (ii) the OECD Convention on

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\* 15 January 2010, Prepared for publication in Sue Arrowsmith and Robert Anderson, eds., *The WTO Regime on Government Procurement: Recent Developments and Challenges Ahead* (provisional title; forthcoming in 2010)

Ensuring integrity and competition in public procurement markets: a dual challenge for good governance Anderson: Counsellor, Intellectual Property Division (team leader for government procurement and competition policy), World Trade Organisation, Geneva, Switzerland. Kovacic: Commissioner, US Federal Trade Commission and E.K. Gubin Professor of Government Contracts Law, George Washington University Law School, Washington, D.C. (on leave). Müller: Associate, Clifford Chance LLP, Frankfurt, Germany. Parts of this chapter draw on material in Anderson and Kovacic, "Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets," *Public Procurement Law Review*, 2009, issue 2, pp. 67-101. **The views expressed are the personal responsibility of the authors and should not be attributed to the organisations with which they are affiliated.**

<sup>1</sup> See, for useful clarification, Frédéric Jenny, "Competition and Anti-Corruption Considerations in Public Procurement," in OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (Paris, 2005), chapter 3, pp. 29-35 (distinguishing between corruption involving public officials and collusion between potential suppliers, and noting factors contributing to each problem). Related perspectives are provided in Jean-Jacques Laffont and Jean Tirole, *A Theory of Incentives in Procurement and Regulation* (Cambridge, Mass.: MIT Press, 1993); in W.B. Bumett and W.E. Kovacic, "Reform of United States Weapons Acquisition Policy: Competition, Teaming Agreements, and Dual-Sourcing," *Yale Journal on Regulation* 6 (1989), pp. 249-317; and in William E. Kovacic, "Commitment in regulation: Defense contracting and extensions to price caps," *Journal of Regulatory Economics*, vol. 3, no. 3, September 1991, pp. 219-240.

Combating Bribery of Foreign Public Officials in International Business Transactions; and (iii) the OECD Revised Recommendation on Combating Bribery in International Business Transactions. The prevention of corruption has also been an important focus for non-governmental organisations (NGOs), which have made important contributions in this field.<sup>2</sup> Given this intensive international focus, it is, perhaps, not surprising that the revised text of the WTO Agreement on Government Procurement (GPA)<sup>3</sup> that was provisionally adopted by the Parties to the Agreement in December 2006 contains a new substantive provision that requires procurements to be conducted in a manner that avoids conflicts of interest and prevents corrupt practices, in addition to related references in the preamble to the Agreement.<sup>4</sup> This provision breaks new ground and signals the increasing importance of the Agreement as an international instrument of market governance.

For the most part, the promotion of competition in public procurement markets has not received similar high-level attention as an aspect of international governance.<sup>5</sup> This is despite the fact that competition is a core objective of national procurement systems which is essential to good performance.<sup>6</sup> Certainly, the promotion of efficient conditions for international competition, consistent with the principles of comparative advantage, is central to the purposes of the GPA.<sup>7</sup> As will be discussed in this chapter, the realisation of this objective necessitates the effective enforcement of national competition law provisions relating to collusive tendering and competition advocacy efforts by relevant agencies in addition to international liberalisation via an instrument such as the GPA; none of these measures is likely to achieve its full objectives in the absence of the other.

In general, measures aimed at preventing corruption in public procurement processes, particularly through enhanced transparency, are also consistent with the promotion of competition. Transparency measures promote competition by informing suppliers of opportunities to compete and by giving them confidence that bids will be assessed objectively on their merits – thereby enhancing their ability and incentive to bid on specific procurements.<sup>8</sup> Transparency measures, nonetheless, may not be consistent with the promotion of competition in all respects. In particular, experience in the application of competition law in public procurement markets highlights circumstances in which transparency-enhancing

<sup>2</sup> See, e.g. the activities of Transparency International, profiled at <http://www.transparency.org/>.

<sup>3</sup> See GPA/W/297 (available at <http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/W297.doc>) and, for commentary, Anderson and Arrowsmith, *this volume*, chapter \_\_\_.

<sup>4</sup> See Part II, below.

<sup>5</sup> To be sure, there are important exceptions – notably the work of the OECD Competition Committee, the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy and the Consumer Unity and Trust Society (CUTS).

<sup>6</sup> Steven L. Schooner, "Desiderata: Objectives for a System of Government Contract Law," *Public Procurement Law Review*, vol. 11, p. 103; see also Steven L. Schooner, Daniel I. Gordon, and Jessica L. Clark, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations* (Working paper, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1133234](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133234)).

<sup>7</sup> As stated by Judge Diane Wood, a former US Deputy Assistant Attorney General for Antitrust: "While the focus [of the Agreement on Government Procurement] might appear to be on securing access to the government's business for foreign companies, the effect just as surely will be to secure the benefits of competition for the procuring government itself." Diane P. Wood, "The WTO Agreement on Government Procurement: An Antitrust Perspective," in Bernard M. Hoekman and Petros C. Mavroidis, eds., *Law and Policy in Public Purchasing: the WTO Agreement on Government Procurement* (Ann Arbor: University of Michigan Press, 1997), chapter 14. See, for related discussion, Part III(A), below.

<sup>8</sup> Sue Arrowsmith, *Government Procurement in the WTO* (The Hague: Kluwer Law International, Studies in Transnational Economic Law, vol. 16, 2003), pp. 169-171.

measures (e.g., the public opening of tenders) can facilitate collusion among suppliers.<sup>9</sup> This highlights a need for balancing (mutual accommodation) of competition and anti-corruption concerns. With such balancing, measures aimed at preventing corruption and promoting competition are likely to be strongly mutually reinforcing.

This chapter develops the foregoing lines of argument. The remainder of the chapter is organised as follows. Part II focuses on the challenge of ensuring integrity in public procurement processes, and the measures that can be employed to address the challenge. This includes a discussion of the new provision of the revised GPA text focusing on the "conduct of procurement". Part III reviews basic economic-theoretical considerations and evidence concerning the importance of competition in procurement markets, and the circumstances in which it is likely to thrive. Part IV discusses the principal means through which competition in public procurement markets is promoted. In addition to the possibility of international liberalisation via the GPA or a similar instrument (itself a powerful tool for strengthening competition), the role of competition policy in this area is examined.<sup>10</sup> This encompasses: (i) the application of antitrust rules to prevent collusive tendering; (ii) the role of such policy in addressing regulatory and other barriers to competition, through "competition advocacy" activities; and (iii) the application of other aspects of competition law including the treatment of mergers and joint ventures. Competition policy, it is argued, is an essential complement to international liberalisation via mechanisms such as the GPA.<sup>11</sup> This part of the chapter, specifically the sub-section on competition advocacy, also reflects on the issue of transparency measures that may facilitate collusion, and suggests some appropriate limits on such measures in this regard. Part V provides concluding remarks.

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<sup>9</sup> See discussion in Part IV, below, and references cited therein.

<sup>10</sup> The term "competition policy" is sometimes equated with the enforcement of laws that prohibit various forms of anti-competitive business practices (competition or antitrust law). Properly understood, however, competition policy encompasses a larger set of policy instruments by which a country can promote business rivalry as a means of improving economic performance. These include, very much, advocacy activities through which competition agencies and other bodies sharing similar interests encourage the adoption of pro-competitive and market-strengthening reforms (see, for related discussion, William E. Kovacic, "The Future of U.S. Competition Policy," *theantitrustsource*, September 2004, pp. 1-3; William E. Kovacic, "The modern evolution of U.S. competition policy enforcement norms," *Antitrust Law Journal*, 71(2): 377-478; and Robert D. Anderson and Frédéric Jenny, "Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy," in Erlinda Medalla, ed., *Competition Policy in East Asia* (Routledge/Curzon, 2005)). In implementing competition policy at the national level, there is considerable room to account for specific national circumstances and changing capabilities through the initial definition of responsibilities and creation of policymaking instruments, the sequencing of activities, and the adjustment of powers over time. See William E. Kovacic, "Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement," *77 Chicago-Kent Law Review* 265 (2001).

<sup>11</sup> See also Robert D. Anderson and William E. Kovacic, "Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets," *Public Procurement Law Review*, 2009, issue 2, pp. 67-101. By "essential complements", we mean that neither external liberalisation nor the promotion of competition through national competition policies is likely to achieve its full objectives in the absence of the other instrument.

## 2. Corruption in public procurement markets: what is the problem (analytically) and how is it addressed?

Corruption in public administration may be defined as the abuse, by public officials, for private gain, of power that has been entrusted to them through statutory or other means.<sup>12</sup> In the context of public procurement markets, such abuses refer to conduct such as the awarding of contracts, the placing of suppliers on relevant lists or other administrative actions taken not for objective public interest reasons, but for improper compensation or other reciprocal benefits (i.e. bribes). Corruption has rightly been condemned as a barrier to development and a scourge on the welfare of citizens in developing and developed countries alike.<sup>13</sup> This builds on the findings of economists such as Robert Wade that have long identified corrupt procurement practices as a barrier to efficient and sustainable development.<sup>14</sup> Such practices can also be viewed as an example of the more generic phenomenon of "rent-seeking" – i.e. the dissipation of a society's resources through activities that enrich individual market participants at the expense of others, without contributing to the welfare of society as a whole – a phenomenon which is viewed by some economists as being central to the problem of under-development.<sup>15</sup>

The economist and jurist Frédéric Jenny offers the following analysis of the "principal-agent" problem that is central to the practice of public procurement, and which can lend itself to corrupt practices:

*"Whereas the awarding of the ... contract [is] supposed to be done in such a way as to maximise public welfare, the complexity of transactions makes it impossible for the end-users to award contracts directly and they have to go through an agent over whom they have limited control because of informational asymmetries. For example, [in] public procurement markets, the body in charge of establishing the contract specifications, selecting the bidders and choosing the winning bid is frequently composed of appointed or elected procurement officers who act as intermediaries between the beneficiaries and the potential providers. ... The difficulty stakeholders have in exercising some control over the design and awarding of public procurement contracts, and thus the possibility for corruption, will be greater in cases where the service or the product which is the object of the contract is complex and/or has been designed to meet the specific needs of the demander. [Accordingly,] there is a possibility for procurement officers or the members of the procurement commission to behave strategically, that is to design the contract, to select the bidders and award the contract in such a way that the winning bidder will not necessarily be the one who maximises the social benefits but the bidder who will*

<sup>12</sup> See, e.g. "How do you define corruption?" on the website of Transparency International, at [http://www.transparency.org/news\\_room/faq/corruption\\_faq](http://www.transparency.org/news_room/faq/corruption_faq).

<sup>13</sup> See, e.g., B.C. Harms, "Holding Public Officials Accountable in the International Realm," *Cornell International Law Journal*, vol. 33, 2000, at p. 159.

<sup>14</sup> See, e.g. Robert Wade, "The system of administrative and political corruption: Canal irrigation in South India," *Journal of Development Studies*, Volume 18, Issue 3, April 1982, pages 287 – 328, and more generally, Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialisation* (Princeton University Press, 2003).

<sup>15</sup> See, for the classic treatment, Anne O. Krueger, "The political economy of the rent-seeking society," *American Economic Review*, 1974, 64(3): 291–303. The continuing significance of this phenomenon for developing countries is discussed in Chiedu Osakwe, "Poverty reduction and development: the interaction of trade, macroeconomic and regulatory policies", Tenth Joseph Mubiru Memorial Lecture, organised by the Bank of Uganda, 14 December 2001.

*maximise their own welfare (by offering the largest bribe) without this strategic behaviour being easily detected.*"<sup>16</sup>

As noted in the Introduction to this paper, the revised text of the Agreement on Government Procurement on which provisional agreement was reached by the GPA Parties in December 2006 incorporates a new substantive provision regarding the "Conduct of procurement". That provision (Article V:4(c)) reads, in relevant parts, as follows:

*"Conduct of Procurement*

*4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:*

...

*(b) avoids conflicts of interest; and*

*(c) prevents corrupt practices."*

Insight into the intended purpose of this provision is provided by related language in the preamble to the revised text, which recognises the shared purpose of the Agreement with other international instruments and initiatives in deterring corrupt practices. For example, a new recital to the preamble recognises "that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources [and] the performance of the Parties' economies" in addition to the functioning of the multilateral trading system.<sup>17</sup> A further new recital recognises "the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner, and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption".<sup>18</sup>

This provision represents a significant innovation in WTO law, in that, until now, WTO Agreements have generally not referred explicitly to corruption issues. Like all provisions of the Agreement, the provision on conduct of procurement is potentially subject to enforcement proceedings under the WTO Dispute Settlement Understanding. This provision, accordingly, establishes a new enforceable legal obligation on the part of GPA Parties to conduct their procurements in a manner that avoids conflicts of interest and corrupt practices – a significant extension of the WTO's role in regard to governance. On the other hand, as Arrowsmith points out, the general transparency provisions of the Agreement already play an essential role in the promotion of fair practices and the prevention of corruption;<sup>19</sup> in this sense, the issue is not new. In addition to the general procedural provisions of the GPA dealing, for example, with publication of procurement opportunities, advance specification of selection and award criteria, etc., the Agreement's provisions relating to the establishment of domestic review or "bid challenge" procedures are an important bulwark against corruption. These provisions require each GPA Party to establish or maintain such procedures and to observe related procedural guarantees, notably that supplier challenges be reviewed in a timely, effective, transparent and non-discriminative manner.<sup>20</sup> These provisions recognise that,

<sup>16</sup> Jenny, above note 1, at p. 31.

<sup>17</sup> See the provisionally agreed revised GPA, above note 3, Preamble, third recital.

<sup>18</sup> See the provisionally agreed revised GPA, above note 3, Preamble, sixth recital.

<sup>19</sup> Arrowsmith, above note 8, p. 455 and, more generally, chapter 7, pp. 167-179.

<sup>20</sup> See Article XVII of the provisionally agreed revised GPA and Article XX of the GPA 1994.

properly designed and administered, such procedures provide a fast, low-cost forum for bringing to light allegations of improper practices that affect individual suppliers and go a long way to establish a culture of "competition on the merits".<sup>21</sup>

Recent work by other international organisations – particularly the OECD – provides additional insights that are relevant to implementation of the prohibition in Article V:4(c), and reinforces the importance of general transparency provisions in this regard. Recently, the OECD has promulgated a set of "Principles for Integrity in Public Procurement" building on other relevant international provisions and experience with regard to the promotion of best practices in this area.<sup>22</sup> These principles are concerned with the entire public procurement cycle and include elements of transparency, good management, prevention of misconduct, as well as accountability and control (see Box 1). A related set of recommendations provides guidance on the implementation of the principles, e.g. through a related checklist and procedure for risk-mapping.<sup>23</sup>

**Box 1. The OECD Principles for Enhancing Integrity in Public Procurement**

The OECD has identified ten principles in order to provide policy makers with Principles for enhancing integrity throughout the entire public procurement cycle, taking into account international laws, as well as national laws and organisational structures of member countries. These include elements of transparency, good management, prevention of misconduct, as well as accountability and control.

**A. Transparency**

1. *Member countries should provide an adequate degree of transparency in the entire public procurement cycle in order to promote fair and equitable treatment for potential suppliers*
2. *Member countries should maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering*

**B. Good management**

3. *Member countries should ensure that public funds are used in public procurement according to the purposes intended*
4. *Member countries should ensure that procurement officials meet high professional standards of knowledge, skills and integrity*

**C. Prevention of misconduct, compliance and monitoring**

5. *Member countries should put mechanisms in place to prevent risks to integrity in public procurement*
6. *Member countries should encourage close co-operation between government and the private sector to maintain high standards of integrity, particularly in contract management*
7. *Member countries should provide specific mechanisms to monitor public procurement as well as to detect*

<sup>21</sup> See, for essential qualification and commentary, chapters 19-21 of this volume.

<sup>22</sup> See also OECD, *Integrity in Public Procurement: Good Practice from A to Z* (Paris: OECD, 2007).

<sup>23</sup> Also available in "OECD Principles for Integrity in Public Procurement," (2009), available online at: [http://www.oecd.org/document/25/0,3343,en\\_2649\\_34135\\_42768665\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/25/0,3343,en_2649_34135_42768665_1_1_1_1,00.html).

*misconduct and apply sanctions accordingly*

***D. Accountability and control***

*8. Member countries should establish a clear chain of responsibility together with effective control mechanisms*

*9. Member countries should handle complaints from potential suppliers in a fair and timely manner*

*10. Member countries should empower civil society organisations, media and the wider public to scrutinise public procurement*

*Source: “OECD Principles for Integrity in Public Procurement,” (2009), available online at:  
[http://www.oecd.org/document/25/0,3343,en\\_2649\\_34135\\_42768665\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/25/0,3343,en_2649_34135_42768665_1_1_1_1,00.html)*

Clearly, the OECD Principles set out in Box 1 embody an important degree of commonality with the GPA. The promotion of transparency is a core objective and principle of the Agreement (as it is of other WTO Agreements, as well), embodied in both specific provisions on transparency of procurement information in the existing and revised texts and in the general procedural provisions of the Agreement in addition to relevant aspects of the preamble.<sup>24</sup> Furthermore, consistent with OECD Principle 2, the GPA provides for fully competitive and transparent, open tendering as a “default” tendering procedure, restricts the use of limited tendering and provides for special transparency measures in cases of selective tendering.<sup>25</sup> The above-emphasised provisions regarding supplier challenges and separate provisions of the Agreement dealing with exclusion of suppliers on the basis of misconduct and similar grounds<sup>26</sup> represent key means of giving effect to Principle 7 and – at least to some extent – also Principles 5 and 9. Similar observations can be made in regard to the commonality of the OECD principles and the UNCITRAL Model Law on Procurement of Goods, Construction and Services,<sup>27</sup> with the qualification that the UNCITRAL Law is a voluntary instrument providing a menu of options for national governments rather than an international treaty.

This part of the chapter has examined the basis of international concerns regarding the promotion of integrity (i.e. the prevention of corruption) in public procurement markets and institutions, in addition to the ways in which these concerns are addressed in the existing and revised GPA texts and other related international instruments and activities. The next two sections delve into an important parallel concern: the promotion and maintenance of competition. The argument is made that these two concerns – the prevention of corruption and the promotion of competition - should, in broad terms, be viewed as allied rather than in tension with each other. Nonetheless, giving due weight to the promotion of competition may require some modest refinements in the application of anti-corruption and transparency measures.

<sup>24</sup> See GPA, preamble, third recital and Article XVII as well as the provisionally agreed revised GPA, above note 3, Preamble, sixth recital and Article XVI.

<sup>25</sup> See, e.g. Articles VII:4-8 and XIII of the provisionally agreed revised GPA, above note 3.

<sup>26</sup> See revised GPA text, above note 3, Article VIII:3.

<sup>27</sup> 1994 - UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment, available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/1994Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html).

### 3. Competition in public procurement markets: why and how much does it matter, what can undermine it?

The idea that competition tends in most circumstances to generate lower prices and/or higher quality for a given price is one of the more basic propositions in industrial organisation, the branch of economics that deals with industrial structure and performance. It is nonetheless worth briefly reviewing the basis for this proposition. Although scholars continue to debate the finer points, economic literature identifies at least four main channels through which competition can have these desirable effects. First, with free entry and an absence of collusion, prices will be driven to marginal costs. Second, costs themselves will be minimised, as firms compete for survival. Third, competition serves as an important driver of innovation.<sup>28</sup> Fourth, competition enables the participating firms to learn from one another and thereby to continuously improve their products in addition to their marketing, production and managerial techniques.<sup>29</sup>

Apart from the guidance that emerges from the above-mentioned literature on competition and industrial organisation generally, the benefits of competition have been explored in economic literature that deals specifically with bidding processes and procurement. This literature establishes a direct relationship between the extent of competition in procurement markets and the costs to governments of the goods and services that are procured.<sup>30</sup> The importance of competition for cost-effective public procurement is corroborated by the considerable efforts that firms typically devote, in business-to-business commercial transactions, to ensure that their procurement departments make effective use of competition to reduce the cost and increase the quality of inputs.<sup>31</sup>

Case histories and examples that illustrate the gains from the promotion of competition in government procurement regimes are fewer and less well documented than would be ideal.<sup>32</sup> Nonetheless, such examples as are available suggest that the gains can be substantial. A number of such examples, taken from an OECD survey, are collected in Box 2. The examples referred to therein indicate that savings to public treasuries of between 17 and 43 % have been achieved in some developing countries through the implementation of more transparent and competitive government procurement regimes. In a broadly similar vein, an independent external study for the European Commission found that increased competition and transparency resulting from implementation of the Public Procurement Directives

<sup>28</sup> See US, Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, October 2003; US, Department of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, April 2007; and Robert D. Anderson and Nancy T. Gallini, *Competition Policy and Intellectual Property Rights in the Knowledge-based Economy*, Calgary: University of Calgary Press for the Industry Canada Research Series, 1998.

<sup>29</sup> Useful elaboration of all four channels referred to above is provided in Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organisation* (Addison-Wesley, 2004).

<sup>30</sup> See, generally, Paul Milgrom, "Auctions and Bidding: A Primer," *Journal of Economic Perspectives*, vol. 3(3), 1989, pp. 3-22 and Paul D. Klemperer, (ed.) (2000) *The Economic Theory of Auctions*, Edward Elgar, Cheltenham, UK. See also R.I. Carr, "Impact of the Number of Bidders on Competition," *Journal of Construction Engineering and Management*, Vol. 109, no. 1, pp. 61-73, March 1983.

<sup>31</sup> See, e.g., David N. Burt and Richard L. Pinkerton, *A Purchasing Manager's Guide to Strategic, Proactive Procurement* (AMACOM, 2006).

<sup>32</sup> Simon J. Evenett and Bernard Hoekman, *International Co-operation and the Reform of Public Procurement Policies* (mimeo, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=821424](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=821424), 2004).

of the European Communities in the period between 1993 and 2002 generated cost savings of between a little less than €5 billion and almost €25 billion.<sup>33</sup>

**Box 2. Examples of cost-savings in developing countries based on the implementation of more transparent and competitive procurement systems**

A 2003 OECD study of the benefits of transparent and competitive procurement processes refers to the following examples of benefits achieved:

- In Bangladesh, a substantial reduction in electricity prices due to the introduction of transparent and competitive procurement procedures.
- A saving of 47 percent in the procurement of certain military goods in Columbia through the improvement of transparency and procurement procedures.
- A 43 percent saving in the cost of purchasing medicines in Guatemala, due to the introduction of more transparent and competitive procurement procedures and the elimination of any tender specifications that favour a particular tender.
- A substantial reduction in the budget for expenditures on pharmaceuticals in Nicaragua, due to the establishment of a transparent procurement agency accompanied by the effective implementation of an essential drug list.
- In Pakistan, a saving of more than Rs 187 million (US \$3.1m) for the Karachi Water and Sewerage Board through the introduction of an open and transparent bidding process.

*Source: OECD, Transparency in Government Procurement: The Benefits of Efficient Governance (TD/TC/WP/(2002)31/Rev2/14 April 2003).*

A further important corroborating source of information regarding the benefits of competition which is sometimes overlooked is provided by evidence of *higher* costs to public treasuries that arise when competition is suppressed, for example through collusive tendering. Such evidence is examined in Part IV(B), below. For the present, it may be noted that collusion in public procurement markets has been conservatively estimated to raise prices on the order of 20 % or more above competitive levels.<sup>34</sup> The benefit of introducing competition where it has not previously existed may be expected to be of a comparable magnitude.

The foregoing does not take into account explicitly the additional benefits that can accrue to countries by opening their procurement markets to *foreign* as compared to domestic competitors, for example via accession to the GPA. International liberalisation – whether with respect to markets for public procurement or other economic sectors – is often conceived principally as a tool through which countries gain access to

<sup>33</sup> Europe Economics, Evaluation of Public Procurement Directives, Markt/2004/10/D, September 2006, available at [http://ec.europa.eu/internal\\_market/publicprocurement/docs/final\\_report\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/final_report_en.pdf).

<sup>34</sup> See Luke M. Froeb, Robert A. Koyak and Gregory J. Werden, "What is the effect of bid rigging on prices?" *Economics Letters*, vol. 42(4), 1993, pages 419-423. Somewhat higher estimates of average cartel overcharges are reported in Margaret C. Levenstein and Valerie Y. Suslow, "What determines cartel success?" *Journal of Economic Literature*, Vol. XLIV, March 2006, pp. 43–95.

foreign markets for their national suppliers.<sup>35</sup> In fact, however, much of the benefit (arguably, the main benefit) of international liberalisation actually accrues to the countries undergoing liberalisation. A principal aspect of this benefit is the enhanced competition in the home market that external liberalisation generates. External liberalisation also creates the possibility of specialisation and exchange based on the principles of comparative advantage. This is no less true for the international liberalisation of procurement markets than it is for other markets.<sup>36</sup> International liberalisation of procurement markets can also provide access to technology that is not available in the home market (i.e. the market in which goods and services are being procured).<sup>37</sup> Clearly, this point may be of particular significance for developing, transition and smaller economies.

Economic analysis also provides insights into the circumstances in which competition is particularly susceptible to being suppressed through collusive practices. A classic contribution by Stigler identified three challenges that must be faced for successful collusion to take place: first, the cartel members must agree on the terms of their co-operation (in a bid rigging context, this would encompass matters such as which firm will win, how the others will be compensated, etc.); second, deviations from the agreement (e.g. by firms that promise to bid high and then bid lower in an attempt to win the contract anyway) must be detected; and (iii) defectors must be punished, e.g. through expulsion from future cooperative arrangements.<sup>38</sup> A related challenge involves excluding or bringing into the cartel new entrants that are attracted by the possibility of *supra*-competitive profits.<sup>39</sup> Stigler also posited an inverse relationship between the number of competitors in a market and the possibilities for collusion, on the basis that more competitors make it more difficult to reach an agreement. This proposition has been elaborated on and challenged in subsequent game-theoretic literature, including the literature on "super-games".<sup>40</sup> While this literature identifies a range of possibilities and outcomes on the basis of various assumptions regarding the behaviour of market participants, the basic idea that more potential sellers make collusion more difficult continues to command broad support. This reflects the simple fact that the greater the number of sellers, the more difficult it is for them to get together and agree on prices, bids, customers and/or territories and (perhaps even more so) to enforce the relevant agreements.

In addition to situations involving a small number of potential sellers, experience points to the following additional circumstances as potentially facilitating collusion:<sup>41</sup>

- The probability of collusion increases where restrictive specifications are used for the product being procured.

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<sup>35</sup> This is the all-too-familiar "mercantilist" paradigm for international trade relations.

<sup>36</sup> Arrowsmith, *Government Procurement in the WTO*, above note 8.

<sup>37</sup> Schooner, above note 6.

<sup>38</sup> George J. Stigler, "A Theory of Oligopoly," *Journal of Political Economy*, 1964, vol. 72, no. 1, pp. 44-61.

<sup>39</sup> William E. Kovacic, Robert C. Marshall, Leslie M. Marx and Matthew E. Raiff, "Bidding rings and the design of anti-collusive measures for auctions and procurements," in Nicola Dimitri, Gustavo Piga and Giancarlo Spagnolo, *Handbook of Procurement* (Cambridge: Cambridge University Press, 2006), chapter 15.

<sup>40</sup> See Jean Tirole, *The Theory of Industrial Organisation* (MIT Press, 1988).

<sup>41</sup> These points have been adapted principally from US, Department of Justice, above note 63; similar material is available on the websites of several other national competition enforcement authorities.

- The more standardised a product is, the easier it is for competing firms to reach agreement on a common price structure. By contrast, it is harder to reach an agreement where other forms of competition, such as with respect to design, features, quality, or service, are important.
- The likelihood of collusion can be enhanced by repeat purchases, since the vendors may become familiar with other bidders and recurring contracts provide the opportunity for competitors to share the work.
- Collusion is more likely if the competitors know each other well through social connections, trade associations, legitimate business contacts, or shifting employment from one company to another.<sup>42</sup>
- Collusion is facilitated if bidders have opportunities to meet together in advance of the submission of bids, for last-minute consultations.

As will be elaborated in Part IV below, collusion can also be facilitated by aspects of the procurement process itself. Domestic content requirements or bans on foreign bidders directly limit the set of potential suppliers and thereby diminish the capacity of entry to upset cartel coordination.<sup>43</sup> The unsealing of bids in public for all bidders to observe can enable cartel members to determine whether co-conspirators fulfilled promises either not to bid or to submit artificially high "cover bids".<sup>44</sup> This concern provides the rationale for limiting the availability of certain kinds of information in the market, despite general transparency considerations which might otherwise favour releasing it. The use of electronic procurement tools and framework contracts, while offering significant potential gains in efficiency for both suppliers and procuring entities, also pose complex challenges for the maintenance of competition. Advocacy efforts to address these concerns can, therefore, be an important additional element of a successful overall strategy to promote competition and deter collusion in procurement markets.

In reflecting on the above considerations regarding the role of competition in public procurement processes, it is important to acknowledge that the promotion of competition is by no means the only value at play in effective procurement systems. The importance of integrity in such systems has already been discussed. Other values, for example accountability, flexibility and administrative simplicity, are also important. Moreover, there may also be trade-offs involved between competition and these other values.<sup>45</sup> To cite an example that can sometimes be abused, procurements in response to national emergencies may, arguably, justify the suspension of normal competitive procedures.<sup>46</sup> Arrangements such as "framework agreements" can also involve a trade-off between competition and transactional efficiency.<sup>47</sup> The next part of this chapter elaborates on the roles of both international liberalisation and national competition (antitrust) policies in promoting competition in such markets.

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<sup>42</sup> US Department of Justice, above note 63. Readers familiar with the writings of Adam Smith, *The Wealth of Nations*, 1776, will recall his dictum that "People of the same trade seldom meet together, even for merriment or diversion, but the evening ends in a conspiracy against the public, or in some contrivance to raise prices".

<sup>43</sup> Malcolm B. Coate, "Techniques for Protecting Against Collusion in Sealed Bid Markets," 30 *Antitrust Bulletin*, 1985, 897, 899-90.

<sup>44</sup> Kovacic et al, above note 39.

<sup>45</sup> Schooner, above note 6.

<sup>46</sup> But cf. the analysis in Schwartz, *this volume*.

<sup>47</sup> See discussion, below.

#### 4. The roles of international liberalisation and national competition laws and policies in ensuring competition in public procurement markets

This part of the chapter examines key tools through which competition can be promoted in national procurement markets. To begin with, and as has already been mentioned, the GPA itself is an important tool for promoting competition. The ways in which it does this are summarised in sub-section A, below. A key premise of this chapter is, however, that while international liberalisation – whether via the GPA, a bilateral agreement or unilaterally, is an important tool for enhancing competition in procurement markets, it is not, by itself, a *sufficient* tool for ensuring an optimal degree of competition. National competition laws and policies play an essential complementary role in this regard. This role encompasses, at a minimum, the following elements: (i) the adoption and enforcement of effective rules to prevent *collusive tendering*; (ii) "*competition advocacy*" activities that promote the use of sound public contracting procedures and the progressive elimination of regulatory and other barriers to competition; and (iii) *other aspects of the enforcement of competition rules* including the treatment of mergers and joint ventures. These elements are discussed in the remaining sub-sections of this part of the chapter.

##### 4.1 International liberalisation as a tool for strengthening competition

Participation in the Agreement on Government Procurement promotes competition in at least four distinct ways.<sup>48</sup> First, it provides a vehicle for the progressive opening of Parties' markets to international competition through market access or "coverage" commitments that are negotiated and incorporated in the schedules contained in Appendix I of the Agreement. Procurement which is "covered" in this way then becomes subject to rules requiring non-discriminatory treatment ("national treatment") of other GPA Parties' goods, services and suppliers. Second, as already noted, the various provisions of the Agreement relating to the provision of information to potential suppliers, contract awards, qualification of suppliers and other elements of the procurement process provide a framework that is intended to ensure transparent and non-discriminatory conditions of competition between suppliers, including both domestic and foreign suppliers.<sup>49</sup> Such measures promote competition by informing suppliers of opportunities to compete and by giving them confidence that bids will be assessed objectively on their merits – thereby enhancing their ability and incentive to bid on specific procurements.

Third, as noted in the discussion on integrity in public procurement in Part II, the Agreement on Government Procurement requires that all GPA Parties put in place national bid challenge systems ("domestic review procedures") through which suppliers can challenge questionable contract awards or other decisions by national procurement authorities. Minimum standards and procedures to ensure the independence and impartiality of the bodies responsible for such systems are also set out in the Agreement. When fairly administered, such systems enhance supplier confidence that contracts will ultimately be awarded on the basis of product quality and competitive pricing, rather than patronage or cronyism. In this way, they can contribute to a culture of competition on the merits in public procurement markets.<sup>50</sup> Fourth, the GPA provides recourse to the WTO Dispute Settlement Understanding (DSU) in circumstances where Parties believe that international competition has been suppressed through measures taken by other Parties in breach of their GPA commitments. Applicability of the DSU is a standard feature of WTO Agreements.

<sup>48</sup> To some extent, these benefits may also be achieved through participation in bilateral or regional arrangements relating to government procurement policy. See Anderson, Müller, Osei-Lah, Pardo De Leon and Pelletier, *this volume*, chapter \_\_\_.

<sup>49</sup> Possible tradeoffs between competition and transparency are discussed below.

<sup>50</sup> See, for related discussion, Christopher R. Yukins and Steven L. Schooner, "Incrementalism: Eroding the Impediments to a Global Public Procurement Market," *Georgetown Journal of International Law*, Vol. 38, No. 529, Spring 2007.

In the area of public procurement, recourse to the DSU has been vastly less extensive than individual bid challenges before national authorities. Such applicability nonetheless represents an essential complement to individual bid challenges as a mechanism for considering systemic matters that may not be adequately addressed in individual bid challenges.<sup>51</sup> A further specific contribution of foreign competition in public procurement markets, whether via the GPA or otherwise, can be to reduce the feasibility of collusion.<sup>52</sup>

## 4.2 *Preventing collusion among suppliers*<sup>53</sup>

Although the opening of national procurement markets either through unilateral action or via negotiations under the WTO Agreement on Government Procurement or other international instruments makes substantially increased competition in procurement markets possible, it does not guarantee this result. Rather, collusive agreements ("cartels" or "bid-rigging") between potential suppliers directly undercut this possibility. For this reason, competition or antitrust rules relating to these practices are an essential counterpart to a liberalised government procurement regime. The WTO Agreement on Government Procurement recognises the role of such measures, without going as far as requiring Parties to adopt them.<sup>54</sup>

### 4.2.1 *Universality of the challenge of deterring collusive practices*

Box 3 (next page) presents examples of bid rigging schemes that have been successfully prosecuted in recent years in various jurisdictions including developed, developing and transition economies. Several of the examples (those from China, Indonesia, Peru and Chinese Taipei) are taken from inputs prepared by those countries for the 2001 OECD Global Forum on Competition. These cases demonstrate the universality of the challenge of deterring collusive practices – i.e. such practices are in no way limited either to developed or to developing countries.<sup>55</sup> The cases also illustrate a number of common characteristics of bid rigging schemes. For example, in several of the cases collusion seems to have been facilitated by restrictive regulations and/or practices of the procuring entities. The role of common

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<sup>51</sup> For a review of key international disputes under both the current Agreement on Government procurement and its predecessor, the Tokyo Round Code on Government Procurement, see Mitsuo Matsushita, "Major WTO Dispute Cases Concerning Government Procurement," 1 *Asian Journal of WTO and International Health Law and Policy* 299 (2006).

<sup>52</sup> See Part IV(B)(5), below.

<sup>53</sup> See, for complementary discussions and additional information on policy developments in OECD member countries, OECD, *Public Procurement* (Policy Roundtable, 2007); OECD, *Competition in Bidding Markets* (Policy Roundtable, 2006) and OECD, *Competition Policy and Procurement Markets* (Policy Roundtable, 1998).

<sup>54</sup> In particular, Article XV of the Agreement provides for the use of limited tendering procedures in circumstances where the tenders submitted in an open or selective tendering process have been collusive.

<sup>55</sup> The foregoing is not at all to suggest that the maintenance of competition in developing countries does not involve special issues and challenges. Factors differentiating the role of competition policy in developing as compared to developed countries may include any or all of the following: (a) higher 'natural' entry barriers due to inadequate business infrastructure, including distribution channels, and (sometimes) intrusive regulatory regimes; (b) asymmetries of information in both product and credit markets; (c) a greater proportion of local (non-tradable) markets; and (d) over-stretched/inadequately developed law enforcement and judicial systems. William E. Kovacic, "Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement," above note 10, and Anderson and Jenny, above note 10. The point is simply that the problems faced by developing and transition economies in maintaining competition are not wholly dissimilar to those of developed countries and, therefore, that there is much to be gained for both sides in sharing experiences.

orthographic errors in the tendering documents of "competing" bidders as a "suspicious sign" – illustrated in the case from Peru – is well known to developed country competition officials.<sup>56</sup>

The cases in Box 3 also illustrate that the mere opening of bidding processes to foreign-based suppliers may not generate effective competition, if effective rules are not in place to deter collusion. The fourth case noted in the table - a conspiracy to rig bids on construction contracts funded by the United States Agency for International Development (USAID) in Egypt – is interesting in that it shows the ability of collusion in tendering processes to impact directly on international assistance efforts. Of course, these are but a few examples of the much larger numbers of bid rigging schemes that have been successfully prosecuted by relevant authorities.

**Box 3: Examples of international and domestic collusive tendering schemes that have been prosecuted in various jurisdictions**

a) International removal and relocation services in Belgium

In 2008, the European Commission imposed fines totalling €32,755,500 on various large firms providing international removal and relocation services in Belgium for fixing prices, sharing the market and bid rigging, in violation of the EC Treaty's ban on cartels (Article 81). The cartel operated for almost nineteen years. Cartel members fixed prices, presented bogus quotes to clients and compensated each other for lost bids.

Source: "Antitrust: Commission fines providers of international removal services in Belgium over €32.7 million for complex cartel" (EC Commission, Press Release, IP/08/415, 11 March 2008).

b) The International Marine Hose Case

Marine hose is a flexible rubber hose used to transport oil between tankers and storage facilities and buoys. According to court papers and other documents, firms based in the United Kingdom (U.K.), France, Italy, and Japan conspired to fix prices and rig for hundreds of millions of dollars worth of marine hose and related products which was sold to other firms in addition to government agencies. The conspirators met in locations such as Key Largo, Fla., Bangkok, and London. The investigation of this case involved coordinated enforcement efforts by the US Department of Justice, the EC Commission and the UK Office of Fair Trading.

Source: US Department of Justice, "Eight executives arrested on charges of conspiring to rig bids, fix prices, and allocate markets for sales of marine hose," Press Release, May 2, 2007 and "Three United Kingdom Nationals Charges With Participating in Worldwide Bid-Rigging Conspiracy in the Marine Hose Industry," US Department of Justice, Press Release, December 3, 2007.

c) Prosecution of bid rigging in school construction in China

Ten construction companies were prosecuted for bid rigging on contract for the construction of a school building. The ten companies including No.2 Construction Company agreed that No.2 Construction Company would get the contract in exchange for payments to the other companies. They also assigned one of the companies to calculate the bidding prices of all candidates. No.2 Construction Company won the bid at a higher price than before. The administration for industry and commerce issued a decision, declaring that the bid was invalid and the illegal gains were confiscated.

Source: *OECD Global Forum on Competition, Summary of cartel cases described by invitees (CCNM/GF/COMP(2001)4, 5 October 2001).*

<sup>56</sup> See related discussion, below.

## d) Bid rigging on USAID contracts in Egypt

Philipp Holzmann AG, a Frankfurt, Germany construction firm, pleaded guilty and was sentenced to pay a \$30-million fine for its participation in a conspiracy to rig bids on construction contracts funded by the United States Agency for International Development (USAID) in Egypt.

Source: U.S. Department of Justice, "German Company Pleads Guilty To Rigging Bids on USAID Construction Contracts in Egypt," (Press Release, 18 August 2000).

## e) The rigging of bids for the supply of pipe and pipe-processing services in Indonesia

Three pipe processors were found to have exchanged their prices with each other at a meeting in a hotel the evening before the bids were opened. Material evidence was contained in statements of a complainant, as well as in the testimony of witnesses from the respondents. As this was the first case ever brought by the Commission, no fines or other sanctions were imposed. Instead, the Commission ordered that the contract between Caltex and the apparent lowest bidder be dissolved and that entire tender process be redone.

Source: OECD Global Forum on Competition, Summary of cartel cases described by invitees (CCNM/GF/COMP(2001)4, 5 October 2001).

## f) Rigging bids for the supply of construction services in Peru

Three companies were convicted of participating in bid rigging on a contract for the construction of a secondary electricity net in Puerto Maldonado City. The claim was based on evidence from the documents presented by the three bidders. The documents contained the same redaction and the same format; they also presented the same orthographic errors, the same time of construction and almost the same price bid. Following appropriate investigation, the Free Competition Commission ordered the three companies to cease the practice and imposed fines of amount of nearly EUR 1,800 on each of the respondents.

Source: OECD Global Forum on Competition, Summary of cartel cases described by invitees (CCNM/GF/COMP(2001)4, 5 October 2001).

## g) The rigging of bids for the procurement of truck-mounted mobile cranes by the Taiwan Power Company in Chinese Taipei

Six companies were prosecuted for having knowingly, and through mutual communications, apportioned the number, suppliers, and amounts of the winning bids before the bid opening. These acts violated Article 14 of the Fair Trade Law, which prohibits concerted acts. The Commission ordered them to cease the concerted practices. The case also included another violation of the Law committed by Taiwan Power Company that improperly restricted the criteria to bid on its contract. The company was ordered to cease its actions.

Source: *OECD Global Forum on Competition, Summary of cartel cases described by invitees (CCNM/GF/COMP(2001)4, 5 October 2001).*

Bid-rigging in public procurement markets accounts for a striking percentage of prosecutions by competition authorities in jurisdictions where such authorities are well-established. For example, from 1972 through 1992, the U.S. Department of Justice (DOJ) obtained 1159 criminal indictments for Sherman Act violations. Some 625 of these indictments, nearly 54%, attacked collusion against public procurement

bodies.<sup>57</sup> The frequency of such cases suggests that suppliers view public bodies as attractive targets for collusive schemes.

A further point worth emphasising is that a large proportion of cartel agreements that have been uncovered by the competition authorities of major developed jurisdictions in the past decade (including both collusive tendering for government contracts and price-fixing arrangements not involving government procurement processes) have been international in scope.<sup>58</sup> Such arrangements directly undercut the gains from trade liberalisation in addition to impacting directly on the welfare of citizens.<sup>59</sup> They manifest a clear need for international co-operation in the enforcement of competition laws. They are also of interest in that they demonstrate that, contrary to the assumptions of some trade policy practitioners, external market opening alone cannot always ensure vigorous competition in the absence of effective competition laws.<sup>60</sup>

#### 4.2.2 Varieties of collusive tendering

Collusive tendering schemes take a variety of common forms. Probably the most common is "bid rotation", by which suppliers organise their bids to determine which firm will win a contract.<sup>61</sup> The "losers" agree to refrain from bidding or to inflate their bids in the expectation that they will win when their turn comes up. Other common forms of bid rigging include "complementary bidding", in which some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer, and "bid suppression", in which one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted. The low bidder often secures support for the plan by giving its co-conspirators side payments or subcontracts.<sup>62</sup> All such schemes have at least one element in common, namely an agreement between some or all of the bidders that limits or eliminates competition between them and (normally) predetermines the winning bidder.<sup>63</sup> Additional information on specific forms of bid rigging is summarised in Box 4.

<sup>57</sup> These data were collected from the Commerce Clearing House Trade Regulation Reporter for the years in question.

<sup>58</sup> See Levenstein and Suslow, above note 34; Julian Clarke and Simon J. Evenett, "A multilateral framework for competition policy?," in State Secretariat of Economic Affairs and Simon Evenett, *The Singapore Issues and the World Trading System: the Road to Cancun and Beyond* (Bern: State Secretariat for Economic Affairs); and Simon J. Evenett, Margaret Levenstein and Valerie Suslow, 'International cartel enforcement: lessons from the 1990s', *The World Economy*, vol. 24, iss. 9, 2001, pp. 1221-45.

<sup>59</sup> Anderson and Jenny, above note 10.

<sup>60</sup> Cf. Alan Winters, 'Doha and world poverty targets,' World Bank, mimeo, 2002 and Richard Blackhurst, 'Trade Policy is Competition Policy', in *Competition and Economic Development*, OECD: 1991.

<sup>61</sup> Representative illustrations include *United States v. Dynaletric Co.*, 859 F.2d 1559 (11th Cir. 1988); *United States v. Northern Improvement Co.*, 814 F.2d 540 (8th Cir. 1987); *United States v. A-A-A Electrical Co.*, 788 F.2d 242 (4th Cir. 1986); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982).

<sup>62</sup> See *United States v. All Star Indus.*, 962 F.2d 465 (5th Cir. 1992). The use of side payments to facilitate bid rotation conspiracies is common where contractors face each other regularly, such as bidding for highway paving contracts. See, e.g., *United States v. A-A-A Electrical Co.*, 788 F.2d 242 (4th Cir. 1986); *United States v. Inryco, Inc.*, 642 F.2d 290, 292 (9th Cir. 1981); *David Thompson*, 621 F.2d at 1149-50; *Azzarelli Construction*, 612 F.2d at 297.

<sup>63</sup> See, for a useful overview, U.S., Department of Justice, "Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For," (available on the internet at <http://www.usdoj.gov/atr/public/guidelines/211578.htm>).

#### **Box 4: Basic Types of Collusive Tendering**

**Bid Suppression:** In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

**Complementary Bidding:** Complementary bidding (also known as "cover" or "courtesy" bidding) occurs when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to create a (false) appearance of genuine competitive bidding.

**Bid Rotation:** In bid rotation schemes, all conspirators submit bids but take turns being the low bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company.

**Subcontracting as a compensating mechanism:** Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder. In some schemes, a low bidder agrees to withdraw its bid in favour of the next lowest bidder in exchange for a subcontract that divides the illegally-obtained higher price between them. Note, however, that sub-contracting is not necessarily anti-competitive if it is not done in furtherance of efforts to limit competition in the award of the main contract.

Source: Adapted from U.S., Department of Justice, "Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For" (available on the internet at <http://www.usdoj.gov/atr/public/guidelines/211578.htm>).

#### *4.2.3 Estimates of the price impact of collusion in public procurement processes*

Collusion adds directly to the price paid by procuring entities for goods and services procured. An obvious question of interest is the extent of the premium that is paid. One of the more sophisticated estimates was done by Froeb et al using data from an investigation of the rigging of bids for the supply of frozen seafood to the US Department of Defense. They found, with a high degree of statistical confidence, that the rigging of bids had raised the price paid by the Department by 23.1 % (this was the smallest point estimate).<sup>64</sup> This is broadly in line with more recent estimates of the costs of cartelisation in international markets.<sup>65</sup> In their analysis of the price impact of international cartels, Levenstein and Suslow report a median cartel overcharge for all types of cartels of 25%; and one of 32% for international cartels (the overcharge is calculated by comparing cartel prices to a competitive benchmark).<sup>66</sup> Clearly, the costs of cartelisation (and, therefore, the potential benefits of anti-cartel enforcement) are substantial.<sup>67</sup>

<sup>64</sup> Froeb, Koyak and Werden, above note 34.

<sup>65</sup> See, e.g., John M. Connor, "Price-Fixing Overcharges: Legal and Economic Evidence", SSRN Working Paper, 2005, Available at: <http://ssrn.com/abstract=787924>.

<sup>66</sup> Levenstein and Suslow, above note 34.

<sup>67</sup> Clarke and Evenett have shown, the resource saving that can be generated by only a marginal reduction in bid rigging on government contracts (e.g., on the order of 1%) is greater than the average annual operating budget of the competition agency in most countries, often by a factor of several times over. Clarke and Evenett, above note 58, p. 127.

#### 4.2.4 *The deterrence of collusive tendering through competition law enforcement*

A pre-requisite for the deterrence of collusive tendering is an effective legal prohibition of such conduct, normally in a national competition or antitrust law.<sup>68</sup> (Reference is made here to "deterring" rather than "preventing" collusion since it is probably impossible to eliminate such conduct altogether.) Often, bid rigging in public procurement processes is prohibited through general antitrust provisions against cartels or conspiracies in restraint of trade;<sup>69</sup> however, it can also be the subject of legal provisions that focus specifically on collusion in public procurement markets.<sup>70</sup> In some jurisdictions, bid rigging can also trigger penalties under statutes aimed at the prevention of fraud. To be effective, legal prohibitions against collusive tendering should be backed up by an effective enforcement regime and by appropriate sanctions (penalties) including heavy fines and, in the view of many experts, prison sentences.<sup>71</sup> In transition economies, such a prohibition serves an important purpose by making clear that the government will not tolerate private efforts to recreate collective planning techniques that the country has abandoned. There are indications that the effective prohibition of "naked" or "hardcore" cartels is becoming an internationally accepted norm.<sup>72</sup>

Enactment of an appropriate competition law provision prohibiting bid rigging and other collusive arrangements is only the beginning. Recent efforts to deter such arrangements through effective enforcement of relevant statutory provisions have taken two main forms. First, sanctions for culpable parties have been substantially increased.<sup>73</sup> Convictions in bid rigging cases can now result in significant penalties. In the US, for corporate defendants, the Sherman Act now sets a maximum fine of \$100 million. Corporate violators also may be fined up to the greater of twice the firm's gross pecuniary gain from the violation or twice the gross pecuniary loss by victims.<sup>74</sup> Individuals may be fined up to \$1,000,000, twice the pecuniary loss by victims, or twice the defendant's gross pecuniary gain from the violation, whichever is greatest.<sup>75</sup> Individuals also may be sentenced to as many as ten years in prison. If it brings a civil suit to enforce the Sherman Act, the DOJ may seek an injunction or may obtain treble damages for injury the

<sup>68</sup> More than one hundred countries now have such laws.

<sup>69</sup> This is the case, for example, in the United States and the European Community.

<sup>70</sup> This is the case, for example in Canada, where bid rigging can, depending on the circumstances, be dealt with under either a specific provision of the *Competition Act* which addresses bid rigging as such or under the more general provision on conspiracies in restraint of trade.

<sup>71</sup> See OECD, *Fighting Hard-Core Cartels – Harm, Effective Sanctions and Leniency Programme*, OECD, 2002; see also Richard Whish, "Control of Cartels and Other Anti-competitive Agreements," in Vinod Dhall, *Competition Law Today: Concepts, Issues and the Law in Practice* (New Delhi: Oxford University Press, 2007), chapter 1.

<sup>72</sup> Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 *Antitrust Law Journal* 711 (2001) (prosecution of vitamins cartel suggests broader international acceptance of anti-cartel norm). The deterrence of hardcore cartels was also a major focus of work in the WTO Working Group on the Interaction between Trade and Competition Policy when that body was active. See *Report (2002) of the WTO Working Group on the Interaction between Trade and Competition Policy to the General Council* (WT/WGTCP/6), paragraphs 47-64, available on the internet at [http://www.wto.org/english/tratop\\_e/comp\\_e/wgtcp\\_docs\\_e.htm](http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm).

<sup>73</sup> The expansion of antitrust sanctions for cartel behaviour is traced in Stephen Calkins, "Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties," 60 *Law & Contemporary Problems* 127 (1997); Wouter P.J. Wils, "Is Criminalization of EU Competition Law the Answer?" 28 *World Competition: Law and Economics Review* (2005).

<sup>74</sup> 18 U.S.C. § 3623 (1994).

<sup>75</sup> *Id.* at § 3623.

federal government has suffered as a purchaser. Under the Civil False Claims Act,<sup>76</sup> the Department may seek treble damages in cases of collusive bidding and, even when no actual damages can be proven, may obtain civil penalties of up to \$10,000 for each separate voucher or invoice submitted under a government contract tainted by collusion. State governments injured in their capacity as purchasers also have standing to seek treble damages. In broad terms, the trend to impose heavy penalties on defendants in cases of bid rigging and collusive tendering has been progressively replicated in other jurisdictions such as the European Communities and Canada.

Antitrust violations involving bid-rigging can also result in a contractor's suspension or debarment. In the US, Federal Acquisition Regulation (FAR) 9.407-2(a)(2) permits the purchasing agency to suspend contractors suspected of a violation of "Federal or State antitrust statutes relating to the submission of offers" and states that an indictment for antitrust violations "constitutes adequate evidence for suspension."<sup>77</sup> The entry of a criminal conviction or civil judgment for violating federal or state antitrust statutes relating to the submission of offers creates grounds for debarment.<sup>78</sup>

A second important tool for the deterrence of bid rigging has been to provide inducements for cartel participants to inform government competition agencies of wrongdoing through so-called leniency programs. In broad terms, such programs encourage cartel members to come forward, confess to their activities and assist the competent authorities in investigating and prosecuting their fellow cartel members. In exchange, they receive amnesty for their own behaviour. Normally, only one company (the "first in") can qualify for leniency.

Leniency programs for co-operation in anti-cartel enforcement cases were introduced in the US in the 1980s and progressively strengthened through the 1990s.<sup>79</sup> Following the lead of the United States, the European Commission adopted such a programme in 1996.<sup>80</sup> The Commission's initial Leniency Notice, which was not as successful as expected, was replaced by a new one in 2002.<sup>81</sup> The main change was that, once a firm was admitted to the programme, immunity became automatic. Subsequently, the European Commission and all EC Member States adopted a model leniency programme developed within the European Competition Network (a network linking all competition authorities in the Community).<sup>82</sup> As a

<sup>76</sup> 31 U.S.C. §§ 3729-31 (1994).

<sup>77</sup> 48 C.F.R. § 9.407-2(a)(2).

<sup>78</sup> 48 C.F.R. § 9.406-2(a)(2).

<sup>79</sup> On the development and operation of modern leniency programs, see Joe Chen & Joseph E. Harrington, Jr, "The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path," in *Political Economy of Antitrust* (Vivek Ghosal & Johan Sennek eds.); Julian M. Joshua, "Leniency in U.S. and EU Cartel Cases," *Antitrust*, vol. 14, no. 3, at 19 (Summer 2000) (comparing U.S. and EU leniency programs); Donald C. Klawiter, "Corporate Leniency in the Age of International Cartels: The American Experience," *Antitrust*, vol. 14, no. 3, at 13 (Summer 2000) (describing development of U.S. leniency policy); and Massimo Motta & Michele Polo, "Leniency Programs and Cartel Prosecution," 21 *International Journal of Industrial Organisation* 347 (2003). Regarding leniency programs in the European Community, see Robert D. Anderson and Alberto Heimler, "What has Competition Done for Europe? An Inter-Disciplinary Answer," *Aussenwirtschaft*, 62. Jahrgang (2007), Heft IV, pp. 419-454.

<sup>80</sup> Commission Notice on the non-imposition or reduction of fines in cartel cases, *Official Journal C* 207, 18 July 1996 pp. 4 – 6.

<sup>81</sup> Commission notice on immunity from fines and reduction of fines in cartel cases, *Official Journal C* 45, 19 February 2002, pp. 3-5.

<sup>82</sup> Internet: [http://ec.europa.eu/comm/competition/cartels/legislation/leniency\\_legislation.html](http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html).

result, the Commission programme was again amended in 2006, mainly to clarify the type and quality of information to be provided by leniency applicants.<sup>83</sup>

US enforcement authorities stress the following three characteristics as being critical to the success of leniency programs. First, there must be severe sanctions in place for firms and individuals that do not obtain amnesty. Without this, the incentive to cooperate will not be present. Second, there must be a genuine fear of detection, based on a credible possibility that illegal behaviour will be detected, prosecuted and sanctioned. Third, there must be predictability and transparency to the amnesty program such that potential applicants a high degree of assurance that, if they take the risk of coming forward, they will get the reward.<sup>84</sup>

In addition to the foregoing measures (effective sanctions and leniency programmes to induce cooperation), enforcement agencies also stress the importance of procurement personnel being alert to various "suspicious signs" that may signal the presence of collusion. A number of these are set out in Box 5. To be sure, the involvement of competition agencies (or, where appropriate, police or other investigatory authorities) is generally necessary to the investigation and prosecution of bid rigging. However, it is the procurement officials who are most likely to be in a position to observe behaviour that may indicate the presence of collusion. Consequently, training programs to enhance procurement officials' "collusion-awareness" are an important adjunct to the enforcement of competition law by the responsible authorities.

**Box 5. Suspicious signs: behaviour that may signal the presence of collusive tendering**

- Potentially suspicious bid patterns
  - The same suppliers submit bids and each company seems to take a turn being the successful bidder.
  - Some bids are much higher than published price lists, previous bids by the same firms, or internal agency cost estimates.
  - Fewer than the normal number of competitors submit bids.
  - A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity.
  - Bid prices drop whenever a new or infrequent bidder submits a bid.
  - A successful bidder routinely subcontracts work to competitors that submitted unsuccessful bids on the same project.
  - A company withdraws its successful bid and subsequently is subcontracted work by the new winning contractor.

<sup>83</sup> [Commission notice on immunity from fines and reduction of fines in cartel cases](#), Official Journal C 298, 8 December 2006, pp. 17-22.

<sup>84</sup> Thomas O. Barnett, "Criminal Enforcement of Antitrust Laws: The U.S. Model" (Remarks before the Presented at the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy New York, New York, September 14, 2006).

- Suspicious Statements and Behaviour

- Bid proposals or forms submitted by different vendors contain common features or irregularities (e.g. identical calculations, spelling errors, handwriting or typeface that suggest they may have been prepared jointly).
- A company requests a bid package for itself and a competitor or submits both its own and another company's bids.
- A company submits a bid when it is incapable of successfully performing the contract (this may be a complementary bid).
- A company brings multiple bids to a bid opening and submits its bid only after determining who else is bidding.
- A bidder or salesperson makes: (a) any reference to industry-wide or association price schedules; (b) statements indicating advance knowledge of competitors' pricing; (c) statements to the effect that a particular contract or project "belongs" to a certain vendor; or (d) statements indicating that a particular bid was only submitted as a "courtesy," "complementary," "token," or "cover" bid.

NB: It should be emphasised that the foregoing are merely signs that may trigger suspicions; they are not, by themselves, proof of collusion.

*Source: Adapted from U.S. Department of Justice, "Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For" (available on the internet at <http://www.usdoj.gov/atr/public/guidelines/211578.htm>).*

The deterrence of bid rigging can also be facilitated by legal requirements to inform the enforcement authorities of apparent violations. In the US, federal procurement statutes and regulations require executive agencies to notify the Department of Justice (DOJ) about bids or proposals that indicate antitrust violations.<sup>85</sup> Another potentially very useful practice – perhaps particularly so in developing jurisdictions where there may be limited awareness of the requirements of competition law within the business community – is to require contractors to certify that they have set their prices independently. In the US, this is done through the requirement for a "Certificate of Independent Price Determination".<sup>86</sup> Where appropriate, basic information on relevant competition law provisions can be provided with tender documentation. Another basic tool for guarding against the possibility of collusion involves the preparation of an internal estimate of the competitive-market cost of significant projects, as a benchmark to evaluate the possibility of collusive overcharges. It must be acknowledged, however, that such estimates are only useful to the extent that they accurately reflect actual market conditions. Finally, it should be noted that the

<sup>85</sup> The statutory requirement appears in 10 U.S.C. § 2305(b)(9) (1994) and 41 U.S.C. § 253b(i) (1994). Section 3.303(a) of the Federal Acquisition Regulations directs agencies to notify the Attorney General of evidence of collusive bidding. 48 C.F.R. § 3.303(a). FAR 3.301(b) requires agency personnel to refer instances of identical bids in advertised bidding to the Attorney General and to supply evidence of suspected antitrust violations to the agency office responsible for debarring and suspending contractors. 48 C.F.R. § 3.301(b).

<sup>86</sup> See FAR 3.103-1, 48 C.F.R. § 3.103-1 (solicitations for firm-fixed-price contracts must include Certificate of Independent Price Determination, by which supplier declares that it set its prices "independently").

detection of bid rigging can also be facilitated by econometric tools that can assist in the identification of suspicious bidding patterns.<sup>87</sup>

Competition law enforcement relating to collusive tendering does not take place in a vacuum. As already noted, other laws and policies – including, very much, those pertaining to tendering processes – can either facilitate or help to prevent collusion. Domestic content requirements directly limit the set of potential suppliers and thereby diminish the capacity of entry to upset cartel coordination. The unsealing of bids in public for all bidders to observe can enable cartel members to determine whether co-conspirators fulfilled promises either not to bid or to submit artificially high "cover bids". The use of electronic procurement tools and framework contracts, while offering significant potential gains in efficiency for both suppliers and procuring entities, also pose complex challenges for the maintenance of competition. Advocacy efforts to address these concerns are, therefore, an important adjunct to law enforcement in this area. Such efforts are the focus of the next sub-section of this chapter.

#### **4.3 *Competition advocacy and education: fostering support for pro-competitive procurement regimes and addressing regulatory barriers/other government measures that impede competition***

Competition agencies – and other public interest-oriented institutions such as research institutes and policy think-tanks - can play an important role in regard to the reform of government measures affecting competition. This is recognised in many jurisdictions, where competition agencies engage in "advocacy" activities (e.g., research, analysis, submissions to parliamentary bodies, etc.) aimed at influencing the evolution of government policies and raising awareness of restraints on competition. There is, in fact, a growing recognition that such work is of critical importance, co-equal in many circumstances with the competition law enforcement function.<sup>88</sup>

Three main areas can be identified for competition advocacy activities aimed at promoting competition in public procurement markets: *first*, general public education efforts aimed at building support for the institutions of a healthy market economy, including sound public contracting rules and procedures; *second*, efforts aimed at modifying or eliminating specific aspects of procurement policy and regulations that may (intentionally or inadvertently) suppress competition; and *third*, broader efforts to modify or reduce sectoral and/or cross-sectoral policies that are not specifically concerned with procurement but which affect the scope for competition in public procurement markets. These might include licensing or other restrictions on entry or participation in markets and cross-sectoral or "framework" laws and policies that unnecessarily make it more difficult for firms to compete.<sup>89</sup> Each of these categories merits elaboration.

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<sup>87</sup> See, e.g. Robert H. Porter & J. Douglas Zona, Detection of Bid Rigging in Procurement Auctions, 101 *Journal of Political Economy* 518 (1993); Robert H. Porter & J. Douglas Zona, Ohio School Milk Markets: An Analysis of Bidding (NBER Working Paper No. 6037: May 1997).

<sup>88</sup> The importance of competition advocacy activities as a complement to competition law enforcement is emphasised in the competition-related work of the OECD and the WTO. See also Kovacic, "Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement," above note 10 and Anderson and Jenny, above note 10.

<sup>89</sup> This is not at all to suggest that regulation does not have a legitimate role to play as an element of governance; on the contrary, it is well established that regulation of one kind or another can serve an important role in remedying market failures whether due to the existence of externalities, asymmetries of information or "natural monopolies". The challenge for competition agencies and other "competition advocates" is to identify situations where regulation has been imposed in the absence of a valid market failure rationale, or the degree or nature of regulation is counter-productive.

#### 4.3.1 *General public education efforts aimed at building support for the institutions of a healthy market economy, including transparent and competitive contracting procedures*

An important aspect of competition advocacy concerns basic public education regarding the institutions of a healthy market economy. To have positive long-lived effects, procurement and other economic policy and legislative reforms ultimately must command public support. In this regard, competition advocates can be a catalyst for debate about the appropriate role of government intervention in the economy and the correct choice of strategies for conducting procurements. Performing the education function before constituencies outside the government can help to build a political constituency for market-oriented policies.

In the current economic environment, an important dimension of such advocacy may be to ensure that public infrastructure spending programmes follow proper contracting procedures and thereby maximise long-run value to citizens. The economic downturn of 2008-09 has triggered increased emphasis on public infrastructure spending as an element of economic stimulus packages, not only in the United States but around the globe. Yet the public benefits to be created through infrastructure spending – which presumably will last well beyond the current recession – depend very importantly on adherence to procurement procedures that ensure vigorous competition in markets and accountability for the use of public funds. Indeed, a time of greater-than-usual public procurement/infrastructure investment would seem to be a critical time for ensuring that proper procedures are followed to ensure competitive and transparent contracting.<sup>90</sup> Competition advocates and procurement authorities have a common interest in fostering a consensus to this effect.

Competition advocacy in transition and developing economies raises special issues. While such economies often have the most pressing needs for upgrading of national transportation and other infrastructure, they may also suffer from a legacy of corruption and clientism in state procurement policies that undercuts efforts at modernisation and renewal.<sup>91</sup> A common path of reform efforts in such economies is to engage the elites - public sector and private sector professionals who often have gained formal training in Western universities or held positions that provide extensive contact with Western market institutions. While understandable, this approach has its limitations. Extending participation in and support for the reform process beyond the elites, to the larger body of citizens who live in extreme poverty or are politically disaffected, requires conscious efforts to increase public awareness of the rationales for reform and the encouragement of public participation in the design and implementation of specific measures.

As already noted, a particularly important audience for consciousness-raising concerning the importance and maintenance of competition concerns contracting personnel – i.e. staff members of purring entities – who should be well-informed regarding the risks of collusion, the harm that it causes and the means of preventing it.<sup>92</sup> The prevention of collusion in the procurement process also requires effective co-operation between procurement and competition agencies. For these purposes, competition agency staff

<sup>90</sup> See Steven L. Schooner and Christopher R. Yukins, "Public Procurement: Focus on People, Value for Money and Systemic Integrity, Not Protectionism," George Washington University Law School Legal Studies Research Paper No. 460, 2009. Robert D. Anderson, "Remarks to the 2010 West Government Contracts Law in Review Conference," 5 January 2010 and "Public works: filling the hole," *The Economist*, December 13, 2008, p. 16.

<sup>91</sup> See, generally, Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, above note 14).

<sup>92</sup> OECD, *Third Report on the Implementation of the 1998 Recommendation*, at 21 (finding that "in many countries procurement authorities and officials are not yet sufficiently aware of the danger of cartels among companies participating in bidding procedures and of the important role they can play in preventing and detecting cartels.").

can be invited to participate in training seminars for procurement officials that include modules on the detection and prevention of bid rigging, or can otherwise work with procurement officials to help ensure a high level of awareness.<sup>93</sup>

#### 4.3.2 *Advocacy efforts focused on procurement policies and regulations that can limit competition*

Public procurement policies can limit competition and even assist firms in behaving anti-competitively in at least two ways. A first way is to restrict entry into procurement markets, particularly by imposing domestic or local content rules that exclude potential bidders. A majority of countries have policies that favour their domestic suppliers in regard to at least some aspects of their public procurement. A second area of possible concern involves procedures that aim to increase the integrity of the procurement system but may also have the unintended effects of limiting entry and facilitating supplier coordination.<sup>94</sup> For example, expansive civil and criminal strictures against fraud in public procurement markets that create asymmetries between public and private contracting can discourage firms from serving public purchasers.<sup>95</sup>

A further important example concerns the process for opening bids in sealed bid procurements. Typically, bids are unsealed in public and displayed for all bidders to observe.<sup>96</sup> While widely seen as being important as an anti-corruption measure, this process can also facilitate collusion by enabling cartel members to determine whether co-conspirators fulfilled promises either not to bid or to submit artificially high "cover bids" (recall the discussion in Part IV:B, above). A possible reform, in this regard, could be to permit the private inspection of bids by a guardian inside the purchasing agency, such as an inspector general. Such a measure could impede efforts by cartel members to detect cheating without undermining the integrity of the award process.<sup>97</sup>

The foregoing also raises possible issues in regard to the above-discussed OECD principles and recommendations for the promotion of integrity in public procurement. While, as we have emphasised, in general transparency (OECD principle 1) enhances competition and provides a level playing field for competing suppliers, too liberal dissemination of information may also result in enhanced opportunities for collusion among suppliers. For example, information on procurement planning (addressed in OECD principle 3) may be used by suppliers e.g. to prepare bid rotation schemes and similar forms of anti-competitive practices. Therefore, a balance will have to be sought between transparency standards that are necessary to discourage corruption and the requirements of competition.

<sup>93</sup> Training seminars and workshops on government procurement which are presented by the WTO Secretariat for relevant officials pursuant to the Secretariat's annual technical assistance plan also typically include a module on the detection and prevention of collusive tendering, on the basis that this is important to ensure that the goals of procurement liberalisation are not undercut by such activities. See, for related details, the discussion at [http://www.wto.org/english/tratop\\_e/gproc\\_e/gptech\\_coop\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gptech_coop_e.htm).

<sup>94</sup> See, generally, OECD, *Competition Policy and Procurement Markets* (Paris: DAF/CLP/(99)3FINAL, 1999).

<sup>95</sup> William E. Kovacic, "The Civil False Claims Act as a Deterrent to Participation in Public Procurement Markets," 6 *Supreme Court Economic Law Review*, 1998, 201.

<sup>96</sup> John Cibinic Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 522-25 (3d ed. 1998).

<sup>97</sup> As stated by Kovacic et al, "If an auctioneer with first-price sealed bidding reveals the amounts of the bids of all the bidders, then the problem that a bidding ring faces in policing the bids of its members is made much easier. In general, the less information provided on auction outcomes, the more difficult it is for a bidding ring to operate. Unfortunately, in many settings it will be impossible to hide the identity of the winner, but certainly the full range of bids with first-price sealed bidding need not be revealed." Kovacic et al, above note 39.

Developments in procurement methodologies, including the increasing use of electronic procurement tools, reverse auctions and framework contracts, while offering significant potential gains in efficiency for both suppliers and procuring entities, also pose complex challenges for the maintenance of competition. For example, electronic procurement tools (e.g. electronic reverse auctions) are capable of being used to facilitate collusion if potentially competing firms gain access to each other's bids. One key here is to ensure a high degree of confidentiality of individual bids prior to the contract award.

Similarly, the use of "framework agreements" or "frameworks" (sometimes also known as two-stage contracting) as a public contracting tool, while capable of generating important transactional efficiencies, can also pose significant challenges with respect to the maintenance of competition, accountability and non-discriminatory procurement processes. While the usage of the term "frameworks" can vary across jurisdictions, a broad definition would include the following elements:

- *"The solicitation of tenders or offers against set terms and conditions;*
- *The submission of tenders indicating the terms (e.g. price) on which different suppliers are willing to supply;*
- *Chosen supplier(s) and the procuring entity entering into a "framework agreement" on the basis of the tenders; and*
- *Subsequent placing of periodic orders (to conclude procurement contracts) with the supplier(s) under the terms of the "framework agreement", as particular requirements arise."*<sup>98</sup>

Such contracts account for a large and increasing proportion of overall procurement activity in major jurisdictions.<sup>99</sup>

Ongoing work on the issue of framework agreements in the context of the revision of the UNCITRAL Model Law on Procurement encompasses important concerns regarding their implications for the maintenance of competition and transparency, in addition to recognition of the efficiency benefits that they can bring. Summarising the thrust of this work, Arrowsmith and Nicholas observe as follows:

*"... it is also recognised that without precise and adequate controls the operation of frameworks can inflict undue damage on the twin principles of competition and transparency that underlie the Model Law. It has therefore been sought to devise a careful system for operating frameworks that preserves these twin principles throughout. Of particular note is the fact that the UNCITRAL system will provide for a clearly defined transparent and competitive procedure for placing orders under a framework agreement – a process that has not always been clearly regulated and adequately controlled in national procurement systems and which seems to present particular dangers. This will be allied to measures that require procuring entities to provide information on awards they have made*

<sup>98</sup> See Sue Arrowsmith and Caroline Nicholas, "Regulating framework agreements under the UNCITRAL Model Law on procurement," in S.Arrowsmith (ed.), *Procurement Regulation for the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Public Procurement*, forthcoming, West; 2009, chapter 2. The US concept of "Indefinite Delivery/Indefinite Quantity" or "ID/IQ" contracts is a type of framework agreement. See, for useful background, Daniel I. Gordon and Jonathan L. Kang, "Task-Order Contracting in the U.S. Federal System: The Current System and Its Historical Context," mimeo, May 2007.

<sup>99</sup> According to Yukins and Schooner, as much as 40 % of the approximately \$400 billion US federal procurement market is administered through such inter-agency framework agreements. Yukins and Schooner, above note 50.

*and that apply the supplier complaints system to orders under a framework. In this way, states that implement the Model Law are encouraged to reap the benefits of framework agreements whilst reducing the risks that frameworks may present for transparent and competitive procurement.*"<sup>100</sup>

An important question for competition advocates and trade liberalisation bodies is whether further work on these issues is needed in the framework either of national competition policies or of trade instruments.

#### 4.3.3 *Efforts to address regulatory and other obstacles to competition that are not specifically linked to the procurement process, but which nonetheless impact on competition in public procurement markets*

Regulatory obstacles to competition that are not specifically linked to the procurement process, but which can nonetheless impact on competition in public procurement markets are of two main kinds: (i) industry-specific measures; and (ii) cross-sectoral or "framework" laws and policies. With regard to the former, such measures include a wide range of licensing and other requirements that impede entry to markets, for example by imposing excessive financial solvency requirements. The anti-competitive effects that such requirements can entail have long been recognised. Experience in both developed and developing countries shows that, in many cases, rather than having regulation imposed on them for the public benefit, incumbent firms have sought regulation for their own benefit, for the purpose of limiting entry into the industry and helping them to enjoy higher prices for their products.<sup>101</sup> Recognition of the significance of such conduct as a barrier to economic development dates back at least to Krueger's classic analysis,<sup>102</sup> and is affirmed in recent analyses by the World Bank and other development-related agencies.

The impact of regulatory obstacles to competition has also received attention in the context of international trading arrangements. For example, in the 1998 Report of the WTO Working Group on the Interaction between Trade and Competition Policy the following views were expressed regarding the significance of such obstacles:

*"The following examples of regulatory situations having adverse effects on competition ... were advanced: outmoded or unnecessary regulations; a failure by countries to recognise each others' technical standards; state zoning laws or sanitary and phytosanitary requirements that limited entry unnecessarily or served as disguised tools for excluding competing suppliers; legal systems that facilitated strategic use of the courts by firms to harass competitors; and discriminatory R&D funding practices. It was suggested that the regulations that needed to be reviewed could be classified as follows: regulation that openly discriminated in favour of domestic suppliers; regulations that were non-discriminatory on the surface but subtly discriminatory in their substantive requirements;*

<sup>100</sup> Arrowsmith and Nicholas, above note 98. See also Caroline Nicholas, "Framework Agreements and the UNCITRAL Model Law on Procurement," *Public Procurement Law Review*, 2008, Number 5, pp. NA20-30.

<sup>101</sup> The classic diagnoses of this problem are provided in George J. Stigler, 'The theory of economic regulation', *Bell Journal of Economics and Management Science* 2(1): Spring 1971, 3-21; and William A. Jordan, "Producer protection, prior market structure and the effects of government regulation," *Journal of Law and Economics* XV(1): April 1972, 151-76.

<sup>102</sup> Krueger, above note 15.

*regulations that simply were no longer needed; and poorly designed regulations that were desirable in principle but unnecessarily intrusive.*"<sup>103</sup>

Any or all of the above-noted regulatory measures can be an appropriate focus for competition advocacy activities.

#### **4.4 Other aspects of competition law bearing on public procurement markets**

Competition in public procurement markets is also affected by other aspects of competition law and policy. A first important example relates to the treatment of *mergers and joint ventures*. In the absence of effective legal provisions to prohibit anti-competitive mergers, competing firms can directly circumvent competition by merging their operations. This is a clear alternative to the use of bid rigging or similar agreements. In the event that firms desire to maintain distinct identities, joint ventures can be formed for the purpose of bidding on specific procurements. The effective regulation of anti-competitive mergers and joint ventures is a challenging problem, in that by no means all such arrangements are anti-competitive. Rather, a majority are likely to be either pro-competitive (i.e. likely to strengthen rivalry through cost savings and synergies) or at least neutral in their effects.<sup>104</sup> Effective tools must be developed to distinguish those arrangements that are likely to harm competition from the others.

Antitrust rules dealing with *single-firm monopolisation and/or abuse of dominant position* can also play a role in regard to public procurement markets.<sup>105</sup> One area in which such rules may come into play relates to privatisation. Economic law reform programs commonly involve the privatisation of state-owned assets through various forms of auctioning mechanisms. Such programs often raise significant competition policy issues. Without adequate attention to competition concerns, the strategy and methods chosen to alienate assets may simply transform state-owned monopolies into durable privately held monopolies.<sup>106</sup>

Competition policy oversight in the post-privatisation period can help the public reap the benefits of placing such assets into the private sector. For example, where the government dissolves a monolithic public enterprise into a number of privately-owned successor firms, the successors may seek to use mergers, holding companies, or other institutional arrangements to re-establish the monopoly structure of the public ownership era. Some forms of consolidation or cooperation will increase efficiency by enabling the participants, for example, to realise scale economies or link complementary assets. Competition policy

<sup>103</sup> WTO, Report (1998) of the Working Group on the Interaction between Trade and Competition Policy (WT/WGTCP/2), p. 36.

<sup>104</sup> In countries with mature competition regimes, typically only a small percentage (1% or less) of mergers are deemed anti-competitive. See Robert D. Anderson and S. Dev Khosla, *Competition Policy As a Dimension of Economic Policy: A Comparative Perspective* (Industry Canada Occasional Paper, 1995).

<sup>105</sup> See, for a recent review of relevant US rules and enforcement approaches, U.S. Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008); see also William E. Kovacic, "Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act" (available on the internet at [http://www.ftc.gov/os/2008/09/080908\\_section2stmtkovacic.pdf](http://www.ftc.gov/os/2008/09/080908_section2stmtkovacic.pdf)). Related perspectives are provided in William E. Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Behavior: The Chicago/Harvard Double Helix," 2007 *Columbia Business Law Review*, pp. 1-82 and in William E. Kovacic, "Designing Antitrust Remedies for Dominant Firm Misconduct", *Connecticut Law Review*, vol. 31, 1999, pp. 1285-1319. The evolution of corresponding approaches in the European Community is discussed in Anderson and Heimler, above note 79; and in Robert D. Anderson and Alberto Heimler, "Abuse of Dominant Position: Enforcement Issues and Approaches for Developing Countries," in Dhall, ed., above note 71, chapter 2, pp. 59-92.

<sup>106</sup> J.J. Laffont, *Regulation and Development* (Cambridge University Press, 2005).

oversight of outright consolidations or cooperation by contract can help ensure that such measures are not mere efforts to create a private variant of the predecessor public monopoly.

## 5. Concluding remarks

Ensuring good governance in relation to public procurement systems (and thereby maximising value for money for taxpayers) requires the addressing of two distinct but inter-related challenges: (i) ensuring integrity on the part of public officials administering the procurement processes; and (ii) promoting *competition* and preventing *collusion* among alternative suppliers. Both corruption and collusion undermine the intended benefits of procurement reforms and international liberalisation via the WTO Agreement on Government Procurement. Although they may sometimes occur together, they are also analytically distinct problems that each merit attention in their own right.

Corruption in public procurement systems has rightly been condemned as a barrier to development and a scourge on the welfare of citizens in developing and developed countries alike. Such practices - which can also be viewed as an example of the more generic phenomenon of "rent-seeking" - are intrinsically related to the "principal-agent" problem that characterises much public procurement. The problem of corruption and the harm that it causes have been given explicit recognition in the 1996 revised text of the GPA, a new development in WTO law that reflects increasing awareness of governance issues as an aspect of development. In addition to the general procedural provisions of the GPA dealing, for example, with publication of procurement opportunities, advance specification of selection and award criteria, etc., the Agreement's provisions relating to the establishment of domestic review or "bid challenge" procedures are an important bulwark against corrupt practices.

With respect to the challenge of promoting competition in public procurement markets, this is key benefit of the international liberalisation via the WTO Agreement on Government Procurement. This chapter has argued, nonetheless, that international liberalisation is not, by itself, a *sufficient* tool for ensuring an optimal degree of competition. National competition laws and policies play an essential complementary role in this regard. As has been discussed, this role encompasses: (i) the adoption and enforcement of effective rules to prevent bid rigging (collusive tendering); (ii) promoting the progressive elimination of regulatory and other barriers to competition, chiefly through "competition advocacy" activities; and (iii) other aspects of competition law enforcement including the treatment of mergers and joint ventures. Specific challenges for competition authorities in the area of public procurement include: (a) promoting awareness among procurement officials of "suspicious signs" of collusion between suppliers; and (b) fostering institutional links between procurement and competition agencies.

In addressing these issues, this chapter has taken as a point of departure that measures aimed at increasing transparency and, thereby, preventing corruption in public procurement processes are consistent with the promotion of competition. Such measures expand the possibilities for competition by informing suppliers of opportunities to compete and by giving them confidence that bids will be assessed objectively on their merits. Nonetheless, as has also been noted, experience in the application of competition law in public procurement markets highlights circumstances in which transparency-enhancing measures can facilitate collusion among suppliers. This highlights a need for balancing (mutual accommodation) of competition and anti-corruption concerns in well-designed procurement systems. We believe that, with such balancing, measures aimed at preventing corruption and promoting competition are likely to be strongly mutually reinforcing.

## BIAC

BIAC has always been concerned about corruption in international markets and especially public procurement, has strongly supported the development of the OECD Anti-Bribery Convention and has assisted in ensuring its implementation including through consultations in the context of OECD country reviews. We welcome this opportunity to present BIAC's views on this important and sensitive subject to the Global Forum on Competition.

The business community is fully conscious that corruption, the abuse of entrusted power for private gain, is a major obstacle to economic growth and social development in the world. Obviously, the principal victims are the consumers and taxpayers of the countries – often the poorest - where corruption is most rife. But corruption goes also directly against the interests of the business entities, which in most corruption cases are subjected to plain extortion.

Corruption goes against the long-term interests of the business community, because it affects overall economic growth<sup>1</sup>. It undermines the acceptance of free trade, democracy and the rule of law, which OECD countries believe are the necessary conditions for sustained economic development. In particular, it distorts markets, both because the business itself is not rewarded on the normal basis of price, quality and innovation criteria, but also because companies operating from jurisdictions which do not have a strong legal framework for fighting corruption in foreign countries (or do not seriously enforce it) have an unfair competitive advantage over those based in countries which do.

Corruption is not confined to the public procurement area. As pointed out by Transparency International in its latest yearly global report focusing on Corruption in the Private Sector: “for business, [corruption] means more than the perceived need to bribe public officials [...] but it also includes, for example, the bribing of purchase officers to win business at other companies' expense (commercial bribery)<sup>2</sup>.” Companies which engage in “active” bribery, and their shareholders, may also become victims of their own practices as these “foster a culture of moral ambivalence and reckless opportunism that undermines the overall commitment to integrity and opens the door for other corrupt acts” including to the detriment of the company itself; moreover, “the very strategies and mechanisms used to circumvent internal or external controls and cover up a specific corrupt activity can also provide the infrastructure for other corrupt acts”<sup>3</sup>, for example to conceal financial risks or manipulate earnings.

However, public procurement is one of the sectors where the issues related to corruption are the most apparent, and perhaps the most harmful. First because of its sheer volume: as noted in the Chairman's call for country contributions, it is estimated to account for approximately 15% of the gross domestic product in OECD countries and more in non-OECD countries. It concerns sectors that play a key role in the

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<sup>1</sup> According to a document entitled “Clean Business is Good Business” published by ICC, Transparency International, the United Nations Global Compact and the World Economic Forum in 2009, “estimates show that the cost of corruption equals more than 5% of global GDP (US \$2.6 trillion), with over US \$1 trillion paid in bribes each year; corruption adds up to 10% to the total cost of doing business globally, and up to 25% to the cost of procurement contracts in developing countries; moving business from a country with a low level of corruption to a country with medium or high levels of corruption is found to be equivalent to a 20% tax on foreign business”.

<sup>2</sup> Transparency International, Global Corruption Report 2009, p.7.

<sup>3</sup> *Ibid.*, p.8.

economy, such as infrastructure, health and education. Ethically, corruption in public procurement is particularly reprehensible because it harms not only consumers but also citizens, because it benefits those who have been elected or selected to act for the common good.

Public procurement is generally subject to bidding procedures to ensure that the public entity obtains value for money. Bribery can affect these procedures in two ways. Either it simply disrupts the competitive process as the business is awarded to those who have made illegal payments. Or it is the price to pay for the bidders to enter into collusive practices. Indeed, corruption and collusion often go together. Bribes have to be paid for the competitors to “step back” i.e. to agree to align prices or refrain from tendering. Payments are made to the companies themselves (either in cash or in the form of other compensations such as sub-contracting arrangements) and sometimes to their executives. Payments may also be made to the purchaser entity’s officers to close their eyes to these collusive practices; there are even cases where these officers play an active part in the organisation of the bid-rigging practice, and charge the corresponding “fee”<sup>4</sup>.

Generally, bid-rigging is considered by competition authorities as a hard-core infringement, for which they impose high penalties<sup>5</sup>. Although bid-rigging is not a specificity of the public sector in itself, it does regularly affect public procurement<sup>6</sup>. And although corruption is not a specificity of public procurement in itself, most of the high-profile corruption cases occur in the public sector. Competition authorities, both in their enforcement and their advocacy roles, must therefore play a key role in the fight against corruption in public procurement alongside anti-corruption and procurement agencies. As stated at a recent 2008 OECD Competition Committee Working Party meeting, BIAC supports the vigorous enforcement of antitrust laws aimed at preventing bid-rigging and punishing offenders<sup>7</sup>.

Thanks largely to the actions of the OECD, the legal background is now very clear for companies. It is not so long ago that in many countries illegal commission payments were tax deductible as ordinary business expenses provided they were discretely declared as such, and export financing support or international aid to development was granted without serious scrutiny to ensure that it would only be used in corruption-free conditions. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997 has now been ratified by 38 countries, and transposed into domestic law making it a criminal offence to bribe foreign officials<sup>8</sup>. Through its “peer review” process,

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<sup>4</sup> For a recent, ominous example of a hospital’s purchasing official pleading guilty to bid-rigging, see the U.S. Department of Justice’s press release of 12 January, 2010.

<sup>5</sup> For instance in the European Union, the practice of bid rigging will automatically infringe Article 101(1) TFEU. It was condemned by the European Commission in 1973 in the European Sugar Cartel case ([1973] OJ L140/17); when bid rigging was discovered in the Pre-Insulated Pipe Cartel ([1999] OJ L24/1), and later in the Lifts and Escalators case (IP/07/09), the European Commission imposed record fines. In Germany, bid-rigging is a specific criminal offence.

<sup>6</sup> “Evidence suggests that bid-rigging, at least in some countries, may be rather widespread, in particular in government procurement cases” (A. Jones and B. Sufirin, *EC Competition Law*, Oxford University Press, 3<sup>rd</sup> ed., 2008, p. 894). It is generally considered that the conditions for bid-rigging to occur more frequently are related to the structure of the market (small number of sellers, lack of ready substitution with other products, repetitive purchases by large buyers, etc.). See Fiona Carlin and Joost Haans, “Bid-rigging Demystified”, *Practical Law Company - PLC* (November 2005).

<sup>7</sup> BIAC contribution to the OECD Competition Committee Working Party No. 3 roundtable on Bid-Rigging and Public Procurement, June 10, 2008, DAF/COMP/WP3/WD(2008)74.

<sup>8</sup> For instance, the German Act of 10 September 1998, the Canadian Act of 10 December 1998, the Argentinean Act of 1<sup>st</sup> November 1999, the French Act of 30 June 2000, the Italian Act of 29 September 2000, or the U.S. Amendment of October 21, 1998 to the Foreign Corrupt Practices Act (“FCPA”).

the OECD exercises pressure on countries parties to the Convention so that their internal legislation and enforcement are improved with a view to a more efficient application of the treaty<sup>9</sup>.

The OECD Convention has paved the way to several other international treaties or mutual commitments, worldwide or regional, achieving the same purposes<sup>10</sup>. It has been complemented by OECD recommendations to the member states, chiefly prohibiting any governmental permissiveness in exporting countries<sup>11</sup>, and by agreements by other governmental bodies securing the co-operation of banks in the fight against corruption<sup>12</sup>.

Avoiding criminal sanctions against themselves and their executives has therefore now become a very significant deterrent to company engagement in corrupt practices. However, it is not the only one. The cost of procedures and remedial actions can be very high, while the impact of management distraction and the harm to personnel motivation and corporate image are immeasurable. The damage resulting from an individual corruption case can also extend to the whole industry: the harm it inflicts on the reputation of the company who engages in it may spill over to those companies which refrain from illegal practices.

In many cases, the benefit derived from corrupt practices, even if successful and undetected, is questionable. Although corruption distorts competition, it is not even a reliable or guaranteed way to maintain or protect high prices: the pattern is often one where the company is approached by an intermediary who threatens "if you do not commit to bribe, you will not be allowed to compete", rather than promises "if you bribe you will win the competition". Moreover, the worst cases are not necessarily those where the highest margins are made by the suppliers - the margin just goes elsewhere.

As stated in the "Clean Business is Good Business" document<sup>13</sup>, "Business organisations, and the companies they represent, have actively involved themselves in the fight against corruption. Companies are

<sup>9</sup> This may concern for instance the enactment of criminal liability of legal persons (companies), or the conditions of exercise of the officials' and private persons' right/duty to report offences. In the UK, after an initial review of existing legislative and common law provisions it was considered that these were sufficient to implement the Convention and a wide reform is now in preparation: the Bribery Bill under which an act of bribery for or on behalf of a British company anywhere in the world will be a strict liability offence carrying an unlimited fine with the sole defence being that the company took all reasonable measures to prevent the act of bribery taking place, e.g. through active compliance programmes.

<sup>10</sup> To name only a few: the United Nations Convention against Corruption of 2003, which addresses corruption both in the public and the private sectors (signed by 140 countries, ratified by 94), the Inter-American Convention against Corruption of 1996, the Council of Europe's Criminal Law and Civil Conventions of 1998, the South African Development Protocol against Corruption of 2001, the African Union Convention on Preventing and Combating Bribery of 2003, the Asia-Pacific Economic Co-operation Organisation's Santiago Commitment to Fight Corruption and Ensure Transparency.

<sup>11</sup> See in particular the OECD Recommendation on Tax Deductibility of Bribes ([http://www.biac.org/pubs/anti-bribery\\_resource/section\\_2.htm#tax](http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#tax)), OECD Guidelines for Managing Conflict of Interest in the Public Service ([http://www.biac.org/pubs/anti-bribery\\_resource/section\\_2.htm#public](http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#public)), OECD Action Statement on Bribery and Officially Supported Export Credits ([http://www.biac.org/pubs/anti-bribery\\_resource/section\\_2.htm#export](http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#export)), Principles for Donor Action in Anti-Corruption ([http://www.biac.org/pubs/anti-bribery\\_resource/section\\_2.htm#donor](http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#donor)), the Paris Declaration on Aid Effectiveness ([www.biac.org/pubs/anti-bribery\\_resource/section\\_2.htm#aid](http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#aid)), and most recently the OECD Recommendation of the Council for Further Combating Bribery of Foreign Officials in International business transactions (26 November 2009).

<sup>12</sup> See in particular the Basel Committee Guidelines on Customer Due Diligence for Banks ([http://www.biac.org/pubs/anti-bribery\\_resource/section\\_2.htm#basel](http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#basel)), and the rules and guidance issued by the Financial Action Task Force ([http://www.biac.org/pubs/anti-bribery\\_resource/section\\_2.htm#faft](http://www.biac.org/pubs/anti-bribery_resource/section_2.htm#faft)).

<sup>13</sup> See note 1 above.

increasingly engaging in sector-specific or multi-industry initiatives, locally, regionally and/or globally, to share their experiences, learn from peers and, in partnership with other stakeholders, contribute to levelling the playing field.”

BIAC has been at the forefront of the fight against corruption through its Task Force on Anti-Bribery and Corruption. This Task Force consists of business experts nominated by BIAC member associations. Since its inception in 1997, it supported the development of the OECD Anti-Bribery Convention and assisted in ensuring its implementation including through participation in consultations in the context of OECD country reviews. BIAC has also been engaged in alerting OECD governments to the on-going problem of bribe solicitation. More recently, the main focus has been to contribute business views to the ongoing review of OECD anti-bribery instruments and to the design of the future OECD monitoring of the implementation of its Anti-Bribery Convention.

Other international business organisations are also very active. For instance, the International Chamber of Commerce (ICC) has long been involved in the fight through its Commission on Anti-Corruption. In 2005, it issued a revised version of its Rules and Recommendations to Combat Extortion and Bribery, first published in 1977. The World Economic Forum Partnering against Corruption Initiative (PACI) is a platform for companies to commit themselves to develop, implement and monitor their anti-corruption programmes through peer network meetings and provision of private sector-driven support tools, based on the PACI Principles for Countering Bribery. PACI was initiated by World Economic Forum member company CEOs in Davos in 2004 and has widely expanded since.

Similar initiatives take place at the regional level, such as that of the Pacific Basin Economic Council (an association of senior business leaders in 20 economies grouped around the Pacific Ocean) and at the national level, where many national confederations publish and update recommendations on the prevention of corruption.

Companies also engage in “multi-stakeholder” initiatives such as those of Transparency International, which introduced in December 2002 its Business Principles for Countering Bribery, or the United Nations Global Compact. The latter is a voluntary initiative with a mandatory requirement for its 4,000 business participants to disclose, on an annual basis, performance changes in the issue areas. In 2004, a 10th Principle was added to the United Nations Global Compact, stating that: “Businesses should work against corruption in all its forms, including extortion and bribery”. Another multi-stakeholder example, targeting a specific sector, is the Extractive Industries Transparency Initiative (EITI) initiated by the British government, and which has issued a set of principles and criteria, and sets of illustrative guidance for “resource-rich” countries and for extractive industry companies.

Beyond the statement of principles, practical tools (case studies, action guides, guidelines for whistleblowing, etc.) have been developed to assist companies in the fight against corruption and extortion. Such tools may originate from international governmental organisations like the OECD<sup>14</sup> or the World Bank<sup>15</sup>, from national governments<sup>16</sup>, from international business organisations like ICC<sup>17</sup>, from national

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<sup>14</sup> OECD Risk Awareness Tool for Investors in Weak Governance Zones.

<sup>15</sup> Business Fighting Corruption, The World Bank Institute’s Resource Centre for Business.

<sup>16</sup> For instance, the Business Anti-Corruption Portal of the Danish International Development Agency.

<sup>17</sup> ICC Guidelines on Whistleblowing.

trade associations<sup>18</sup>, from NGOs, international like Transparency International<sup>19</sup> or domestic, or from multi-stake-holder organisations<sup>20</sup>.

Special attention must be given to industry sector initiatives. Remarkable efforts have been made in certain sectors, which are particularly vulnerable to corruption and extortion. One example is the “Common Industry Standards” developed by the members of the Aerospace and Defence Industries Associations of Europe (ASD), including commitments to avoid all forms of direct and indirect corruption, and providing guidance on compliance matters. Similarly, U.S. defence industry companies have signed the “Defence Industries Initiative Principles of Business Ethics and Conduct”. Another example is the “Guidelines on Reputational Due Diligence” published by the International Association of Oil and Gas Producers, a practical tool to assist companies in the evaluation of the potential risks of doing business through associates and the implementation of measures to reduce those risks.

Understandably, antitrust authorities may be wary of situations where competitors get together to address issues related to their behaviour on the market. However, companies dedicated to “top-class” standards of business conduct, cannot succeed (or even survive) if they are alone in their stand against corruption. The sector initiatives described above are key contributions to the levelling of the playing field, and their goals are of such importance to the development of the world’s economy that they must seriously be encouraged.

The authorities should also be clearly supportive of compliance programmes developed by companies, which are generally multi-subject and may address both anti-corruption and antitrust issues. Indeed, both collusive and corrupt behaviour can only be successfully combated if employees, who may be tempted either by personal greed or be put under pressure to achieve performance targets to give in to extortion or engage in illegal action, are clearly made aware of the principles and values on which the company will not compromise, are provided with adequate training and be subjected to adequate internal controls. In this respect, the OECD urges its member countries to encourage internal compliance programmes in companies<sup>21</sup> and the relevant authorities should properly take those programmes into account in both their advocacy and their enforcement roles, especially as a potentially mitigating factor or remedy when reviewing companies’ conduct.

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<sup>18</sup> For instance, “Avoid Corruption, a Guide for Companies” by the Confederation of Danish Industries, “Avoid Corruption in International Business (*Korruption bei Auslandsgeschäften vermeiden*)” by ICC Austria and the Austrian Federal Economic Chamber (AWO), or “*Démarche Export – Prévenir le risque de corruption*”, a practical guide aimed at SMEs by MEDEF, the Confederation of French Industries.

<sup>19</sup> Transparency International’s “Six-Step Implementation Process” (a guide for companies in the process of devising and implementing an anti-bribery programme), “Self-Evaluation Module” (to assist companies wishing to assess their anti-bribery performance) and “Global Integrity Pact” (a process that including an agreement between a public purchase and all bidders for a public contract).

<sup>20</sup> For instance, “RESIST” is a joint project of ICC, PACI, Transparency International and the UN Global Compact to develop concise advice on how to resist different extortion scenarios.

<sup>21</sup> OECD Recommendation of the Council for Further Combating Bribery of Foreign Officials in International Business Transactions, p.5. See also the International Standard Organisation’s draft “Guidance on Social Responsibility” document ISO/DIS 26000, currently circulated for comments, which spells out recommendations for compliance programmes relating to, among other issues, anti-corruption (p. 46) and fair competition (p. 48). See also the UK Bribery Bill approach, as referred to in note 9 above.



## CUTS

### 1. Introduction

According to the Organisation for Economic Co-operation and Development (OECD), “*procurement is the process of:*

- *Identifying what is needed;*
- *Determining who is the best person or organisation to supply this need; and*
- *Ensuring what is needed is delivered to the right place, at the right time, for the best price and that all this is done in a fair and open manner.”* (OECD, 2006)

In yet another definition by Transparency International “Procurement” refers to the acquisition of consumption or investment goods or services, from pencils, bed sheets and aspirin for hospitals, gasoline for government cars, car and truck fleets, equipment for schools and hospitals, machinery for use by government departments, other light or heavy equipment or real estate, to construction, advisory and other services from the construction of a hydroelectric power station or expressway to the hiring of consultants for engineering, financial, legal or other advisory functions.

Public procurement refers to the government’s activity of purchasing goods and services needed to carry out its functions - ranging from construction to paper, missiles to street cleaning, information technology to secretarial services, etc. Such procurement is of huge importance to any country including India. Public procurement is a key economic activity of governments, accounting for an estimated 15% of Gross Domestic Product (GDP) worldwide on an average.<sup>1</sup> Public procurement impacts the economy of any country significantly by generating demand and consumption.

Public procurement can be used as a tool for generating social benefits - for example, by way of preferential treatment in procurement, it may be used to promote and support development of backward regions or protection of small scale industries, etc.

In most countries characterised by a high incidence of corruption, public procurement remains a key activity of the government suggesting some kind of possible positive association between corruption and the magnitude of public procurement, with the latter driving the former. The public procurement mechanism has been empirically found to have an impact on the integrity of vendors present in the market. An inefficient public procurement system may act as a deterrent to firms maintaining high quality and ethical standards. Firms with lesser competence would be able to survive in the market by exploiting the loopholes of the public procurement system.

As mentioned, the public procurement system is highly prone to corruption. But is corruption good or bad? Corruption has ancient roots and is a global phenomenon. Corruption is undesirable because it not

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<sup>1</sup> OECD (2008), “Fighting cartels in public procurement”, Policy Brief, available at <http://www.oecd.org/dataoecd/45/63/41505296.pdf>.

only results in loss of public trust and faith in the government but also sub-optimal allocation of resources with negative implications for the growth and level of output. It also leads to a skewed distribution of income. As the link between individual effort and individual income is weaker in highly corrupt societies, the aggregate supply of effort is also adversely affected. This again has a negative impact on economic growth.

Corruption also results in lessening of innovation. Companies relying on corruption will not spend resources on innovation, and even companies that do not indulge in corruption will feel less inclined to make the necessary investments in innovation, if they are not able to gain access to markets/consumers due to corruption by their competitors. Thus, if a government allows corruption to survive and shortlists bidders not on the basis of their experience and/or ability to execute the project, but on their ability to indulge in corruption in the form of bribery or collusion, the country will soon end up risking losing new investment opportunities. Such loss will adversely affect the country's economic development and without such development poverty alleviation through trickle down or augmentation of government resources will not be possible.

A few economists have attempted to measure or theoretically analyse the consequences of corruption for an economy. But, on the other hand, benefits of corruption have also been identified. It is often argued that bribes work as grease in a sluggish economy to keep the wheels moving and thus improves its efficiency. As explained below, it can also pave the way for business to avoid cumbersome rules/regulations, which in most cases act as speed breakers in the path of growth:

*“Interference with the free market usually induces inefficiencies. However, bribes sometimes can partially restore the price mechanism and improve allocative efficiency. Corruption might be viewed as people’s optimal response to market distortions. In this sense, corruption has some beneficial effects to society, but the resulting solution is only second best.”<sup>2</sup>*

However, as mentioned above, there are strong arguments which point to the enormous harm caused by corruption. Many international institutions, such as the World Bank and the International Monetary Fund, have reached the same conclusion. The World Bank believes that corruption is a major factor impeding economic development. Corruption hampers economic growth, disproportionately burdens the poor and undermines the effectiveness of investment and aid.<sup>3</sup>

The rest of the paper is structured as follows. Section 2 examines the sources of corruption in public procurement and then evaluates systems of public procurement in India with emphasis on implications for the extent of corruption. This analysis is then used in Section 3 to suggest the way forward i.e. the insights from Section 2 are used to come up with recommendations for the public procurement system/processes in India.

## **2. Public Procurement: Impact of Corruption**

### **2.1 Corruption in Public Procurement**

Corruption has many faces in public procurement. These can range from the most common form of bribery to more sophisticated forms of political corruption or blue collar corruption. Bribes usually are

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<sup>2</sup> Arrowsmith, S. and Davies, A (1998), “Public Procurement – Global Revolution”, Kluwer Law International.

<sup>3</sup> Zhang H, “Corruption, Economic Growth and Macroeconomic Volatility”, available at [www.karmayog.org/anticorruption/anticorruption\\_913.htm](http://www.karmayog.org/anticorruption/anticorruption_913.htm).

smaller amounts paid to lower level officials to expedite a decision, to induce a decision which has been delayed or to avoid undue delays.

The most common and rampant form of corruption in public procurement is the practice of collusion or cartelisation for the purpose of bid rigging. Bidders often form a cartel, which then tries to manipulate the award decision in favour of one of their members, with or without the involvement of a corrupt official. Each of the cartel members thus gets a chance to be a successful bidder through prearranged bidding for several contracts bid for by the same set of firms. This undermines competition in the industry and its price lowering impact. Bidders can eliminate competition in public procurement in many simple ways - for example, a competitor agrees to submit a non-competitive bid that is too high to be accepted or contains terms that are unacceptable to the buyer; a competitor agrees not to bid or withdraws a bid from consideration; a competitor agrees to submit bids only for certain geographic areas.

There are certain factors that help bidders to engage in practice of collusion, such as<sup>4</sup>:

- High entry barriers that make it difficult for new or smaller firms to bid for contracts;
- Opportunities for repeated interaction among market participants
- Presence of active trade associations
- A high level of market transparency that makes it easy to see what the competitors are doing (if bidders are easily identifiable)

Corruption in government abets such collusion as corrupt government officials turn a blind eye to practices such as bid rigging, with such behaviour being linked to a share in the gains enjoyed by colluding firms.

## **2.2 Public Procurement in India: Status and Challenges**

In India, different procurement rules apply at the Central Level, in the states/territories, to the central public sector units and to public sector enterprises. At the federal level, procurement is regulated through executive directives. The General Financial Rules, issued by the Ministry of Finance, lay down rules and procedures for the procurement of goods and services. A manual on policies and procedures for purchase of goods has been published to assist the procurement entities and their officers in procurement.

At the Central Level, procurement is administered by the individual government agencies. Certain control and functions are carried out by central authorities such as the Comptroller and Auditor General and the Central Vigilance Commission (CVC). The Comptroller and Auditor General of India (CAG) undertakes ex-post audit of government expenditures including government and public sector procurements, essentially checking the budget for expenditures and adherence to procedures. The CAGs annual and special reports highlight unauthorised and wasteful expenditures, losses to the public exchequer and unjustified departures from established procedures. The reports are published and are discussed in the Parliament and State legislatures.

However, in India there is no single authority at the Central Level which is exclusively responsible for overseeing procedures relating to the procurement process. Thus, all states and public sector units have their own procurement organisation. There is no Central Procurement Authority though Central Purchase Organisations such as the Directorate General of Supplies and Disposal (DGS&D) are active in finalising

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<sup>4</sup> <http://www.oecd.org/dataoecd/36/40/42594504.pdf>.

contracts with registered suppliers for goods and items under the provisions of Government Financial Rules and State Financial Rules.

One major problem being faced in India is the confusion created by the existence of multiple procurement guidelines and procedures issued by various agencies (centre and state level). There is neither a single comprehensive public procurement standard nor a single agency to deal with public procurement policy in India. For example, in the US the Federal Acquisition Regulation is the public procurement standard which codifies a uniform policy for acquisition of supplies and services. This office is headed by a committee consisting of the heads of the major procuring organisations. Lack of standardisation not only causes inefficiency but also creates a major hurdle in ensuring transparency and accountability in procurement and provides enough leeway for indulgence in corrupt practices.

In the absence of a Central law or State act in public procurement, each ministry department, agency, etc, follows the basic tender system with certain variations. The key stakeholders involved are always the government and the private sector but these are represented by different agencies in different cases and thus procedures and practices vary from case to case. This reduces the credibility and public confidence in the system, creates confusion and thus provides room for corruption.

Another problem that one faces in public procurement is the multiplicity of tender documents used by different ministries and agencies in India. According to one estimate, there are more than 150 different contract formats used by the government and its agencies. This leads to confusion in the minds of bidders and concern about the risks imposed on them. Often in a given state, for the same work (for example, construction of a bridge), the tender document differs with the agency of issue, i.e. the nature of the document issued by the Public Works Department is different from that issued by the Municipal Corporation and both documents are different from that issued by the Metropolitan Urban Development Authority or the State Road Development Corporation. The differences manifest themselves in differences in criteria such as qualification requirements, selection, payment terms, dispute settlement mechanism, etc.

Thus, there is an urgent need in India to put in place comprehensive public procurement law/standards with a single authority to deal with relevant issues.

The efforts made by the Government to ensure standardisation in other areas such as steps taken by the Committee on Infrastructure under Planning Commission of India to adopt Model Concession Agreements with respect to Public Private Partnerships<sup>5</sup> can be potentially replicated for standardising the whole public procurement system in India.

### **2.3 *Public procurement at State level in India: Presence of Corruption***

In a federal set up, states compete with each other to attract industrial investment by offering various incentives to the private sector such as electricity duty waivers, tax holidays, etc. Similar packages are also provided to protect and promote local units. One such preference given by the States is to local units during public procurement. Under this policy, price preference is given to the local units.

The aim of such policy is to protect and support small sector units, which otherwise might find it difficult to meet competition from large enterprises. Even if products of other players are better in quality or more competitive, these are not purchased because of price preference. Overall, the policy of giving preference might be desirable in the context of promoting balanced development and might keep vote banks happy but the incentives it offers for cartel formation by local units under the aegis of government

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<sup>5</sup> <http://infrastructure.gov.in/mca.htm>.

protection are problematic. In such cases, the State Government invariably ends up paying a higher price for a product which might be of inferior quality (refer to Box 1).

### **Box 1: Barbed wire association in Rajasthan**

As per an earlier Rajasthan Government policy, a certain quota of barbed-wire was to be procured from local manufacturers. This is supposed to have led to the formation of a ‘cartel’ under the name of Rajasthan Barbed – Wire Manufacturers Association in mid-80s. This association hiked the prices and with an implicit arrangement allocated the total requirement of barbed-wire amongst its members.

As a consequence of this arrangement, poor quality of barbed-wire was procured at high price with almost no quality checks at the Government end. Local manufacturers depended solely on Government’s patronage rendering them uncompetitive. With the changed Government procurement policy, local units were closed down and the association broke up.

Source : Mehta. P (2006), “Towards a Functional Competition Policy for India”, CUTS International

In this context, the Parliamentary Standing Committee on Railways in 2004 observed, that “the procurement of concrete sleepers has become a sensitive matter, because a lot of unscrupulous existing manufacturers have formed a ‘cartel’ to secure orders by unfair means or tampering with the procedure and simultaneously keeping the new competitors out of the race. The committee is constrained to notice that there exists a regional imbalance in the setting up of concrete sleeper manufacturing unit. They also expressed their unhappiness that new entrants are not encouraged, which ultimately strengthen the cartel of old/existing manufacturers”. This, in procuring 160 lakhs broad gauge sleepers, the Railways awarded contracts to existing 71 firms, and ignored 24 new firms entirely.<sup>6</sup>

Further, collusion between the contractor and/or supplier and the procurement agency to earn extra profits is a major problem. By the very nature of the arrangement, it is extremely difficult to detect and curb these though there have been instances where the agreement did not materialise and the cases were reported:

*“Few instances could be drawn from the CAG report. One such example is the procurement of Balau sleepers from Malaysia by Indian Railways, involving a sum of INR 20 crore. The Railways went against the report of the Forest Research Institute and cleared the imports. Later, the officers who were charged with the responsibility of checking quality standards also cleared the sleepers, despite their being of sub-standard quality. Thus, few of the strategies that are followed in collusion with the suppliers are:*

- *Quantity variations or change in specification ex post to favour the contractor in case of projects;*
- *Accepting poor quality product or work;*

<sup>6</sup> Mehta. P (2006), “Towards a Functional Competition Policy for India”, CUTS International.

- *Coming up with ingenious requirements and arguments in favour of the contractor or the supplier.*<sup>7</sup>

### **3. Way Forward**

In recent times, public procurement has attracted attention in the policy discourse on improving governance to promote sustainable growth and improve quality of public services. However, the situation is not so grim in all Indian states. For example, in Tamil Nadu, an Act called ‘The Tamil Nadu Transparency in Tenders Act 1998’ came into effect in 2000. The Act mandated an open advertisement mechanism for the tender system, and publication of tender notices and tender decisions in weekly bulletins, and also introduced an appeal procedure.

Following the steps taken by Tamil Nadu, the state of Karnataka too enacted ‘The Karnataka Transparency in Public Procurement Act 1999.’ The steps taken by the two states have enhanced transparency and improved public confidence. The performances of public sector enterprises have improved a lot and large business houses have also become more efficient and transparent in their functioning. Overall, the number of public complaints has gone down.

Thus, other states could also follow the steps taken by Tamil Nadu and Karnataka to ensure transparency and accountability in public procurement. Given below are a few suggestions for policy makers/decision makers to fight corruption in public procurement.

#### **3.1 Adoption of a dedicated agency for public procurement**

The absence of a nodal agency to look after issues pertaining to public procurement policies/processes has contributed to the multiplicity of procedures, rules, practices and documents, etc. It is recommended that an agency be created at the Centre with offices in each state to exclusively deal with public procurement policies and bring about standardisation in theory and practice.

#### **3.2 Introduce Public Procurement Law and Public Procurement Regulations<sup>8</sup>**

A ‘Public Procurement Law’ complemented by a set of Public Procurement Regulations, to replace and consolidate the present fragmented rules, will improve transparency and ensure accountability. The law would discourage the polity and corrupt officials from adopting short cuts in the name of public interest. The law could also define the precise scope for court intervention, thereby eliminating frivolous suits which result in wastage of time.

A few States have taken the lead - for example, the issue of ‘The Tamil Nadu Transparency in Tenders Act 1998’ by Tamil Nadu followed by a similar issue by the Karnataka Government. There are also international models to draw lessons from - for example, the UNCITRAL model law published in 1980 which has served as a model for the procurement law being legislated in most East European and ex-Soviet Union countries, as well as some developing countries in Africa and Asia; and the Government Procurement Agreement of the WTO.

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<sup>7</sup> India Infrastructure Report (2003), “Public expenditure allocation and accountability”, 3iNetwork, Oxford University Press.

<sup>8</sup> World Bank (2003), “India Country Procurement Assessment Report”, Report No 27859-IN.

### 3.3 *Adoption of E-Procurement Process*

Procurement is generally regarded as a sensitive function of the public sector and is rarely transparent. Governments across the globe are under immense pressure to meet the expectations of citizens and ensure transparency in the process as well as enhance accountability of involved government officials. There is a growing realisation in governments that usage of information and communication technology (ICT) can remove existing hurdles and make the public procurement mechanism more efficient and transparent.

The history of extensive use of e-procurement in the public sector in India is short and therefore does not yield many pointers for the future. “The e-procurement project of Government of Andhra Pradesh has been implemented successfully. The implementation was instrumental in reducing cartel formations amongst contractors and suppliers since all the bidding is done online through the portal. It has actually increased the participation from the supplier community since anybody can bid for a tender remotely through the internet. The new system has considerably empowered the small and medium-sized suppliers”.

### 3.4 *Role of Competition Commission of India*

The Indian Competition Act, 2002 specifically prohibits collusive bidding. Thus, the Competition Commission of India (CCI) is mandated to play an important role in developing an efficient public procurement system in India. There is a need to buttress competition advocacy with effective enforcement through action against cases of bid rigging, collusive bidding, etc. Strict and proactive enforcement against bid rigging has promoted fair and free competition in public procurement in many countries and saved significant public resources by enhancing competition.

The following are certain steps that could be taken by CCI:

- Creation of awareness regarding risks of bid-rigging in procurement by way of outreach programmes;
- Education and capacity building of procurement officials in detecting and collecting evidence which could then be used against colluders in a court of law;
- Education of public procurement officials and government investigators on the cost of bid-rigging to the government and taxpayers;
- Development of a toolkit to catalogue standard indications of potentially collusive conduct which could help procurement agencies to undertake spot investigation for identifying possible collusive activities, etc.

### 3.5 *The Right to Information Act, 2005*

The adoption of the Right to Information Act, 2005 in India marks a watershed in attainment of transparency and accountability with its objective of creating an informed citizenry to facilitate effective democracy. Procurement procedures are covered by the Act. The active involvement of civil society organisations in social audit could lead to greater awareness and transparency in the whole process of public procurement. Information relating to the procurement process is accessible by the citizens under this Act.

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<sup>9</sup> [http://www.csi-sigegov.org/casestudies/22\\_implement\\_e\\_procure.pdf](http://www.csi-sigegov.org/casestudies/22_implement_e_procure.pdf).

The Right to Information Act is one tool through which we can monitor the work of anti corruption agencies and use this information to create political pressures for change. It is only when the common man is able to use these tools and take a more proactive role in the discourse on checking corruption that pressure for reforms emerge, as it would be unrealistic to expect insiders who benefit from the system to take initiatives to improve the system and make it more transparent and corruption free. Political pressures need to be created externally and public pressure is thus essential.

## SUMMARY OF DISCUSSION

*by the Secretariat*

**The Chairman (Khalid Mirza)** opened the discussion, noting the general agreement that public procurement is a large and important segment of economic activity, the main objective of which is to achieve maximum value for public money. Moreover, the actual harm caused by collusion and/or corruption in public procurement goes beyond its economic magnitude: (i) the goods and services involved typically affect a large section of the population; (ii) public procurement often involves physical infrastructure or public health, which support other forms of economic activity; (iii) it impacts on international competitiveness; (iv) it can impact on the investment climate; (v) distortion of public procurement typically has the heaviest detrimental impact on the most disadvantaged in society, who rely on public services and infrastructure to the greatest extent; and (vi) public procurement often concerns “public goods”, and so government failures cannot be addressed by private market mechanisms.

The Chairman stated that the roundtable discussion would consist of expert presentations, interspersed with questions posed to individual delegations. He introduced the four expert panellists: Professor Sue Arrowsmith of the University of Nottingham, United Kingdom; Dr. Benny Pasaribu, Commissioner and former Chairman of Indonesia’s Competition Commission, the KPPU; Dr. Abdesselam Abouddrar, President of Morocco’s Central Agency for Corruption Prevention; and Professor David Lewis of the Gordon Institute of Business Science, South Africa, and former Chairman of South Africa’s Competition Tribunal. After thanking delegates for their contributions, the Chairman outlined the five topics to be covered: (i) the importance and aims of public procurement; (ii) the problem of collusion; (iii) the problem of corruption; (iv) how to fight collusion and corruption in public procurement; and (v) competition advocacy for integrity and competitiveness in public procurement. Turning to the first topic – the importance and aims of public procurement – he invited Professor Arrowsmith to make her presentation.

**Professor Sue Arrowsmith** began by noting that she was approaching the issue from the perspective of public procurement regulation. Transparency is frequently cited as *the* most important tool in preventing corruption in public procurement, so the more transparency there is within the procurement process, the better. Professor Arrowsmith, however, took the view that transparency may not be an unfailingly helpful value in this context. Rather, more research needs to be done on the role of transparency in addressing corruption, and on which aspects are valuable in public procurement regulation.

Professor Arrowsmith introduced the question: what is transparency? She suggested that it has four dimensions: publicity for contract opportunities; publicity for the rules of each procedure; limits on public officials’ discretion; and verification and enforcement. The third dimension – limiting the discretion of procurement officials – is often seen as the fundamental aspect of transparency. The principle reason behind this is the anticorruption imperative: to constrain discretion so that there is simply no room for bribery, favouritism etc.

Instead of the well-known benefits of transparency, Professor Arrowsmith focused on its limits, particularly in relation to the third dimension. In practice, it is virtually impossible to remove all discretion from the procurement procedure, but efforts to do so in any event tend to result in a mechanical, inefficient process. Furthermore, corruption can be pushed into the post-award phase, whereby the favoured bidder knows that they can win the contract, ostensibly fairly, in accordance with the very transparent rules, and later secure lax enforcement or contract revisions.

Transparency brings with it various costs. Firstly, by removing all scope for subjective judgment from the procurement process, procurement rules can make it impossible for officials to secure the best value for money from public procurement, leading to an inefficient result. Secondly, transparency can facilitate collusion among bidders. Thirdly, the cost of the public procurement process itself is significant, which deters some good contractors from participating in public tendering processes. Related to this point, Professor Arrowsmith noted some research findings that indicated that the majority of wastage in public procurement is due, not to corruption and abuse, but to simple inefficiency – so that excessive emphasis should not be placed on transparency in this context.

Professor Arrowsmith concluded by saying that she felt there was a need for more empirical research, utilising a quantitative approach, on the various costs and benefits of specific types of transparency rules and the appropriate limits. Such research should be backed up by work on other policy aspects, such as capacity building, skills training and ethics issues, rather than a blanket focus on transparency.

**The Chairman** thanked Professor Arrowsmith for her presentation. He noted the contributions of Albania, which cited empirical evidence of price rises in the range of 5-10% in public procurements with small numbers of bidders, and of Mexico, which found evidence of price decreases of between 20-50% in public procurements that had benefited from increased numbers of bidders. The contribution of the Slovak Republic highlighted the risk that prior corruption or collusion could constitute a barrier to entering public procurement by new firms, while the contribution from CUTS suggested that these offences undermine incentives to invest and innovate. The Chairman then moved to the second topic – corruption in public procurement – and invited Dr. Abouddrar to make his presentation.

**Dr. Abdesselam Abouddrar** began by noting the importance of public procurement. With large sums of money involved, a diverse range of stakeholders and a multiplicity of complex rules, public procurement is highly exposed to the risks of collusion and corruption. This may take various forms: direct bribery; lack of public access to information facilitating differentiation between bidders; non-compliance with disclosure requirements; bias in adjudication; or post-award corruption.

The risk of corruption affects all stages of the public procurement process. At the inception stage, i.e. when defining the public need, this definition may be biased or false – the notion of “cathedrals in the desert”. The next step is to define the terms of reference of the procurement, which can be drafted to favour certain suppliers. The most vulnerable stage is the tendering process itself, which is conducted in accordance with detailed procurement rules. Corruption can also occur in the post-award or delivery phase, for example, where the contractor is allowed to vary the requirements of the contract or is granted a higher price.

Typically, in Morocco, corruption is viewed in terms of the percentage of public spending that is diverted as a result. However, Dr. Abouddrar stated that this is not his primary concern. Instead, he focuses, firstly, on the enormous waste involved in corruption, particularly with regard to projects that are undertaken solely because of corruption. Secondly, corruption involves a misallocation of finite public resources. Thirdly, corruption can deter investment and impact negatively on the economic development of a country.

Morocco has undertaken numerous reforms in order to fight corruption in public procurement. Areas of reform include simplification and clarification of procedures; enhanced competition; equal treatment of bidders; reinforcing transparency and public ethics; modernising the public service; improving protection of other bidders; and complaint mechanisms for review of public procurement awards. Promotion of transparency in public procurement is important, particularly because the State as purchaser is disproportionately powerful.

There are a multitude of stakeholders, both public and private, involved in any public procurement process: the bidding firms, the procuring agency, and in Morocco now, a variety of government supervisory agencies, including the anti-corruption agency and competition authority. This multiplicity can lead to problems of co-ordination and efficiency. Morocco has signed up to a number of free trade treaties, which have included commitments to improve the quality of public procurement. Training of procurement officials and capacity-building is another means to fight corruption in public procurement.

**The Chairman** thanked Dr. Abouddrar for his presentation. He noted that the issue of corruption in public procurement had two aspects: the costs of corruption and the factors facilitating corruption. The country contributions highlighted a variety of costs, including wastage of public resources, loss of purchasing power, diminished ability of government to reach its policy goals and public distrust of government. While most of the contributions had focused on corruption in the awarding of public contracts, those of Croatia and Gabon had also raised the issue of post-award corruption. The Chairman invited Gabon to speak on this issue.

The delegate from **Gabon** noted that any public contract valued at €45,000 or greater must be put out to public tender, which is awarded to the lowest bidder. However, ways to distort free competition through collusion or corruption always exist. Therefore, there is *ex post* monitoring of procurement, to ensure that money has not been disbursed fraudulently. Other techniques include prosecution of procurement officials involved in corruption; building a competition culture among businesses, in particular by linking it to the notion of competitiveness; and transparency in public management.

**The Chairman** thanked Gabon for its contribution, and invited Norway to speak on the issue of public perceptions of levels of corruption following increased anti-corruption enforcement.

The delegate from **Norway** noted that a number of high-profile public corruption cases have taken place in Norway in recent years. However, greater enforcement has had the paradoxical effect of creating a public perception that corruption is a new and increasing phenomenon in society, and the resulting concern paved the way for a strengthening of anti-corruption legislation. By way of example, a fine of €6.5 million was imposed recently on the municipality of Oslo for failure to comply with the existing rules on public procurement.

**The Chairman** thanked Norway for its contribution, and then turned to the second aspect of corruption, namely the factors that facilitate corruption. The contribution of Latvia cited long-standing relationships between firms and public officials. Pakistan mentioned inadequate remuneration of public officials and weakened political institutions. Brazil listed frequent interactions between bidders. Romania's contribution reported on a study that identified reasons for corruption in Romania, and the Chairman invited Romania to elaborate further on these findings.

The delegate from **Romania** explained that the study, which was based on a survey of local public administration officials, had revealed a variety of reasons for corruption in the country: inconsistency in reforms; lack of coherence and mismanagement of the privatisation process; lack of traditions that support the market economy and administrative systems reluctant to change; low salaries among public officials; lack of financial discipline in the public sector; and fluctuations in the numbers of civil servants. The survey also identified a number of ways by which to reduce corruption in public procurement: to intensify the reform process including civil service reform; to strengthen local autonomy and increasing local authorities' capacity for financial management; and to improve public policy formulation. These were also the requirements that had to be fulfilled by Romania in order to join the European Union. The delegate concluded by stating that corruption has profound negative effects for all countries attempting to develop market economies, and for that reason, a number of public agencies with specific remit over corruption had been established in Romania since 2002.

**The Chairman** thanked Romania for its contribution. The contribution from Papua New Guinea highlighted how the problem of corruption can have its roots in certain social traditions. The Chairman asked Papua New Guinea to elaborate on this point.

The delegate from **Papua New Guinea** explained that a traditional system of social assistance exists in that country, whereby individuals are obliged to assist their extended family members, known as a “wantok”, to the greatest extent possible. As this village tradition has been applied within the context of the modern economic system, it has fostered corrupt practices. For example, public contracts may be granted to wantoks on the basis of the needs of the wantok, rather than merit. Additionally, the prior existence of the wantok tradition has made the community in general more tolerant of corruption. However, as nepotism is not unknown in developed countries also, the delegate suggested that the wantok system might be regarded as merely a local manifestation of a global problem.

**The Chairman** thanked Papua New Guinea for its contribution, and noted that the contribution of Peru also mentioned historical and cultural conditions that foster corruption. Turning to the issue of sanctions, the Chairman noted that monetary fines and imprisonment are available as penalties in many but not all jurisdictions. Generally, competition authorities do not have jurisdiction over pure corruption issues, but there is a degree of co-operation and co-ordination between agencies that deal with collusion and corruption in public procurement. Indonesia, Gabon, India, Poland and Tunisia had each established independent government agencies to tackle corruption in public procurement. The contributions of Australia, France, South Africa, the United States and Japan provided examples of cases taken by competition authorities that included both collusion and corruption aspects. In Israel, the competition authority could occasionally pursue corruption aspects of a case if there were also competition violations at issue. The Chairman then introduced the third topic for discussion – collusion in public procurement – and invited Dr. Pasaribu to speak.

**Dr. Benny Pasaribu** began by describing the substantial growth of the Indonesian economy since the 1970s. The reform era in the country had started in 1998, and had resulted in a variety of new laws that prohibit anti-competitive and corrupt behaviours, and accompanying enforcement agencies. International and domestic competitiveness is also becoming more important. However, various surveys suggest that Indonesia remains a haven for corruption.

Dr. Pasaribu spoke about the vicious cycle of corruption and collusion that can occur, whereby collusion leads to supra-normal profits that can be used to fund bribery, which in turn reinforces lack of competition as the status quo. In particular, governments with a high level of corruption tend to have strong relationships between State officials and business. Dr. Pasaribu provided some figures regarding the relative corruption and competitiveness rankings of Indonesia and its less corrupt, more competitive neighbour, Singapore, which demonstrated the correlation between corruption and lack of competitiveness.

Dr. Pasaribu then spoke of his own experiences with the Indonesian competition authority, the KPPU. The vast majority of complaints received by the authority relate to bid rigging, constituting a disproportionate share of the case load. Problems in public procurement could involve a horizontal relationship between bidders or a vertical one between bidders and officials. While the KPPU focuses mainly on collusion in enforcement, its advocacy efforts are targeted at both corrupt and anticompetitive practices. In Indonesia, there is also a government procurement supervisory agency, with which the KPPU planned to sign a memorandum of understanding, and a corruption eradication commission (KPK), with which it had already signed such a memorandum. In addition, legislation relating to public procurement regulation was before parliament.

Dr. Pasaribu talked about the KPPU’s co-operation with the KPK, whereby the KPPU would send any evidence of corruption in public procurement cases to the KPK, which has jurisdiction to investigate

corruption offences. There were a number of big cases, relating to oil container ships, electricity, first aid and ink procurement, where evidence of corruption had been sent to the KPK. Dr. Pasaribu noted that a further memorandum of understanding between the KPPU and the police and attorney general's office was pending, which would bring about a further division of responsibility between these agencies.

**The Chairman** thanked Dr. Pasaribu. He noted that the factors that facilitate collusion in general also apply in the public procurement context, in particular the detrimental effect of having a small number of bidders. Mexico's contribution cited the exclusion of foreign suppliers from public procurements, plus the practice of public opening of bids. Ireland identified failures to update bid qualification lists, thus restricting bidding to firms that had participated in previous procurements. Albania and Tunisia cited excessive criteria in bid specifications, which restrict the number of bidders. Colombia identified failure of competition law enforcement to protect new entrant firms from economic attacks by incumbents. Chile noted that the design of the procurement procedure could lead to excessive predictability and barriers to entry. Canada mentioned the possibility that trade associations could be used to organise collusion. El Salvador cited lack of knowledge of bid rigging among procurement officials, in a nation which is new to competition policy; the Chairman invited El Salvador to elaborate on the issue of education and training.

The delegate from **El Salvador** outlined various competition advocacy activities of the Competition Superintendence of El Salvador: production of an information booklet on bid rigging; a series of presentations to public officials which elaborated on the contents of the booklet; and development of channels of communication between procurement officials and other State agencies. Advocacy efforts are supported by enforcement efforts: in 2009, four travel agents were fined by the Superintendence for bid rigging in public tenders.

**The Chairman** thanked El Salvador, and invited South Korea to speak on bid rigging in design-and-build construction projects.

The delegate from **South Korea** stated that bid rigging may be especially prevalent in public tenders relating to projects where the winning bidder is responsible for design as well as construction, for several reasons: advanced technology is required, so fewer firms can bid; such projects tend to be large, further restricting bidding to larger firms; and construction companies in South Korea have close relationships, which facilitates collusion.

**The Chairman** thanked South Korea, and invited Latvia to speak on transparency and collusion, and the practice of sub-dividing contracts to avoid public procurement rules.

The delegate from **Latvia** noted that, in the past, many bid rigging cases were uncovered when identical mistakes were found in paper bids submitted by several firms. The introduction of e-procurement procedures, while desirable in terms of transparency and cost, reduces the possibility that evidence of collusion of this nature will come to light. Secondly, under Latvian law the procurement procedure to be followed depends on the value of the contract. By artificially sub-dividing contracts, procurement officials can avoid more onerous rules that apply to higher value contracts. It is desirable, therefore, to have some monitoring agency in place which can sanction officials who sub-divide contracts in this manner.

**The Chairman** thanked Latvia, and invited CUTS to speak on the detrimental effects of preference systems within public procurements.

The delegate from **CUTS** explained that preference systems limit the number of effective bidders that can participate in a public procurement, which reduces competition and its benefits. Moreover, collusion is easier to sustain among smaller numbers of bidders. In India, there is excessive heterogeneity of rules

governing public procurements, so that the procurement process could be improved by standardisation of rules.

**The Chairman** thanked CUTS, and invited Poland to speak on bid suppression.

The delegate from **Poland** noted that bid suppression may present evidence of collusion in tendering, whereby certain bidders fail to comply with the various requirements of the tendering process and have their bids cancelled, so the tender is granted to the most expensive bidder. Poland does not currently require bidders to certify as to bid independence; instead, the emphasis is placed on corruption, with employees of the awarding agency being required to provide written statements of impartiality. However, introduction of a certificate of independent bid determination (CIBD) is being considered.

**The Chairman** thanked Poland, and noted that the contributions had suggested that bid rigging tends to be concentrated in a few industries, such as construction and healthcare. He invited the United Kingdom to speak about its recent series of construction industry cases.

The delegate from the **United Kingdom** explained that, while the investigation had revealed evidence of cover pricing throughout the construction sector, for pragmatic reasons relating to the efficient use of public resources only a portion of these cases had been prosecuted. The objective was to send a strong message to the sector that this practice is illegal. The competition agency had pursued those cases in which the evidence of collusion was strongest, and where there was repeated collusion. A mix of large and small firms was selected, to illustrate the endemic nature of the practice. The delegate mentioned the Office of Fair Trading's ongoing "Drivers of Compliance" project and two findings of note. Firstly, competition compliance is now viewed by businesses as an aspect of business ethics. Secondly, while fines are considered by some firms as merely a cost of doing business, the reputational effects of a competition conviction, plus the possibility of criminal liability and directorship disqualifications, may be more serious deterrents.

**The Chairman** thanked the United Kingdom, and invited Turkey to speak about its boycott cases relating to the healthcare sector, including on the consumer welfare effects.

The delegate from **Turkey** described two cases whereby boycott of a public tender had constituted a violation of competition law. In response to a government decision to put healthcare purchasing out to tender to minimise costs, suppliers had colluded and jointly refused to bid. As bid rigging is a criminal offence in Turkey, the case was investigated by the competition authority in conjunction with the public prosecutor, who has more extensive investigatory powers. Evidence revealed that the medical suppliers were prepared to disregard patients' urgent medical needs entirely. The undertakings involved were fined for their participation in these boycotts. The case illustrates how collusion can take a form other than bid rigging or market sharing.

**The Chairman** thanked Turkey, and invited Mexico to talk about the work of its competition authority to improve the design of public procurement procedures.

The delegate from **Mexico** suggested that bid rigging in public procurement typically stems from a badly designed legal framework, with three basic problems: (i) restricting bidding to domestic suppliers; (ii) multiple provision, that is, segmenting an award among a number of suppliers; and (iii) fragmentation of auctions, which are held several times a year at different regional levels. In the case of pharmaceutical procurement in Mexico, the competition authority worked with the responsible government agency, to redesign the procurement framework to address these three problems. Although there was resistance from pharmaceutical firms and some levels of government, the improvements had resulted in a significant reduction in procurement costs since their introduction.

**The Chairman** thanked Mexico, and asked Japan to discuss a study from 2003 that had precipitated the involvement of the JFTC in procurement reforms.

The delegate from **Japan** outlined the three principal recommendations emerging from the study: (i) expansion of the scope of general competitive bidding; (ii) promotion of the use of comprehensive bid evaluation methods; and (iii) ensuring consistency between competitiveness and other policy objectives, such as developing the local economy or facilitating participation by SMEs. Six examples of reforms introduced since the publication of the report were provided: (i) the areas of procurement subject to general competitive bidding have been widened; (ii) comprehensive bidding evaluation methods have been introduced by many procurement agencies; (iii) use of e-procurement has been extended; (iv) increased disclosure of information, in order to establish that contracts are not awarded arbitrarily; (v) strengthening of penalties for bid rigging; and (vi) efforts by procurement agencies to strike a balance between development of local economies and fair competition.

**The Chairman** thanked Japan, and asked Tunisia to speak about what was behind recent changes to Tunisia's legislation.

The delegate from **Tunisia** noted that revisions to the anti-corruption laws a decade ago had greatly reduced the occurrence of corruption in public procurement in Tunisia. However, bid rigging is still a common problem, in sectors such as the provision of food to schools, prisons and hospitals. What attracted the attention of the competition authority to this problem was the fact that a single operator could obtain a greater than 90% share of the relevant market. There is a further issue whereby contractors submit bids which come out below the minimum wage; so they are either hiring staff on the black market or engaging in predatory pricing. Consequently, the laws on public procurement were revised in 2008 to strengthen the provisions against bid rigging.

**The Chairman** thanked Tunisia, and noted the use of CIBDs in some jurisdictions, including Brazil and Canada, as a tool to eliminate collusion. The Chairman then asked for a show of hands by the delegations as to whether, in their jurisdiction, firms that were convicted of bid rigging were subsequently prohibited from bidding in procurements for a period of time -- seven positive responses were received. The discussion then moved to the fourth topic -- fighting collusion and corruption -- and the Chairman invited Professor Lewis to make his presentation.

**Professor David Lewis** suggested that bid rigging in public procurement constitutes the most egregious competition offence. While bid rigging and bid corruption may operate completely independently of each other, and in fact one may even subvert the other, the evidence is that they generally occur in tandem. Assistance on the buyer side may be necessary for a cartel to monitor cheating and avoid detection; while conversely, co-operation between bidders may be necessary to dissuade the losing bidder from exposing evidence of corruption in the awarding of a contract. Therefore, while there is no necessary relationship between collusion and corruption, frequently there is some relationship.

Professor Lewis outlined reasons why collusion and corruption in public procurement, specifically, are considered particularly problematic: (i) society is hit with a "double whammy" of criminality when these offences occur in tandem; (ii) the consumer is also hit twice, as consumer and as taxpayer; (iii) the scale of public procurement projects tends to make them attractive and susceptible to collusion and corruption, and moreover, makes monitoring difficult; (iv) collusion and corruption in this context amounts to a direct attack on good governance and public accountability; and (v) the disadvantaged in society are hit disproportionately hard, in terms of reduced range and quality of public services and infrastructure. Given that public procurement concentrates the buyer side, educating procurement officials about bid collusion and corruption is likely to yield high returns. This is particularly important because, in spite of

the dangers of bid rigging, public procurement remains an important instrument of industrial policy for governments.

Professor Lewis considered means by which to address bid rigging and bid corruption. Mechanisms to protect against one offence may work against mechanisms to protect against the other. While transparency, for example, is considered to be the most effective mechanism to prevent corruption, it may well assist collusion. Procurement via regular small bids tends to facilitate collusion, whereas large lumpy tenders may facilitate corruption. At the same time, however, information collected by anti-corruption monitoring agencies may be of assistance to anti-collusion agencies, and vice versa.

Having considered the literature, the four most common methods proposed to combat both bid corruption and bid collusion are: (i) close liaison between competition authorities and anti-corruption agencies; (ii) training of public officials to recognise collusion and corruption; (iii) transparency, although there is a need to identify more precisely which forms of information facilitate collusion; and (iv) alignment of government databases to identify indicators of collusion and/or corruption.

**The Chairman** thanked Professor Lewis, and noted that, of the many contributions received, very few had reported cases that involved both collusion and corruption in public procurement. Notable exceptions were the contributions of France, which delegations were encouraged to review, and that of India, which the Chairman invited the Indian delegation to speak about in greater detail.

The delegate from **India** noted that, while the competition regime in India is a relatively new phenomenon, efforts are underway to devise guidelines and other tools to govern public procurement. As the competition authority becomes fully operational, more cases of bid rigging will be detected and sanctioned. As regards corruption, this is subject to a more well-established institutional regime. India has a central vigilance commission, as well as anti-corruption agencies in the States and an office of Comptroller and Auditor General, which carries out *ex post* audits of government expenditure. There is also a Right to Information Act, which aims to promote greater transparency in public activities.

**The Chairman** thanked India. From the contributions, it appeared that no level of government is immune from collusion or corruption in procurement, and there is insufficient enforcement evidence to determine how common these offences are. Nevertheless, **Sweden's** contribution reported on a major national study of collusion and corruption in public procurement, which indicated that these offences are closely related and facilitated, in large part, by a lack of understanding among front line public procurement officials. The Chairman raised the issue of enforcement techniques that can address both collusion and corruption, noting the contribution of the **United States** regarding surveillance and undercover investigation techniques in this regard. Other contributions, including those of the **Russian Federation, Bangladesh, Brazil, Romania** and **South Korea**, suggested internet-based procurement techniques as a means to prevent both collusion and corruption. Brazil listed co-operation agreements between procurement agencies and law enforcement agencies. Germany has a specialised review process for disputed public contract awards, which the Chairman invited Germany to speak about in greater detail.

The delegate from **Germany** stated that, from a competition perspective, the strengths of this review procedure are the opportunities it offers to create transparency and ensure non-discrimination in public procurement, and to correct any procurement award that has been found faulty. The primary purpose of a review is verification of whether the procedural rules have been respected in individual instances, rather than concern for the competitive process as such. Individualised review is not an appropriate means to conduct a systematic review of public procurements over time to detect suspicious patterns of bidding, which may be a more effective means of identifying collusion. Nevertheless, while there is no empirical evidence in Germany as to whether the existence of the review procedure has any effect on levels of

collusion or corruption, one might assume that the threat of *ex post* scrutiny of the procurement process by an independent body might dissuade companies somewhat from engaging in these offences.

**The Chairman** thanked Germany, and invited Singapore to speak about the techniques it uses to fight both corruption and collusion in public procurement.

The delegate from **Singapore** stated that the three guiding principles for public procurement in that country are transparency, open and fair competition, and value for money. To achieve *transparency*, public procurement is conducted under a substantial framework of laws, regulations and guidelines; public officials are required to disclose conflicts of interests and frequently rotated; and members of the tender-evaluation and tender-approving committees are kept separate. To achieve *open and fair competition*, tendering is conducted through an e-procurement portal; open tendering is the default option; technical specifications cannot be used as barriers to entry; and SMEs are allowed to form consortiums in order to bid in higher value tenders. To achieve *value for money*, proposals are selected on the basis that they meet the requirements and offer the best value, meaning an optimal balance of cost and benefit; higher value projects are subject to more quantifiable evaluation to remove the element of subjective discretion; and negotiation is permitted only where there is limited competition, to obtain best value. In enforcing these principles, the risk of being caught and heavily penalised – by fines, imprisonment or civil proceedings – is a strong deterrent. In Singapore, two separate State agencies are responsible for fighting collusion and corruption, with close collaboration between the two. As regards the potential tension between the principles of competition and transparency, the use of internet-based procurement platforms maximises bidder participation, reduces costs and can put in place requirements that do not unreasonably limit competition, while easy availability of information assists policing of procurement.

**The Chairman** thanked Singapore, and invited the United States and Federal Trade Commissioner, William Kovacic, to speak about their country contribution and individual contribution, respectively.

The delegate from the **United States** noted that both collusion and corruption subvert the competitive procurement process, and they often occur in tandem. In the United State, a single agency – the Department of Justice – has jurisdiction over both types of offence. The critical issue, however, is efficient prosecution, which can also be achieved by two or more agencies with jurisdiction, provided they have in place mechanisms for co-operation. There is additional complementarity between collusion and corruption in the area of training of public procurement officials, so that effective training should cover the problem of bid rigging and should also make officials aware of the penalties for engaging in corruption.

**Commissioner William Kovacic** noted that his paper, written with Robert Anderson and Anna Müller, considers the tension between mechanisms to protect the integrity of the public procurement process and those to promote competition. The paper concludes that, with careful design, transparency measures can avoid anti-competitive consequences. For example, having a procedure whereby bids are opened publicly protects the integrity of the process, but also assists cartels to monitor cheating. An alternative approach might be to keep the bids secret, but have in place an auditing mechanism by which a trusted public official reviews the process for evidence of corruption. Another example is cases of subcontracting: public projects should be reviewed to ensure that losing bidders are not routinely granted subcontracts, which might provide evidence of prior collusion in the procurement process.

**The Chairman** thanked Commissioner Kovacic, and invited France to discuss strategies to curtail combined collusion and corruption in public procurement.

The delegate from **France** noted that, in spite of detailed regulations governing public procurement in France, collusion and corruption may still occur. The competition authority has responsibility solely for enforcing competition law. The Administrative and Criminal courts consider related practices, such as

collusion and corruption. Favouritism is the crime most frequently prosecuted in relation to public procurement. There are mechanisms for co-operation between the competition authority and the criminal process. Moreover, a study into prevention and detection of collusion and corruption is underway.

**The Chairman** thanked France, and asked for a further show of hands as to whether leniency programmes for individuals and firms that had participated in bribery or corruption existed in their jurisdiction -- nine positive responses were received. The discussion then moved to the final topic of competition advocacy to promote objective and competitive public procurement. Many jurisdictions had experienced major anti-corruption and anti-collusion efforts in recent years; Croatia was invited to discuss its efforts in this regard.

The delegate from **Croatia** outlined the legal provisions governing public procurement. Specific procurement legislation regulates the entire process of competition in public procurement, with the Croatian competition authority as the implementing authority for these rules. Other State agencies, including the police force, the State attorney's office and the courts, are also involved. Recently, an anti-corruption programme for State-owned enterprises for the period 2010-12 was launched. It has three objectives: (i) improving integrity, responsibility and transparency; (ii) creating the conditions necessary for prevention of corruption at all levels; and (iii) affirmation of a zero tolerance approach to corruption. The Croatian competition authority engages in advocacy work in order to assist procurement officials and other State agencies with this process. For example, the competition authority provides advice to procurement officials on procurement design in order to prevent bid rigging from occurring. A series of seminars and an information brochure are also planned.

**The Chairman** thanked Croatia, and invited BIAC to discuss internal controls, which are put in place at the corporate level, to prevent collusion and corruption in procurement.

The delegate from **BIAC** noted the lack of empirical evidence available regarding the proportion of collusion/corruption occurring that is authorised by senior management versus the proportion that is unauthorised. However, companies are increasingly aware that corruption harms businesses. Many firms are putting in place multidisciplinary compliance programmes to prevent collusion and corruption in addition to other illegal business practices, for example in the environmental field. While one of the underlying assumptions of such programmes is that some illegal conduct is attributable to lower management, a compliance programme has three objectives: (i) it provides an affirmation of the company's values and requires senior management to take steps to protect these; (ii) it ensures that personnel are fully aware of the relevant rules; and (iii) it puts in place mechanisms to detect and stop illegal behaviour. Nevertheless, decentralisation in larger companies, plus the growth of performance-based compensation, means that collusion and corruption can occur at lower levels, and it is the responsibility of senior management to prevent this from happening. BIAC took the view that genuine compliance programmes should be taken into account by competition authorities when assessing alleged breaches of the competition and anti-corruption laws by firms.

**The Chairman** thanked BIAC, and issued a reminder to delegates that proactive competition advocacy is of paramount importance in defending the rules against collusion and corruption. He thanked all the delegations that had responded to questions, and asked the guest speakers if they would like to add anything in light of the discussion.

**Dr. Pasaribu** noted the repeated references in the discussions to the correlation between collusion and corruption in public procurement, and the need for a co-ordinated response among the various agencies with jurisdiction over these problems. In the Indonesian context, the competition authority has engaged in co-ordination efforts with the corruption eradication commission, the State audit agency, and now with the

police and attorney general. Co-operation with other agencies is a key aspect of prevention programmes for any competition authority.

**Dr. Abouddrar** stated that prevention of corruption and collusion begins before public projects are conceived. So, for example, in Morocco, public purchasers are required to publish their purchasing programmes in advance, to allow suppliers to prepare to participate. In the post-award stage, Morocco conducts *ex post* audits and reports on implementation, which can identify collusion or corruption. The two key points are: (i) getting business on board, as it is generally disappointed bidders that have the opportunity to reveal corruption or collusion in the process; and (ii) training of public procurement officials to detect risks. The “red flags of collusion”, presented at the break out session that morning, was an example of a simple but effective tool.

**Professor Lewis** emphasised the importance of advocacy when tackling collusion and corruption in public procurement, in particular by informing civil society of the costs of corruption. When a competition authority takes on corruption, it usually takes on powerful interests in society, and so it needs to have the public on its side, in order to ensure that it is not overwhelmed by these strong opposing interests.

**The Chairman** thanked the speakers for their remarks, and stated that there was sufficient time remaining for two questions or comments from the floor.

The delegate from **Chile** provided an update on Chile’s contribution with regard to CIBDs. In particular, CIBDs were used in two procurements by the privately-managed pension funds regulator. In one of these tenders, the certification requirement had led several bidders to disclose certain prior communications. Moreover, the result of that tender was a reduction of 24% in management fees compared with the average fees paid. This provides an example of how intelligent tender design and use of CIBDs can lead to a more competitive outcome.

The delegate from **Brazil** noted that CIBDs are now obligatory in public procurements in that country, which the competition authority, the SDE, hopes will greatly increase the deterrence of bid rigging.

**The Chairman** thanked the delegates for their comments, and thanked all those who had participated in the discussion, including the guest speakers and the Secretariat. He invited Professor Frédéric Jenny to take the floor, in order to sum up the afternoon’s discussion.

**Professor Frédéric Jenny** began by praising the discussion as rich and highly interesting. He noted the importance of the topic, in view of the importance of public procurement as an economic activity and the magnitude of harm that can be caused to the process by collusion and corruption.

The discussion had begun by considering collusion and corruption as discrete phenomena. As regards corruption, it may occur because a weak system of law permits deviant behaviour by officials, or where cultural or social values lead to co-operation between citizens that feed the process of corruption, as for example in Papua New Guinea. Another factor is that the buyer is not the payer in public procurement transactions. As regards collusion, it is facilitated by a variety of factors, including bad procurement procedures, lack of training of procurement officials, excess complexity, and occasionally, too much transparency.

The link between collusion and corruption has at least two different sources. The first is the necessity of compensating losing firms, in order to avoid corruption being discovered. The second is the need to make corruption less visible, in order to create an appearance of competition even though the result has been pre-determined. These links, in particular the second one, make it desirable to have a co-ordinated response to the individual problems of collusion and corruption.

Although collusion and corruption may be more concentrated in some sectors, for example construction and health care, it appears to occur in almost every industry. Forms of collusion and corruption can be quite sophisticated – for example, the Polish case of bidders purposely getting disqualified for failure to comply with tendering requirements, in order to support a more expensive bid.

The discussion considered solutions to address collusion and corruption as separate phenomena, and joint solutions to protect public procurement from both offences. Mechanisms for fighting corruption include *ex post* audits, capacity building, building a culture of compliance, bringing high profile cases to generate public support for enforcement efforts, and limiting the discretion of public officials via transparency requirements. Mechanisms for fighting bid rigging include using enforcement as an important deterrence strategy, opening markets to international competition, collusion-proofed auction design, improving public procurement rules, reducing transaction costs, and dialogue with and training of procurement officials. Transparency is a more complex issue. While it is important in the fight against corruption, it can aid collusion between bidders and make the procurement process excessively predictable.

Close co-operation between agencies is an important means by which to reduce incidents of collusion and corruption in public procurement. This has two aspects: co-operation between competition authorities and public procurement agencies, and co-operation between competition authorities and anti-corruption agencies. In many countries, there are already links between these various bodies. While there is perhaps scope for additional work on this matter – for example, in terms of the scope of the memoranda of understandings between these agencies – this at least appears to be a fruitful way of moving forward. Moreover, advocacy in one area, collusion or corruption, can have spill-over effects in the other. In terms of structural issues, there is a need to avoid the negative side effects of transparency, although even on this point the interests of competition agencies and anti-corruption agencies can converge, for example with regard to subcontracting.

Professor Jenny drew his remarks to a close by noting that although considerable progress had been made, the topic had scope for further discussion, because of the range of good and bad experiences among countries. In particular, examination might be given to the contents of public procurement regulations and the extent to which these were compatible with competition policy. Finally, he again thanked everyone for their participation in the roundtable.

## COMPTE RENDU DE LA DISCUSSION

*par le secrétariat*

**Le président (Khalid Mirza)** ouvre les débats, prenant note du consensus général sur le fait que la passation des marchés publics constitue un segment important de l'activité économique, dont l'objectif principal est d'assurer une utilisation rationnelle des deniers publics. De plus, le préjudice effectivement causé par la collusion et la corruption dans ce domaine va au-delà de son poids économique ; en effet : i) les biens et services en jeu concernent généralement une large fraction de la population ; ii) les marchés publics portent souvent sur des infrastructures physiques ou sur la santé publique, qui soutiennent d'autres formes d'activité économique ; iii) ce problème a une incidence sur la compétitivité internationale ; iv) il peut nuire au climat d'investissement ; v) les distorsions dans l'attribution des marchés publics produisent généralement leurs effets les plus néfastes sur les couches les plus défavorisées de la population, qui font le plus appel aux services et infrastructures publics ; et vi) comme les marchés publics portent souvent sur des « biens publics », on ne peut pas compter sur les mécanismes de marché à l'œuvre dans le secteur privé pour remédier aux défaillances de l'État.

Le président annonce que la table ronde va consister en une succession de présentations d'experts, entrecoupée des questions qui seront posées aux différentes délégations. Il présente les quatre intervenants : Mme Sue Arrowsmith, de l'Université de Nottingham, Royaume-Uni ; M. Benny Pasaribu, membre et ancien président de la Commission de la concurrence de l'Indonésie (KPPU) ; M. Abdesselam Abouddrar, président de l'Instance centrale de prévention de la corruption du Maroc ; et M. David Lewis, du Gordon Institute of Business Science, Afrique du Sud, et ancien président du tribunal de la concurrence de ce pays. Après avoir remercié les délégués de leurs contributions, le président cite les cinq thèmes qui vont être abordés : i) l'importance et les buts de la passation des marchés publics ; ii) le problème de la collusion ; iii) le problème de la corruption ; iv) la lutte contre la collusion et la corruption dans la passation des marchés publics ; et v) la promotion de la concurrence comme moyen d'assurer l'intégrité et la compétitivité dans la passation des marchés publics. Sur le premier thème – l'importance et les buts de la passation des marchés publics –, le président invite Mme Sue Arrowsmith à présenter son exposé.

**Mme Sue Arrowsmith** commence par signaler qu'elle aborde cette question du point de vue de la réglementation régissant la passation des marchés publics. La transparence est souvent présentée comme l'outil par excellence de prévention de la corruption dans les marchés publics – plus le processus d'attribution des marchés est transparent, mieux c'est. Mme Arrowsmith est toutefois d'avis que la transparence ne présente pas toujours un intérêt incontestable dans ce contexte. Il serait utile de mener de plus amples recherches sur le rôle de la transparence dans la lutte contre la corruption et sur les aspects de la transparence qui sont utiles pour la réglementation des marchés publics.

Mme Arrowsmith pose la question : qu'est-ce que la transparence ? Elle en indique les quatre dimensions : la transparence permet de faire connaître l'existence des marchés à pourvoir, de rendre publiques les règles de chaque procédure, de limiter le pouvoir discrétionnaire des agents publics, et enfin de vérifier que les règles sont respectées. La troisième dimension – limiter le pouvoir discrétionnaire des responsables de la passation des marchés – est souvent considérée comme l'aspect fondamental de la transparence. La raison principale en est l'impératif anticorruption : il faut restreindre la liberté de décision de sorte qu'il n'y ait tout simplement pas de place pour la corruption, le favoritisme, etc.

Au lieu de se pencher sur les avantages bien connus de la transparence, Mme Arrowsmith s'est concentrée sur les limites de celle-ci, en particulier sur sa troisième dimension. En pratique, il est presque impossible d'éliminer toute marge d'appréciation de la procédure de passation de marché et, quoi qu'il en soit, les tentatives dans ce sens donnent généralement naissance à un processus mécanique et inefficace. De plus, la corruption peut entacher aussi la phase post-attribution, si le soumissionnaire favori sait qu'il peut remporter le marché, en toute équité grâce à des règles très transparentes, et ensuite bénéficier d'un contrôle laxiste du respect des règles ou de révisions contractuelles favorables.

La transparence a un certain coût. Premièrement, du fait qu'elles éliminent de la procédure toute marge d'appréciation subjective, les règles de passation des marchés peuvent empêcher les responsables d'obtenir le meilleur rapport qualité-prix, ce qui est un résultat inefficace. Deuxièmement, la transparence peut faciliter la collusion entre les soumissionnaires. Troisièmement, le coût du processus lui-même n'est pas négligeable, ce qui dissuade certaines entreprises de qualité de participer aux appels d'offres publics. À ce propos, Mme Arrowsmith évoque les conclusions de certains travaux qui indiquent que la majeure partie du gaspillage constaté dans la passation des marchés publics est due non pas à la corruption et aux abus, mais tout simplement à l'inefficacité des procédures : il ne faut donc pas exagérer les vertus de la transparence dans ce contexte.

Mme Arrowsmith estime, en conclusion, qu'il serait nécessaire de mener des recherches plus empiriques, fondées sur des méthodes quantitatives et portant sur les coûts et les avantages de types spécifiques de règles de transparence et sur les limites appropriées. De telles recherches devraient s'accompagner de travaux portant non pas sur la transparence en général, mais sur d'autres aspects de l'action des pouvoirs publics, tels que le développement des capacités, l'acquisition de qualifications ou les problèmes d'éthique.

**Le président** remercie Mme Arrowsmith de sa présentation. Il mentionne la contribution de l'Albanie, qui cite des données empiriques faisant état d'un surcoût de l'ordre de 5 à 10 % pour les marchés publics passés en présence d'un petit nombre de soumissionnaires, et celle du Mexique, qui atteste de prix inférieurs de 20 à 50 % lorsque les appels d'offres attirent un plus grand nombre de soumissionnaires. D'après la contribution de la Slovaquie, la présence de corruption ou de collusion en amont peut constituer un obstacle à l'entrée de nouvelles entreprises sur les marchés publics, tandis que la contribution de CUTS semble indiquer que les comportements illicites réduisent les incitations à investir et innover. Le président aborde ensuite le deuxième thème – la corruption dans la passation des marchés publics – et invite M. Abouddrar à présenter son exposé.

**M. Abdesselam Abouddrar** souligne tout d'abord l'importance de la passation des marchés publics. Étant donné l'ampleur des sommes en jeu, la diversité des parties prenantes, ainsi que la multiplicité et la complexité des règles, la passation des marchés publics est fortement exposée aux risques de collusion et de corruption. Celles-ci peuvent prendre différentes formes : corruption directe ; insuffisance de l'accès public aux informations facilitant la différenciation entre les soumissionnaires ; non-respect des obligations de divulgation d'informations ; biais dans l'adjudication ; ou encore corruption post-attribution.

Le risque de corruption existe à tous les stades du processus de passation des marchés publics. Au stade de la détermination du besoin public, cette définition peut être biaisée ou erronée – c'est la notion de « cathédrales dans le désert ». L'étape suivante consiste à rédiger le cahier des charges de l'appel d'offres, dont la formulation peut favoriser certains fournisseurs. L'étape la plus vulnérable est celle de l'appel d'offres lui-même, qui est mené selon des règles détaillées. La corruption peut aussi se produire dans la phase postérieure à l'attribution ou à la livraison, par exemple lorsque le soumissionnaire est autorisé à modifier des conditions contractuelles ou se voit accorder un prix plus élevé que prévu.

Au Maroc, la corruption est généralement vue sous l'angle du pourcentage de dépenses publiques qui est détourné à cause de la corruption. Mais M. Aboudrar affirme que là n'est pas son principal motif de préoccupation. Il se concentre surtout, en premier lieu, sur l'énorme gaspillage qui résulte de la corruption, notamment du fait des projets qui sont entrepris uniquement sous l'effet de la corruption. Deuxièmement, la corruption se traduit par une mauvaise affectation de ressources publiques dont le montant n'est pas infini. Troisièmement, la corruption peut dissuader les investisseurs et nuire au développement économique d'un pays.

Le Maroc a mené de nombreuses réformes pour lutter contre la corruption dans la passation des marchés publics. Ces réformes ont porté sur la simplification et la clarification des procédures ; le renforcement de la concurrence ; l'égalité de traitement des soumissionnaires ; l'accroissement de la transparence et de l'éthique dans la sphère publique ; la modernisation du service public ; l'amélioration de la protection des autres soumissionnaires ; et l'instauration de mécanismes de recours pour la révision des attributions de marchés. La promotion de la transparence dans les marchés publics est importante, en particulier parce que l'État, en tant qu'acheteur, dispose d'une puissance disproportionnée.

Une multitude de parties prenantes, publiques et privées, participent la passation d'un marché public : les entreprises soumissionnaires, l'entité adjudicatrice et, au Maroc désormais, divers organes étatiques de contrôle, dont l'instance anti-corruption et l'autorité de la concurrence. Cette multiplicité des acteurs peut susciter des problèmes de coordination et d'efficacité. Le Maroc a signé plusieurs traités de libre-échange, aux termes desquels il s'engage à améliorer la qualité de la passation des marchés publics. La formation des agents chargés de ces procédures et le développement des capacités sont d'autres moyens de lutter contre la corruption dans la passation des marchés publics.

**Le président** remercie M. Aboudrar de sa présentation. Il prend note du fait que le problème de la corruption dans la passation des marchés publics revêt deux aspects : le coût de la corruption, et les facteurs qui facilitent la corruption. Les contributions des pays mettent en évidence toute une série de coûts, allant du gaspillage des ressources publiques à la perte de pouvoir d'achat, en passant par une moindre capacité des gouvernements à atteindre les buts qu'ils se sont fixés et la méfiance du public à l'égard des pouvoirs publics. Si la plupart des contributions se penchent sur la corruption dans l'attribution des marchés publics, celles de la Croatie et du Gabon soulèvent aussi la question de la corruption dans les phases suivant l'attribution. Le président invite le Gabon à s'exprimer sur le sujet.

Le délégué du **Gabon** fait remarquer que tout marché d'un montant égal ou supérieur à 45 000 EUR doit faire l'objet d'un appel d'offres, qui est attribué au moins disant. Cependant, il existe toujours des moyens de fausser la concurrence par la collusion ou la corruption. Les autorités assurent donc un suivi *ex post* pour vérifier que les fonds n'ont pas été déboursés de façon frauduleuse. D'autres techniques consistent à poursuivre en justice les agents responsables de la passation des marchés qui sont impliqués dans des affaires de corruption ; à instaurer une culture de la concurrence dans les entreprises, notamment en la reliant à la notion de compétitivité ; et à pratiquer la transparence dans la gestion des affaires publiques.

**Le président** remercie le Gabon de sa contribution et invite la Norvège à prendre la parole au sujet du degré de corruption perçu par le public, suite à un renforcement de la répression de la corruption.

Le délégué de la **Norvège** explique que plusieurs affaires de corruption retentissantes ont touché le secteur public ces dernières années. Mais la répression accrue a paradoxalement donné au public l'impression que la corruption était un phénomène nouveau et grandissant dans la société, une préoccupation qui a ouvert la voie à un renforcement de la législation anti-corruption. Par exemple, la ville d'Oslo s'est récemment vu imposer une amende de 6,5 millions EUR pour n'avoir pas respecté les règles existantes en matière de marchés publics.

**Le président** remercie la Norvège de sa contribution et se tourne vers le second aspect de la corruption, à savoir les facteurs qui facilitent la corruption. La contribution de la Lettonie cite l'existence de relations de longue date entre les entreprises et des agents de la fonction publique. Celle du Pakistan mentionne l'insuffisance de la rémunération des fonctionnaires et la faiblesse des institutions politiques. Celle du Brésil évoque de fréquentes interactions entre soumissionnaires. Celle de la Roumanie fait état d'une étude qui décrit les raisons à l'origine de la corruption, et le président invite ce pays à commenter davantage les conclusions de cette étude.

Le délégué de la **Roumanie** explique que l'étude, qui est fondée sur une enquête auprès des agents de l'administration locale, révèle une série de raisons diverses à l'origine de la corruption dans ce pays : l'incohérence des réformes ; le manque de suivi dans le processus de privatisation et sa mauvaise gestion ; l'absence de culture de l'économie de marché et la réticence de l'administration face au changement ; le bas niveau des traitements des fonctionnaires ; le manque de discipline financière dans le secteur public ; et les fluctuations des effectifs de la fonction publique. L'enquête a également mis en évidence plusieurs moyens de réduire la corruption dans la passation des marchés publics : intensifier le processus de réforme, notamment dans la fonction publique ; renforcer l'autonomie des collectivités locales et leurs capacités de gestion financière ; et améliorer la formulation des politiques publiques. Ce sont d'ailleurs là les conditions que la Roumanie a dû remplir pour adhérer à l'Union européenne. Le délégué conclut en affirmant que la corruption a des effets profondément négatifs dans tous les pays qui tentent de mettre en place une économie de marché ; c'est la raison pour laquelle plusieurs organismes publics spécifiquement chargés de lutter contre la corruption ont été créés en Roumanie depuis 2002.

**Le président** remercie la Roumanie de sa contribution. La Papouasie – Nouvelle-Guinée montre dans sa contribution comment le problème de la corruption peut tirer ses origines de certaines traditions sociales. Le président demande à la Papouasie – Nouvelle-Guinée de développer ses commentaires.

Le délégué de la **Papouasie – Nouvelle-Guinée** explique qu'il existe dans ce pays une tradition d'assistance sociale qui oblige les individus à soutenir les membres de leur famille élargie, le *wantok*, dans toute la mesure du possible. Lorsque cette tradition, venue des villages, a commencé à s'appliquer dans le contexte du système économique moderne, elle a engendré des pratiques corrompues. Par exemple, un marché public peut être attribué à un *wantok* en raison des besoins de celle-ci plutôt que selon les mérites de son offre. De plus, l'existence préalable de cette tradition a rendu la population plus tolérante à l'égard de la corruption. Cependant, le népotisme touchant aussi les pays développés, le délégué estime qu'il faut peut-être considérer le système du *wantok* comme la simple manifestation locale d'un problème global.

**Le président** remercie la Papouasie – Nouvelle-Guinée de sa contribution et constate que la contribution du Pérou mentionne elle aussi des conditions historiques et culturelles qui favorisent la corruption. Abordant la question des sanctions, le président note que les amendes pécuniaires et les peines de prison figurent parmi les sanctions possibles dans de nombreux pays, mais non dans tous. De manière générale, les autorités de la concurrence n'ont pas compétence pour juger les affaires relevant purement de la corruption, mais il existe un certain degré de coopération et de coordination entre les organismes chargés de la lutte contre la collusion et la corruption dans la passation des marchés publics. L'Indonésie, le Gabon, l'Inde, la Pologne et la Tunisie sont des pays qui ont créé un organisme public indépendant doté d'un tel mandat. Les contributions de l'Australie, de la France, de l'Afrique du Sud, des États-Unis et du Japon offrent des exemples d'affaires portées devant les autorités de la concurrence et incluant des aspects de collusion et de corruption. En Israël, l'autorité de la concurrence peut occasionnellement statuer sur les aspects de corruption d'une affaire s'il y a eu également violation du droit de la concurrence. Le président présente ensuite le troisième thème du débat – la collusion dans la passation des marchés publics – et invite M. Pasaribu à s'exprimer sur le sujet.

**M. Benny Pasaribu** commence par évoquer la forte croissance économique que connaît l'Indonésie depuis les années 70. Les réformes ont débuté dans le pays en 1998, donnant lieu à toutes sortes de nouvelles lois interdisant les comportements anti-concurrentiels et corrompus, ainsi qu'à la création d'instances d'application de ces lois. La compétitivité internationale et intérieure commence elle aussi à prendre plus d'importance. Diverses études laissent toutefois penser que l'Indonésie demeure un havre de corruption.

M. Pasaribu évoque le cercle vicieux dans lequel la collusion conduit à réaliser des bénéfices supranormaux, que l'on peut utiliser pour financer la corruption, laquelle renforce à son tour le *statu quo* que constitue le manque de concurrence. En particulier, dans les administrations très corrompues, on constate souvent la présence de relations étroites entre les fonctionnaires et les hommes d'affaires. M. Pasaribu cite des données concernant le degré relatif de corruption et de compétitivité de l'Indonésie par rapport à Singapour, son voisin moins corrompu et plus compétitif, classement qui démontre la corrélation existant entre la corruption et le manque de compétitivité.

M. Pasaribu parle ensuite de sa propre expérience auprès de l'autorité indonésienne de la concurrence, la KPPU. La grande majorité des plaintes reçues par cette commission concerne des cas de soumissions concertées, qui constituent une part disproportionnée des affaires. Les problèmes rencontrés dans la passation des marchés publics peuvent porter sur une entente entre soumissionnaires (relation horizontale) ou entre soumissionnaires et fonctionnaires (relation verticale). Si la KPPU s'efforce principalement de faire respecter les règles anti-collusion, ses campagnes de sensibilisation visent à la fois les pratiques corrompues et anticoncurrentielles. En Indonésie, il existe aussi un organe de contrôle de la passation des marchés publics, avec lequel la KPPU prévoit de signer un protocole d'accord, et une commission d'éradication de la corruption (KPK), avec laquelle elle a déjà signé un tel protocole. En outre, le Parlement examine actuellement un projet de loi sur la réglementation de la passation des marchés publics.

M. Pasaribu évoque la coopération entre la KPPU et la KPK : la KPK ayant compétence pour enquêter sur les infractions en matière de corruption, la KPPU lui transmet toute preuve de corruption dans des dossiers de marchés publics. Dans un certain nombre d'affaires de grande ampleur, portant sur des achats de navires pétroliers, d'électricité, de matériel de premier secours et d'encre, des preuves de corruption ont ainsi été communiquées à la KPK. M. Pasaribu signale qu'un autre protocole d'accord, entre la KPPU et les services de police et du Procureur général, est en attente de signature et va se traduire par une nouvelle division des responsabilités entre ces instances.

**Le président** remercie M. Pasaribu. Il prend note du fait que les facteurs qui facilitent la collusion en général s'appliquent aussi au contexte des marchés publics, en particulier les effets néfastes d'un nombre restreint de soumissionnaires. Parmi ces facteurs, la contribution du Mexique cite l'exclusion des fournisseurs étrangers et la pratique de l'ouverture des offres en public. L'Irlande mentionne l'absence d'actualisation des listes d'admissibilité des offres, ce qui restreint la participation aux entreprises ayant déjà soumissionné lors de précédentes procédures de passation de marchés. L'Albanie et la Tunisie citent les critères excessifs imposés dans les cahiers des charges, qui limitent le nombre de soumissionnaires. La Colombie désigne parmi ces facteurs le non-respect du droit de la concurrence, censé protéger les nouveaux entrants contre les attaques économiques menées par les entreprises en place. Le Chili constate que la façon dont la procédure de passation des marchés est organisée peut conduire à une prévisibilité excessive et dresser des obstacles à l'entrée. Au Canada, il est possible que les associations professionnelles soient utilisées pour organiser la collusion. En El Salvador, où la politique de la concurrence est récente, les fonctionnaires chargés de la passation des marchés manquent de connaissances sur les soumissions concertées. Le président invite El Salvador à faire des commentaires sur la question de l'éducation et de la formation.

Le délégué d'**El Salvador** décrit diverses activités de promotion de la concurrence que mène l'instance chargée de la concurrence dans ce pays : production d'une brochure d'information sur les offres concertées, accompagnée d'une série de présentations à l'intention des fonctionnaires ; et mise en place d'une meilleure communication entre les services chargés de la passation des marchés et les autres organes de l'État. Les campagnes de sensibilisation sont soutenues par une meilleure mise en œuvre de la loi : en 2009, par exemple, cette instance a infligé des amendes à quatre agents de voyage pour entente dans le cadre d'un appel d'offres public.

**Le président** remercie El Salvador et invite la Corée du Sud à prendre la parole au sujet des soumissions concertées dans les projets de travaux publics clés en mains.

Le délégué de la **Corée du Sud** indique que les soumissions concertées sont peut-être particulièrement fréquentes dans les appels d'offres publics portant sur des projets dans lesquels l'adjudicataire est chargé à la fois des études de conception et des travaux de construction, et ce pour plusieurs raisons : ces projets font appel à des technologies avancées, ce qui restreint le nombre d'entreprises qui peuvent soumissionner ; ces projets sont souvent de grande envergure, de sorte que seules les grandes entreprises se portent candidates ; et les entreprises de bâtiment et travaux publics (BTP) en Corée sont étroitement liées entre elles, ce qui facilite la collusion.

**Le président** remercie la Corée du Sud et invite la Lettonie à faire des commentaires sur la transparence et la collusion, ainsi que sur la pratique consistant à subdiviser les marchés pour échapper aux règles imposant des seuils.

Le délégué de la **Lettonie** indique que, par le passé, de nombreux cas de soumissions concertées ont été mis au jour parce qu'on a découvert des erreurs identiques dans les dossiers d'offres soumis sur papier par différentes entreprises. L'instauration de procédures électroniques de passation des marchés, quoique souhaitable pour des raisons de transparence et de coût, réduit les possibilités de mettre en évidence de telles preuves de collusion. Par ailleurs, la législation lettone prévoit que la procédure de passation de marché applicable dépend du montant du marché. En subdivisant artificiellement les marchés, les fonctionnaires responsables peuvent contourner les règles plus contraignantes qui s'appliquent aux marchés plus gros. Il est donc souhaitable qu'une instance de surveillance puisse sanctionner les fonctionnaires qui subdivisent ainsi les marchés.

**Le président** remercie la Lettonie et donne la parole à CUTS au sujet des effets néfastes des systèmes de préférences dans la passation des marchés publics.

Le délégué de **CUTS** explique que les systèmes de préférences limitent le nombre de soumissionnaires qui peuvent effectivement répondre à un appel d'offres public, ce qui restreint la concurrence et ses bienfaits. De plus, la collusion est plus facile à entretenir avec un nombre plus faible de soumissionnaires. En Inde, les règles régissant les marchés publics sont extrêmement hétérogènes, et leur harmonisation pourrait améliorer le processus de passation des marchés.

**Le président** remercie CUTS et invite la Pologne à formuler des commentaires sur la suppression des offres.

Le délégué de la **Pologne** indique que l'annulation d'offres peut être le signe d'une collusion dans le cadre d'un appel d'offres : certaines offres, ne répondant pas à toutes les conditions imposées, se voient écartées, de sorte que le marché est attribué au soumissionnaire ayant présenté l'offre la plus onéreuse. À l'heure actuelle, la Pologne ne demande pas aux soumissionnaires de certifier que leur offre a été établie en toute indépendance. L'accent est plutôt mis sur la corruption : les responsables de l'attribution d'un

marché, au sein de l'entité adjudicatrice, doivent fournir une attestation écrite d'impartialité. La mise en place d'un système d'attestation d'absence de collusion est toutefois à l'étude.

**Le président** remercie la Pologne, et note que les contributions laissent penser que le problème des soumissions concertées se concentre généralement sur quelques secteurs, tels que le BTP et la santé. Il invite le Royaume-Uni à commenter une série récente d'affaires de collusion dans le secteur du BTP.

Le délégué du **Royaume-Uni** explique que, si des enquêtes ont mis en évidence des cas d'offres de couverture dans tout le secteur du BTP, seule une fraction de ces cas ont fait l'objet de poursuites, pour des raisons pragmatiques tenant à l'efficacité de l'emploi des ressources publiques. L'objectif était d'adresser un signal clair à ce secteur, réaffirmant le caractère illégal de cette pratique. L'organe chargé de la concurrence a porté en justice les affaires dans lesquelles les preuves de collusion étaient les plus nettes et où il y avait eu collusion répétée. La sélection comportait des entreprises grandes et petites, pour illustrer la nature endémique de cette pratique. Le délégué mentionne le projet actuel du Bureau de la concurrence, intitulé *Drivers of compliance* (« Les moteurs de la conformité »), et deux conclusions intéressantes. Premièrement, le respect des règles de la concurrence est désormais considéré par les entreprises comme un aspect standard de l'éthique des affaires. Deuxièmement, si certaines entreprises peuvent considérer les amendes comme un simple coût opérationnel, elles sont peut-être plus sérieusement dissuadées par les effets, nuisibles pour leur réputation, d'une condamnation dans une affaire de concurrence, entraînant éventuellement des conséquences pénales et une interdiction d'exercice.

**Le président** remercie le Royaume-Uni et invite la Turquie à parler de ses affaires de boycott dans le secteur de la santé, et de leurs effets sur le bien-être du consommateur.

Le délégué de la **Turquie** décrit deux cas dans lesquels le boycott d'un appel d'offres public a constitué une violation du droit de la concurrence. En réponse à une décision gouvernementale de procéder aux achats dans le secteur de la santé par voie d'appel d'offres en vue d'abaisser les coûts, les fournisseurs se sont entendus pour refuser collectivement de répondre à l'appel d'offres. Les soumissions concertées relevant en Turquie de la justice pénale, l'affaire a été instruite conjointement par l'autorité de la concurrence et le procureur général, qui a des pouvoirs d'investigation plus étendus. L'enquête a révélé que les fournisseurs ne se souciaient nullement des besoins médicaux urgents des patients. Les entreprises impliquées se sont vu infliger une amende pour leur participation à ce boycott. Cette affaire illustre comment la collusion peut prendre d'autres formes que les soumissions concertées ou le partage des marchés.

**Le président** remercie la Turquie et invite le Mexique à décrire le travail qu'effectue l'autorité de la concurrence dans ce pays pour améliorer les procédures de passation des marchés publics.

Le délégué du **Mexique** estime que les soumissions concertées dans le cadre des marchés publics sont généralement imputables à un cadre juridique mal conçu, qui pose trois problèmes principaux : i) la restriction de la participation aux appels d'offres aux seuls fournisseurs nationaux ; ii) la répartition des marchés attribués entre plusieurs fournisseurs ; iii) la fragmentation des adjudications, qui se déroulent plusieurs fois par an à différents niveaux territoriaux. Dans le secteur des produits pharmaceutiques au Mexique, l'autorité de la concurrence a, en collaboration avec l'organisme public responsable, révisé le cadre de la passation des marchés en vue de remédier à ces trois problèmes. Bien que les laboratoires pharmaceutiques et certains niveaux d'administration aient opposé une certaine résistance, les améliorations apportées se sont traduites par une réduction sensible du coût des marchés.

**Le président** remercie le Mexique et demande au Japon de commenter une étude de 2003 qui a précipité la participation de la Commission de la concurrence à la réforme de la passation des marchés.

Le délégué du **Japon** résume les trois recommandations principales issues de l'étude : i) élargir le périmètre d'application de l'appel général à la concurrence ; ii) encourager le recours à des méthodes détaillées d'évaluation des offres ; iii) veiller à la cohérence entre la compétitivité et d'autres objectifs du gouvernement, tels que le développement de l'économie locale ou de la participation des PME. Il donne six exemples de réformes adoptées depuis la publication du rapport sur cette étude : i) les domaines soumis à une obligation d'appel général à la concurrence ont été élargis ; ii) de nombreux organismes acheteurs ont adopté des méthodes détaillées d'évaluation des offres ; iii) le recours à la passation électronique des marchés a été élargi ; iv) la divulgation de l'information a été renforcée, ce qui permet de s'assurer que les marchés ne sont pas attribués arbitrairement ; v) les sanctions pour entente ont été alourdies ; et vi) les organismes acheteurs s'efforcent de trouver un équilibre entre développement de l'économie locale et concurrence loyale.

**Le président** remercie le Japon et demande à la Tunisie d'expliquer les raisons qui ont motivé le changement récent de la législation tunisienne.

Le délégué de la **Tunisie** fait remarquer que les révisions apportées aux lois anti-corruption il y a une dizaine d'années ont fortement réduit la prévalence de la corruption dans les marchés publics en Tunisie. Les soumissions concertées demeurent toutefois un problème fréquent, dans des secteurs tels que la restauration dans les écoles, les prisons et les hôpitaux. L'autorité de la concurrence a été alertée de ce problème par le fait qu'un seul fournisseur pouvait obtenir plus de 90 % d'un marché donné. Un autre problème est que des candidats soumettent des offres qui se traduisent par des salaires inférieurs au minimum légal, ce qui indique qu'ils emploient du personnel au noir ou alors qu'ils appliquent des prix abusivement bas. Ce sont les raisons pour lesquelles la législation relative aux marchés publics a été révisée en 2008 en vue de renforcer les dispositions de lutte contre les soumissions concertées.

**Le président** remercie la Tunisie et note que certains pays, dont le Brésil et le Canada, ont recours, pour lutter contre la collusion, aux attestations d'absence de collusion. Le président demande alors aux délégués de répondre, par un vote à main levée, à la question de savoir si, dans leur pays, les entreprises qui ont été sanctionnées pour entente se voient ensuite interdire l'accès aux appels d'offres pendant un certain temps : sept réponses positives sont enregistrées. La table ronde aborde ensuite le quatrième thème – la lutte contre la collusion et la corruption –, et le président invite M. Lewis à présenter son exposé.

**M. David Lewis** indique que le trucage des offres dans la passation des marchés publics constitue certainement l'infraction la plus répandue au droit de la concurrence. Si l'entente sur les offres et la corruption peuvent exister l'une sans l'autre, ou si l'une peut même pervertir l'autre, force est de constater que, de manière générale, elles se produisent de façon concomitante. Ainsi, un cartel d'entente peut avoir besoin d'une assistance du côté de l'acheteur pour surveiller le trucage et éviter d'être découvert ; à l'inverse, la coopération entre soumissionnaires peut être nécessaire pour dissuader un candidat éliminé d'exposer au grand jour les preuves de corruption dans l'attribution d'un marché. Par conséquent, si la relation entre collusion et corruption n'est pas nécessairement présente, elle est néanmoins fréquente.

M. Lewis explicite les raisons pour lesquelles la collusion et la corruption dans la passation des marchés publics sont considérées comme particulièrement problématiques : i) la société subit une "double peine" en termes de criminalité lorsque ces infractions se produisent ensemble ; ii) le citoyen est lui aussi doublement pénalisé, comme consommateur et comme contribuable ; iii) du fait de leur ampleur, les marchés publics sont souvent lucratifs, propices à la collusion et à la corruption, et de plus difficiles à surveiller ; iv) dans ce contexte, la collusion et la corruption constituent une offensive directe contre la bonne gouvernance et la responsabilité des pouvoirs publics à l'égard des citoyens ; et v) les couches défavorisées de la société en souffrent de façon disproportionnée, sous l'effet d'une diminution de la gamme et de la qualité des services publics et des infrastructures proposés. Étant donné que, dans la passation des marchés publics, la puissance d'achat est concentrée entre les mains du secteur public,

l'éducation des agents responsables quant aux offres collusives et à la corruption a toutes chances d'être très rentable. Et elle est particulièrement importante, car en dépit des dangers que présente le trucage des offres, les marchés publics demeurent un instrument important de la politique industrielle des États.

M. Lewis examine les moyens de lutte contre les soumissions concertées et la corruption dans le cadre des appels d'offres. Les mécanismes de prévention de l'un de ces problèmes peuvent œuvrer à l'encontre des mécanismes de protection contre l'autre. Si la transparence, par exemple, est considérée comme le mécanisme le plus efficace pour prévenir la corruption, elle peut cependant favoriser la collusion. La passation de marchés à l'aide de petits appels d'offres réguliers a tendance à faciliter la collusion, tandis que les grands appels d'offres généraux peuvent favoriser la corruption. Dans le même temps, cependant, les informations recueillies par les organismes anti-corruption peuvent être utiles aux instances de lutte contre la collusion et vice-versa.

Au vu des travaux publiés sur le sujet, les quatre méthodes les plus couramment proposées pour prévenir à la fois la corruption et la collusion dans les appels d'offres sont i) des contacts étroits entre autorités de la concurrence et organismes anti-corruption ; ii) la formation des fonctionnaires responsables des marchés publics pour les aider à déceler la collusion et la corruption ; iii) la transparence, bien qu'il soit nécessaire de cerner plus précisément les types d'informations qui facilitent la collusion ; et iv) l'harmonisation des bases de données nationales en vue de préciser les indicateurs de la collusion et de la corruption.

**Le président** remercie M. Lewis et fait remarquer que, parmi les nombreuses contributions reçues, très peu signalent des cas où collusion et corruption sont présentes en même temps dans le contexte des marchés publics. Des exceptions notables sont la contribution de la France, que les délégations sont invitées à étudier, et celle de l'Inde, que la délégation indienne est invitée à commenter de façon plus détaillée.

Le délégué de l'**Inde** précise que, si le régime de la concurrence est un phénomène relativement nouveau dans son pays, des travaux sont actuellement menés pour élaborer des lignes directrices et d'autres outils visant à encadrer la passation des marchés publics. Lorsque l'autorité de la concurrence sera pleinement opérationnelle, elle pourra détecter et sanctionner davantage de cas de soumissions concertées. La corruption fait quant à elle l'objet d'un régime institutionnel mieux établi. L'Inde dispose d'une commission centrale de vigilance et d'instances anti-corruption dans les différents États, ainsi que du bureau du Contrôleur et Auditeur général, qui procède à l'audit *ex post* des dépenses publiques. Il existe en outre une loi sur le droit à l'information, qui vise à promouvoir la transparence dans les activités du secteur public.

**Le président** remercie l'Inde. Au vu des contributions reçues, il apparaît qu'aucun échelon de l'administration n'est exempt de collusion ou de corruption dans la passation des marchés, et que les indices recueillis sont insuffisants pour déterminer la fréquence de ces infractions. La contribution de la **Suède** témoigne néanmoins d'une vaste étude nationale sur la collusion et la corruption dans la passation des marchés publics, qui indique que ces infractions sont étroitement associées, et facilitées en grande partie par le fait que les fonctionnaires qui traitent les dossiers ne comprennent pas la situation. Le président aborde la question des techniques qui permettent de lutter à la fois contre la collusion et la corruption, évoquant la contribution des **États-Unis** au sujet des techniques de surveillance et d'enquêtes par infiltration. D'autres contributions, dont celles de la **Fédération de Russie**, du **Bangladesh**, du **Brésil**, de la **Roumanie** et de la **Corée du Sud**, mentionnent le recours aux techniques de passation des marchés faisant appel à Internet pour prévenir à la fois la collusion et la corruption. Le Brésil énumère les accords de coopération passés entre des services acheteurs et les organes chargés de faire respecter les lois. L'Allemagne applique un processus spécial d'examen des attributions de marché contestées, que le président l'invite à présenter de façon plus détaillée.

Le délégué de l'**Allemagne** déclare que, du point de vue de la concurrence, l'avantage de cette procédure d'examen est qu'elle offre l'occasion d'apporter de la transparence et de lutter contre la discrimination dans la passation des marchés publics, mais aussi de rectifier les adjudications qui sont jugées défectueuses. Le but premier d'un tel examen est de vérifier si les règles de procédure ont bien été respectées dans le cas étudié et non de défendre les grands principes de la concurrence. L'examen individualisé n'est pas un moyen approprié pour effectuer une étude systématique de la passation des marchés publics au fil du temps et détecter des schémas suspects dans la soumission des offres, technique qui est peut-être plus efficace pour déceler la collusion. Néanmoins, bien qu'il n'existe pas en Allemagne de données empiriques permettant de déterminer si l'existence de cet examen a une incidence sur le niveau de collusion ou de corruption, on peut supposer que la menace d'un contrôle *ex post* par un organe indépendant peut dissuader quelque peu les entreprises de s'engager dans cette voie.

**Le président** remercie l'Allemagne et invite Singapour à commenter les techniques qu'utilise ce pays pour lutter à la fois contre la corruption et la collusion dans la passation des marchés publics.

Le délégué de **Singapour** explique que les trois principes qui guident la passation des marchés publics dans ce pays sont la transparence, la concurrence ouverte et loyale, et le rapport qualité-prix. Pour assurer la *transparence*, la passation des marchés publics se déroule au sein d'un solide cadre de lois, règlements et directives ; les fonctionnaires chargés des adjudications sont tenus de signaler les conflits d'intérêts et la rotation du personnel est fréquente ; enfin, les comités chargés de l'évaluation des offres et de leur approbation sont constitués de membres différents. Pour obtenir une *concurrence ouverte et loyale*, les appels d'offres sont publiés sur un portail électronique ; l'appel d'offres ouvert est l'option par défaut ; les spécifications techniques ne peuvent pas être des critères d'exclusion ; et les PME sont autorisées à se regrouper en consortiums pour pouvoir participer à des appels d'offres portant sur des montants plus élevés. Afin d'obtenir le meilleur *rapport qualité-prix*, les offres sont sélectionnées dans la mesure où elles répondent aux critères définis et sont assorties d'un prix intéressant, c'est-à-dire lorsqu'elles présentent un rapport coût-avantage optimal ; les projets de montant plus élevé font l'objet d'une évaluation plus quantitative de façon à éliminer l'élément d'appréciation subjective ; et la négociation n'est autorisée qu'en présence d'une concurrence limitée, afin d'obtenir le meilleur prix. Pour ce qui est du respect de ces principes, le risque d'être découvert et lourdement sanctionné – sous forme d'amendes, de peines d'emprisonnement ou de poursuites civiles – est un facteur fortement dissuasif. À Singapour, deux organismes publics distincts sont chargés de lutter contre la collusion et la corruption, mais ils œuvrent en étroite collaboration. En ce qui concerne les éventuelles contradictions de principe entre concurrence et transparence, le recours à une plateforme électronique maximise la participation, réduit les coûts et permet d'imposer des critères qui ne restreignent pas exagérément la concurrence, tandis que la facilité d'accès à l'information contribue à faire respecter les règles de la passation des marchés.

**Le président** remercie Singapour et invite les États-Unis et le commissaire fédéral au commerce, William Kovacic, à commenter respectivement la contribution de son pays et la sienne propre.

Pour le délégué des **États-Unis**, tant la collusion que la corruption altèrent le processus d'appel à la concurrence, et elles sont souvent présentes concomitamment. Aux États-Unis, un seul organe – le ministère de la Justice – a compétence pour juger ces deux types d'infraction. La question critique est cependant celle de l'efficacité des poursuites, qui peuvent aussi être menées par deux ou plusieurs instances compétentes, pour autant qu'elles disposent de mécanismes de coopération. Un autre domaine de complémentarité entre collusion et corruption est celui de la formation des fonctionnaires chargés des marchés publics : une formation efficace doit couvrir le problème des ententes mais aussi sensibiliser les agents aux sanctions infligées en cas de corruption.

**M. William Kovacic** explique que sa contribution, fruit d'une collaboration avec Robert Anderson et Anna Müller, examine les contradictions qui peuvent exister entre les mécanismes destinés à préserver

l'intégrité du processus de passation des marchés publics et ceux qui visent à encourager la concurrence. Le document conclut qu'il est possible d'éviter que les mesures en faveur de la transparence, sous réserve qu'elles soient soigneusement conçues, aient des conséquences anticoncurrentielles. Par exemple, une procédure qui prévoit l'ouverture des offres en public a pour effet de préserver l'intégrité du processus, mais elle permet aussi aux cartels de mieux surveiller le trucage. Une autre méthode consiste à maintenir le secret des offres, mais avec un mécanisme d'audit selon lequel un fonctionnaire digne de confiance examine le processus pour détecter d'éventuels signes de corruption. Les cas de sous-traitance constituent un autre exemple : dans les projets du secteur public, il convient de vérifier que les candidats éliminés ne se voient pas systématiquement accorder des contrats de sous-traitance, ce qui peut être un signe de collusion en amont dans le processus.

**Le président** remercie M. Kovacic et invite la France à présenter ses stratégies visant à prévenir les cas associant collusion et corruption dans la passation des marchés publics.

Le délégué de la **France** note que, en dépit d'une réglementation détaillée des marchés publics, la France connaît encore des cas de collusion et de corruption. L'Autorité de la concurrence est compétente uniquement pour faire respecter le droit de la concurrence. Ce sont les tribunaux administratifs et les cours pénales qui traitent les cas de pratiques telles que la collusion et la corruption. Le favoritisme est l'infraction qui fait le plus souvent l'objet de poursuites en relation avec la passation des marchés publics. Il existe des mécanismes de coopération entre l'Autorité de la concurrence et la justice pénale. Par ailleurs, une étude est en cours sur la prévention et la détection des cas de collusion et corruption.

**Le président** remercie la France et demande un nouveau vote à main levée pour savoir s'il existe, dans les pays des délégués, des programmes de clémence en faveur des personnes et des entreprises qui ont offert des pots-de-vin ou participé à des actes de corruption ; neuf réponses positives sont enregistrées. Les débats abordent ensuite le dernière thème – la promotion de la concurrence comme moyen d'assurer l'objectivité et la compétitivité dans la passation des marchés publics. De nombreux pays ont mené ces dernières années de grandes campagnes de lutte contre la corruption et la collusion. La Croatie est invitée à présenter ses activités dans ce domaine.

Le délégué de la **Croatie** décrit les grandes lignes des dispositions légales régissant la passation des marchés publics. Une législation spécifique régit l'ensemble du processus de concurrence dans les marchés publics, et l'autorité croate de la concurrence est responsable de l'application de ces règles. D'autres organes de l'État, dont la police, le Procureur général et les tribunaux, sont aussi actifs en la matière. Un programme anti-corruption, couvrant la période 2010-2012, a été lancé récemment à l'intention des entreprises publiques. Il poursuit trois objectifs : i) améliorer l'intégrité, la responsabilité et la transparence ; ii) créer les conditions nécessaires à la prévention de la corruption à tous les niveaux ; iii) réaffirmer le principe de la tolérance zéro à l'égard de la corruption. L'autorité croate de la concurrence mène des actions de sensibilisation pour aider les fonctionnaires chargés des marchés publics et d'autres organes de l'État à mettre ce programme en œuvre, en les conseillant par exemple pour la rédaction des appels d'offres de façon à empêcher les ententes. Une série de séminaires et la publication d'une brochure d'information sont également prévues.

**Le président** remercie la Croatie et invite le BIAC à présenter les contrôles internes qui sont mis en place dans les entreprises pour prévenir la collusion et la corruption dans la passation des marchés.

Le délégué du **BIAC** constate le manque de preuves empiriques disponibles au sujet de la proportion des cas de collusion et de corruption qui sont autorisés ou non par la direction des entreprises. Le monde des entreprises est toutefois de plus en plus conscient que la corruption lui fait du tort. De nombreuses sociétés mettent en place des programmes de conformité pluridisciplinaires pour prévenir la collusion et la corruption ainsi que d'autres pratiques illégales, par exemple dans le domaine de l'environnement. Ces

programmes partent souvent du principe que les pratiques illicites sont en partie imputables aux cadres subalternes, mais ils poursuivent généralement trois objectifs : i) réaffirmer les valeurs de l'entreprise et amener les cadres supérieurs à prendre des mesures pour les faire respecter ; ii) vérifier que le personnel est pleinement conscient des règles édictées ; et iii) mettre en place des mécanismes permettant de détecter les comportements délictueux et d'y mettre fin. Avec la décentralisation des activités des grandes entreprises et le développement de la rémunération en fonction des performances, la collusion et la corruption peuvent se produire aux échelons inférieurs, et c'est aux cadres supérieurs qu'il revient de prévenir ces comportements. Le BIAC est d'avis que les autorités de la concurrence devraient tenir compte des programmes de conformité réellement appliqués lorsqu'elles évaluent des cas supposés de violation du droit de la concurrence et des lois anti-corruption.

**Le président** remercie le BIAC et rappelle aux délégués qu'une promotion active de la concurrence est d'une importance capitale lorsqu'il s'agit de défendre le respect des règles anti-collusion et anti-corruption. Il remercie toutes les délégations qui ont répondu aux questions et demande aux orateurs invités s'ils souhaitent formuler d'autres commentaires à la lumière des interventions qui ont précédé.

**M. Pasaribu** fait remarquer que, dans les débats, il est souvent fait référence à la corrélation entre collusion et corruption dans la passation des marchés publics, et que les différents organes compétents en la matière se doivent d'apporter une réponse coordonnée. Dans le contexte indonésien, l'autorité de la concurrence s'efforce de coordonner son action avec la commission d'éradication de la corruption, l'office national d'audit et, désormais, également avec la police et le ministère public. Pour toute autorité de la concurrence, la coopération avec les autres instances compétentes est un aspect capital des programmes de prévention.

**M. Abouddrar** estime que la prévention de la corruption et de la collusion doit commencer en amont de la conception des projets publics. Ainsi, au Maroc, les acheteurs du secteur public doivent publier à l'avance leurs programmes d'achats de façon à ce que les fournisseurs puissent se préparer à participer aux appels d'offres. Postérieurement à l'attribution des marchés, le Maroc procède à des audits *ex post* et établit des rapports de mise en œuvre, qui mettent parfois en évidence des cas de collusion ou de corruption. Les deux points importants sont les suivants : i) la participation des entreprises du secteur n'est pas à négliger, car ce sont généralement les soumissionnaires déçus qui saisissent cette occasion pour signaler la présence de corruption ou de collusion dans le processus ; et ii) les fonctionnaires chargés des marchés publics doivent être formés à la détection des risques. Les « signaux d'alerte » présentés à la séance en sous-groupe du matin constituent un exemple d'outil simple mais efficace.

**M. Lewis** souligne l'importance des actions de sensibilisation dans la lutte contre la collusion et la corruption dans la passation des marchés publics. De telles actions peuvent consister par exemple à informer la société civile du coût de la corruption. Lorsqu'une autorité de la concurrence s'attaque à la corruption, elle se trouve généralement face à des intérêts puissants, et elle doit donc mettre l'opinion publique de son côté pour pouvoir y résister.

**Le président** remercie les orateurs de leurs remarques et annonce qu'il reste assez de temps pour répondre à deux questions ou commentaires de l'assistance.

Le délégué du **Chili** apporte des éléments nouveaux, par rapport à la contribution de son pays, au sujet du recours aux attestations d'absence de collusion. Celles-ci ont été utilisées dans le cadre de deux marchés passés par l'autorité de réglementation des fonds de pension, en gestion privée. Dans l'un de ces appels d'offres, l'obligation d'attestation a conduit plusieurs soumissionnaires à révéler qu'ils avaient été en communication au préalable. Par ailleurs, cet appel d'offres s'est soldé par des frais de gestion inférieurs de 24 % à la moyenne des commissions habituellement versées. C'est là un exemple qui montre qu'une

conception judicieuse des appels d'offres ainsi que le recours aux attestations d'absence de collusion peuvent aboutir à une issue plus compétitive.

Le délégué du **Brésil** signale que les attestations d'absence de collusion sont désormais obligatoires pour les marchés publics passés dans ce pays ; l'autorité de la concurrence espère que cette mesure va fortement dissuader les ententes entre soumissionnaires.

**Le président** remercie les délégués de ces commentaires et adresse aussi ses remerciements à tous les participants aux débats, en particulier les orateurs invités et le Secrétariat. Il invite alors Frédéric Jenny à prendre la parole pour résumer les débats de l'après-midi.

**M. Frédéric Jenny** fait tout d'abord l'éloge des débats, qu'il a jugé enrichissants et très intéressants. Il souligne l'importance du sujet, compte tenu du poids que représentent les marchés publics dans l'activité économique et de l'ampleur du préjudice que peuvent causer la collusion et la corruption dans ce contexte.

Dans un premier temps, les problèmes de collusion et de corruption ont été abordés comme des phénomènes distincts. La corruption peut se produire parce que les faiblesses du régime législatif permettent des comportements délictueux de la part des fonctionnaires, ou parce que des valeurs culturelles ou sociales engendrent une coopération entre citoyens qui alimente le processus de corruption, comme c'est le cas en Papouasie – Nouvelle-Guinée, par exemple. Un autre facteur résulte du fait que, dans les marchés publics, l'acheteur n'est pas le payeur. Quant à la collusion, elle est facilitée par divers facteurs, tels qu'une mauvaise conception des procédures de passation de marchés, le manque de formation des fonctionnaires responsables, un excès de complexité et, occasionnellement, trop de transparence.

La relation entre collusion et corruption a au moins deux origines. La première est la nécessité de dédommager les entreprises éliminées, afin que la corruption ne soit pas révélée. La seconde est la volonté de rendre la corruption moins visible, afin de créer une apparence de concurrence même si l'issue de la procédure est déterminée à l'avance. Ces liens, et en particulier le second facteur, imposent d'offrir une réponse coordonnée aux problèmes différents que sont la collusion et la corruption.

Bien que la collusion et la corruption soient plus concentrées sur certains secteurs, comme le BTP et la santé, elles semblent toucher pratiquement tous les secteurs. Par ailleurs, elles peuvent prendre des formes très complexes – c'est le cas, par exemple, des soumissionnaires polonais qui se font disqualifier à dessein en ne répondant pas aux critères de l'appel d'offres, dans le but de soutenir une offre plus onéreuse.

Les participants ont envisagé des solutions pour remédier aux problèmes de collusion et de corruption en tant que phénomènes séparés, mais aussi des solutions permettant de protéger les marchés publics contre ces deux types d'infraction en même temps. Parmi les mécanismes de lutte contre la corruption, on peut citer les audits *ex post*, le développement des capacités, la création d'une culture de la conformité, les poursuites judiciaires dans des affaires à haute visibilité afin d'engendrer un soutien public aux efforts d'application des lois, et la limitation du pouvoir discrétionnaire des fonctionnaires par le biais de la transparence. Pour lutter contre les ententes, les mécanismes disponibles sont la stricte application de la législation en tant que stratégie dissuasive, l'ouverture des marchés à la concurrence internationale, une conception des adjudications qui ne laisse aucune marge pour la collusion, l'amélioration des règles régissant la passation des marchés publics, la réduction des coûts de transaction, ainsi que la formation des fonctionnaires et le dialogue avec eux. La transparence est une question plus complexe. Si elle joue un rôle important dans la lutte contre la corruption, elle peut néanmoins faciliter la collusion entre soumissionnaires et rendre le processus d'adjudication trop prévisible.

Une étroite coopération entre les instances concernées est un outil important pour réduire l'incidence de la collusion et de la corruption dans les marchés publics. Elle revêt deux aspects : la coopération entre les autorités de la concurrence et les entités adjudicatrices, et la coopération entre les autorités de la concurrence et les organismes de lutte contre la corruption. Dans de nombreux pays, il existe déjà des liens entre ces diverses instances. Si des travaux supplémentaires sur cette question paraissent peut-être souhaitables – notamment sur le champ couvert par les protocoles d'accord entre ces organismes –, il semble du moins que ce soit une approche fructueuse pour avancer. De plus, les actions de sensibilisation à un problème, la collusion ou la corruption, peuvent avoir des retombées positives sur l'autre. En ce qui concerne les questions structurelles, il convient d'éviter les effets secondaires négatifs de la transparence bien que, même sur ce point, les intérêts des autorités de la concurrence puissent converger avec ceux des organismes anti-corruption, par exemple pour ce qui est de la sous-traitance.

M. Jenny conclut ses remarques en indiquant que, même si des progrès considérables ont déjà été accomplis, le sujet mérite de plus amples débats, en raison de la gamme des expériences positives et négatives enregistrées par les pays. En particulier, on pourrait examiner la teneur de la réglementation des marchés publics et la mesure dans laquelle elle est compatible avec la politique de la concurrence. Enfin, il remercie tous les participants à cette table ronde.