Bribery in Public Procurement

METHODS, ACTORS AND COUNTER-MEASURES



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MÉTHODES, ACTEURS ET CONTRE-MESURES

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Foreword

A major part of the world's exports of merchandise and commercial services are linked to public procurement. In OECD countries, public procurement accounts for 15% of GDP; in many non-OECD countries, that figure is even higher. But while public procurement can mean valuable business opportunities, it is also exposed to bribery. Such corruption undermines markets and welfare, and exerts a corrosive effect on society by eroding trust in leaders, institutions and business itself. Left unchecked, a culture of corruption can easily take root and is hard to remove. The OECD has been at the forefront of global efforts to fight corruption and bribery in public procurement. Raising anti-bribery standards in public procurement was recommended by the OECD as long ago as 1994. A coherent strategy is necessary in an effective anti-corruption campaign, and the OECD Anti-Bribery Instruments are the tactical tools developed to carry out this strategy.

This publication examines bribery in public procurement from a number of vantages. It summarises the techniques and means used to bribe, examines the relationship between bribery and other crimes as well as the motivations of those offering and accepting bribes. It also offers insights into the prevention, detection and sanction of bribery. Finally, pertinent cases on which the outlined observations are based are also provided.

In January 2007, the Working Group on Bribery agreed that the following typology of bribery in public procurement should be used in the review of OECD anti-bribery instruments. It was also proposed that the study serve as training material for procurement administrators and law enforcement agents worldwide. In addition, governments should circulate this typology to raise public awareness on bribery.

The work on bribery in public procurement is the result of a collaborative effort of experts from many countries, observers from international organisations, delegates to the OECD Working Group on Bribery in International Business Transactions, and the OECD Anti-Corruption Division. The typology builds on discussions among experts present at a seminar held in Paris in March 2006. The seminar brought

together law enforcement officials, procurement specialists and related professionals from 12 countries – Argentina, France, Germany, Greece, Mexico, the Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom, United States – as well as representatives from international organisations and multilateral development banks. Nicola Ehlermann-Cache of the OECD managed the project and is the lead author of this publication. She benefited from Helen Green's editorial suggestions and Patrick Moulette's policy guidance.

Table of Contents

Executive Summary 9

Introduction 13

Part I
Analysis of Corruption in Public Procurement

Chapter 1 **Public Procurement Rules, Procedures and Practices** 17

1.1. Procurement frameworks 17
1.2. Corruption risks in the tendering process 19
1.3. Other risks in relation to tendering 25

Chapter 2 **Vulnerabilities Relating to Project Size, Sector or Tendering Administration** 27

2.1. Contract size 27
2.2. Sector risks 27
2.3. Other areas at risk 29

Chapter 3 **Links to Other Offences** 31

Part II
Analysis of the Actors Engaging in Bribery and Typical Corruption Agreements

Chapter 4 **Parties Involved in Bribery** 37

4.1. The Briber 37
4.2. Intermediaries 38
4.3. The Bribee 40
4.4. Third party beneficiaries 41
4.5. Others involved in international procurement contracts 43

Chapter 5 **Content of the Bribery Agreements** 45

5.1. Viewpoint: the briber 45
5.1.1. Motivations to engage in bribery 45
5.1.2. Expected returns 46
5.1.3. Advantages offered, promised or given 47
5.1.4. Organisation of the bribe payment 48
5.2. Viewpoint: the bribee 50
5.2.1. Motivations to engage in bribery 50
5.2.2. Returns in exchange for an advantage 52

Part III
Preventing, Detecting and Sanctioning Bribery in Public Procurement

Chapter 6 **Preventive Measures** 55

6.1. Public notice and transparency 55
6.2. Training of procurement personnel 56
6.3. Good practices 56

Chapter 7 **Controls** 59

7.1. Internal controls 59
7.2. Additional controls 61

Chapter 8 **Detection Mechanisms** 63

8.1. Red Flags 63
8.2. Facilitating and encouraging reporting 63
8.3. Teamwork 64

Chapter 9 **Investigation and sanctions** 67

9.1. Effective regulations and sanctions 67
9.2. Multi-disciplinary investigations 68
9.3. International harmonisation and co-operation 71

Part IV

Ten Anonymous Studies on Bribery in Public Procurement

Template for the description of the cases of bribery in public procurement 74

I. A senior civil servant and a subcontractor from another state 75

II. Bribery relating to public procurement within a local authority 77

III. Bribery related to procurements within an international aid-organisation 80

IV. Fraudulent bid evaluation by an "independent consultant" in international limited bidding 83

V. Award of a consultancy contract to fellow national in exchange for bribes 85

VI. Susceptibility of international bidders to influence peddling and coercion in bid tendering 87

VII. Collusive bidding and overpricing in international shopping/international price quotations 90

VIII. Preferential treatment in exchange for gratuities and family-member employment 93

IX. Bribes in exchange for awarding contracts 95

X. Bribes from contractor to increase quantity of work 97

Annex A **The OECD Anti-Bribery Instruments: How They Address Public Procurement** 99

Executive Summary

Public works contracts are big business. From major infrastructure projects such as power stations and roads to building public universities and equipping them with telecommunications, government purchasing for goods and services carries enormous financial power. In fact, in OECD countries, public procurement is estimated to account for 15% of GDP; in many non-OECD countries, that figure is even higher. Government contracts clearly mean valuable, often long-term, business opportunities. For a large engineering company, in energy for instance, securing a contract can also open up other business opportunities for its own suppliers. Not surprisingly, competition for government contracts can be fierce, whether at local, national or international level. Much of the time, this drives healthy economic activity. But it also makes public procurement a hotbed for bribery. Left unchecked, a culture of corruption can take root and becomes hard to remove. Indeed, even the most normally upstanding of entrepreneurs have admitted that in some markets, bribery is simply a normal way of doing business. This of course is a delusion: bribery distorts markets and undermines trust in government and institutions. It destroys value and jobs, and indeed, business. With bribery, no-one really wins.

As public procurement accounts for such a large slice of economic activity, the potential of bribery to damage a nation's economy is considerable. The trouble is how to identify the problem, and then sanction it. The growing complexity of bribe schemes in today's globalised markets is a daunting challenge. They exploit transnational financial networks and sometimes even manipulate the regulations designed to prevent the problem from occurring in the first place. Clearly, a better understanding of the mechanisms and patterns of bribery must be fostered and new tools developed if bribery in public procurement is to be successfully combated.

Law enforcement officials, procurement specialists, representatives of competition authorities, accountants, and other experts have pushed this view for some years, notably at a 2004 OECD Global Forum on governance entitled "Fighting corruption and promoting integrity in public procurement". A step forward in meeting their concerns was taken in January 2007, when the OECD Working Group on Bribery in International

Business Transactions officially endorsed the typology of bribery described in this book.

This typology analyses the methods employed, the actors prone to offering or accepting bribes and their motivations as well as the means to discourage or detecting bribery in public procurement.

The typology brings to light that public procurement is a long and complex process that may take many years and pass through many stages before a project comes to fruition. An act of bribery may occur at any stage along the way, from the very initial steps of deciding a project is needed, through drawing up specifications and calling for tender, to the completion of the project. Operations will project an image of legitimacy to mask the irregularities actually taking place. One of the difficulties in detecting bribery and corruption is that such offences can involve a number of actors working together, sometimes over many years.

The potential for corruption in public procurement exists in all economies and no sector is free from risks of corruption. However, some sectors are considered being particularly exposed to corruption in public procurement, due to the complex nature of the works, the amounts of the contracts involved and sometimes applicable national security provisions. International public procurement is an especially lucrative target, given the amount of money to be earned in winning a contract and the ability to conceal bribes across borders. Opportunities for corruption also arise in the delivery of development assistance, threatening the integrity of aid-funded public procurement projects as well as their efficacy.

Bribery and corruption are frequently associated with other crimes, such as money laundering, accounting fraud, tax evasion and extortion. The public procurement process can also be abused through collusion and corruption for the purposes of political gain.

Boosting competition among bidders and securing the best price, quality and delivery of goods and services are the considerations that have so far driven the adoption and enforcement of legislation in public procurement. However, as this typology illustrates, fighting bribery should be an integral part of the process too. There are many ways to fight corruption, and many of these are mentioned in the pages ahead. But in general, we see three broad ways of stepping up action against bribery in public procurement.

1. Procurement administrations must increase awareness and application of adequate procurement rules and controls, and cultivate a better understanding among officials of the detrimental effects of bribery and corruption.

2. A network of experts with judicial and non-judicial skills should be created to improve detection and prevention of bribery and corruption, including within procurement administrations.

3. Clear rules and regulations must be developed, effectively applied and properly enforced with substantial penalties. This is the most effective means to combat bribery and corruption in public procurement. Further harmonisation of anti-bribery legislation as well as procurement rules and procedures is essential; the development of common anti-bribery standards and the establishment of multidisciplinary networks that co-operate internationally would significantly strengthen the ability of governments to fend off bribery and corruption in public procurement globally.

Bribery in Public Procurement: methods, actors and counter-measures sets out the issues in a simple format. Part I of the report examines procurement rules, procedures and practices, and highlights risks in the tendering process. It goes on to look at how size of contracts can affect public procurement bribery, and focuses on individual sectors at risk, from mining and energy to the arms industry. After establishing links between bribery and other crimes, the typology considers in Part II who is actually involved in bribery. It takes two to tango, and the report describes both the briber and the recipient of the bribe. In short, the first two parts set the stage on which bribery in public procurement is played out, introduce the actors and elucidates the plot.

Part III of the report moves into the detail of how to prevent and punish bribery. It evaluates transparency issues, as well as preventive measures and controls. Bribery is rarely easy to detect, but there may be telltale signs, which this section also describes. One challenge is to train up staff not only to spot the signs, but also to come forward and report them. This raises important issues about teamwork and loyalty. Part III ends by looking at regulations and sanctions that can prevent bribery, and examines how international cooperation should come into play.

In preparing this study, experts from various backgrounds shared their own experiences in fighting bribery and submitted real cases. Part IV presents ten of these anonymous cases. These relate to a range of situations, such as an incident at local authority level, fraud concerning an independent consultant, and bribery at an international aid body. These bribes can be aimed at winning anything from new contracts to extra work. Together they serve as useful concrete examples in helping readers to understand the challenge of bribery in public procurement.

Finally, in the annex, there is a reminder of the anti-bribery instruments which the OECD has built over the last decade or more.

Bribery in Public Procurement: methods, actors and counter-measures fills a gap in helping government to come to grips with what is a particularly tricky area of bribery in a fast changing world. By bringing together national and international thinking in this way, this report is a small though important contribution to the tools modern governments need to fight corruption.

Introduction

In October 2005, the OECD Working Group on Bribery undertook to develop a typology of bribery in public procurement, with the aim of improving knowledge of the mechanisms and patterns of bribery in public procurement and enhancing efforts in the prevention, detection and investigation of this criminal activity.

Globalisation has brought great benefits, as well as challenges, not least in the vast and increasingly open market of public procurement. Competition for government contracts is intense. As public procurement is vulnerable to bribery, governments have to be vigilant about the entire process, from initial planning right down to completion. Several governments have effective anti-bribery instruments in place, and many look to OECD anti-bribery instruments for guidance. That armoury could be strengthened by offering governments a clear, simple review of how bribery works its way into public procurement, including beyond borders, the players involved and the counter-measures that may be utilised. Governments must lead the fight against bribery and drawing lessons from each other's experiences is key to making progress. This typology report is but one contribution to that end.

It is the first typology exercise by the Working Group (see Annex for other activities of the Working Group) and by drawing global experiences together, it fills a gap. It adopts a functional and process-based analysis of bribery in public procurement, which provides a tool for understanding the methods and the institutional contexts of bribery. It also opens up avenues for further reflection.

The typology starts by analysing how bribery is likely to occur in the procurement process. It describes how bribery is committed throughout the various stages of government purchasing and how bribery in public procurement is related to other crimes, such as fraud and money laundering. Then, the responsibilities of the different actors engaged in bribery offences are identified. Thereafter the contents of corrupt agreements are addressed from the points of view of the briber and bribee, including the main motivations, expected advantages and manner in which the deeds were

organised. The latter being for the most part typical of bribery of public officials; they are not necessarily specific to the area of public procurement.

The third part of the report gives an overview of measures to prevent, detect and sanction corruption; it reflects experts' discussions on combating active bribery as well as preventing and detecting passive bribery[1]. Experts did not consider the list of measures as exhaustive. Rather, they suggested that professionals with different expertise give further consideration to those elements[2]. The anonymous cases submitted for publication are included in the fourth part of the typology. These cases, which deal both with domestic and trans-national bribery in public procurement, illustrate the observations presented throughout this typology report.

Notes

1. "Active corruption" or "active bribery" is defined as paying or promising to pay a bribe; "passive bribery" is the offence committed by the official receiving the bribe. Of course, in a number of situations, the recipient may induce or coerce the briber, and in that sense, is the active party.

2. It may be recalled that disqualification of legal persons from participation in public procurement is part of the sanctioning system of the OECD Anti-Bribery Instruments. Annex 2 provides a brief overview of the Instruments' procurement related provisions.

Part I

Analysis of Corruption in Public Procurement

Bribery and corruption in public procurement may have multiple negative effects, leading notably to unnecessary, unsuitable, uneconomic or even dangerous projects.

The following part reviews the public procurement rules, procedures and practices and looks at the areas where the process is vulnerable to bribery because of the size of a project, the sector concerned or the specificities of the purchasing administration. Links to other, frequently associated crimes and malpractices are also shown. This section brings to light the numerous common bribery opportunities public procurement provides. This functional, process-based analysis could possibly help define counter-measures to bribery crimes (see also Part III).

Chapter 1

Public Procurement Rules, Procedures and Practices

Public procurement rules and procedures do not represent an effective obstacle to bribery; ineffective or inadequate public procurement rules and procedures can even create a multitude of opportunities for bribery. These opportunities may be deliberately created, or they may arise from discretionary interface between the public procurement agents and the private operators. Effective and efficient controls of the procurement agent or the procurement authorities may be lacking. Complications in the procurement process as well as the nature and technicality of purchased goods, works or services may be exploited. Finally, bribery and corruption are rarely isolated crimes – they are often associated with other offences or misdeeds.

1.1. Procurement frameworks

The existence of public procurement rules or changes related to them are recent (see Box 1), and a number of countries are either still lacking them or otherwise must confront unclear regulations and procedures. The absence or inadequacy of procurement rules provides multiple opportunities for transgressions. The primary focus of procurement rules is to secure the best value for money. It is only gradually now becoming obvious that bribery should be one of the fundamental concerns in ascertaining the effectiveness of procurement regulations.

The multiplicity of rules may have a negative impact on transparency and lead to legal uncertainties and high transaction costs, both for the procurement agencies and the potential suppliers. The correct application and supervision of laws may be difficult, and awarding agencies could have problems negotiating their way through the regulatory diversity.

However, procurement agencies may also purposely use and abuse the regulatory diversity. For instance, they may privilege firms by opting for tendering procedures which require no controls. They may also formulate requirements which favour specific firms and constrain market access to specific suppliers. Various options are outlined in the following section.

Box 1. **Movement towards public procurement regulation and reform**

Regionalisation and increased internationalisation have had a great impact on the development of public procurement regulations. Impetus for reform in many European countries was based on the objective of entering the European Union and seeking consistency with the regional regulatory framework. Many reforms are initiated by regional or bilateral aid or by aid from the international development institutions such as the World Bank, which provide financial assistance for reform programmes.

Developments around the world have been supported by the adoption of a Model Law on the procurement of Goods, Construction and Services by the United Nations Commission on International Trade Law (UNCITRAL).

International perspective

Since many visible trade barriers, such as tariffs and quotas, have been reduced or eliminated through trade agreements, attention has turned increasingly towards more subtle and sophisticated protectionist practices, such as discriminatory government procurement.

Regional agreements include regulation on government procurement. They require the parties to adapt their laws on procurement to comply with the requirements of the agreements and provide formal national procedures to allow aggrieved firms to challenge procurement decisions.

Domestic and international rules generally emphasise the same key principles of competition, publicity, use of commercial criteria and transparency.

Competition means that contracts are awarded by comparing offers from a certain number of contractors in order to establish which one can provide the most favourable terms for delivering the government's requirements.

The publicity (or public notice) principle supplements the competition principle since it ensures that contractors find out about contracts and propose their services or goods. Decisions on which contractors should be treated as eligible to bid must generally be based on the ability of firms to undertake the contract. In choosing which bid to accept, authorities are required to consider only the merits of each submission (price, product quality, etc.).

The concept of transparency refers to the idea that procurement procedures should be "characterised by clear rules and by means to verify that those rules were followed". Transparent procurement regimes share the following characteristics:

1. All participants and potential participants should be aware of the applicable rules of procedures;
2. The discretion of procurement officers in achieving the goals of the procurement process should be structured and subject to formal rules;
3. Compliance with the applicable rules should be verifiable;
4. Mechanisms should exist for scrutinising decisions to ensure compliance with legal norms.

Box 1. **Movement towards public procurement regulation and reform** (cont.)

The development of formal systems to regulate domestic procurement can make a valuable contribution towards opening markets to international competition.

International rules only deal with some aspects of procurement activities. Detailed rules on contract award procedures contained in the WTO Government Procurement Agreement (GPA), NAFTA and the European Union regimes govern only contracts above certain financial thresholds.

Tendering procedures

Public procurement can take place through different types of tendering. Procuring entities draw up a detailed description ("specification") of the product or the service that they require and invite firms to submit written bids setting out the price and other terms by which they can supply the product or service. The contract is then awarded to the firm offering the best price or the best combination of price, quality and other factors. Such formal tendering is generally characterised by the absence of discussions between the procuring entity and the bidders.

The main types of formal competition for tenders are: 1) open (or unlimited) procurement, 2) selective procurement (restricted to pre-selected categories of suppliers invited to bid) and framework agreements, 3) limited (or negotiated) procurement, including individual, sole-source, single-source or direct tendering. [Terms used correspond to the WTO GPA; although similar in type, terms may vary significantly between different national regulations].

Countries use both formal as well as "informal" methods such as requests for proposals and requests for quotations (where procuring entities seek detailed technical and cost proposals, on the basis of which they hold negotiations with prospective providers). As national administrations are using information and communication technologies more often, novel methods of procurement, such as purchase cards or electronic catalogues, have been introduced. It generally appears that procuring entities tend to use more formal award procedures for goods and works than for services, which are more reliant on judgment from procurement officers.

Sources: « Public Procurement : Global Revolution » ; editors Sue Arrowsmith and Arwel Davies ; Kluwer Law International; and OECD Transparency in Government Procurement: The benefits of efficient governance and orientations for achieving it [TD/TC/WP(2002)31/FINAL]

1.2. Corruption risks in the tendering process [1]

Public procurement can be characterised as a process flow starting with procurement planning and proceeding in sequence to product design, advertising, invitation to bid, prequalification, bid evaluation (broken down further into technical and financial evaluation), post-qualification, contract award and contract implementation. Each link in the chain is potentially vulnerable to corruption in some form or another.

***Identification of needs and design of tenders*:** Different preparations take place before launching a tender. Identification of needs and the design of tender are known to be vulnerable to corruption as there are many opportunities for manipulation. Furthermore, corrupt acts that will occur later can be planned at that stage. For instance, exchanges and discussions at this initial stage may lead to the disclosure of confidential bid information. Exchanges between project designers and intermediaries, involving the public bodies which provide or obtain funds for the project(s), may have an impact on the planning of public works *per se* and can lead to the introduction of inaccurate policy requirements. During the planning period, hidden mistakes and fictitious positions can be built into the project calculation and design, affecting the terms of reference, which leaves openings that can later be used to conveniently account for increased costs, influence the selection process or the selection procedure (see bidding procedure below). The briber and the bribee may for instance decide to: (i) limit the time frame for the tendering process, (ii) use specifications that preclude competitive bidding, (iii) select additional fictitious bidders or ones unlikely to submit competitive bids, (iv) plan a very low bid price and include "hidden" possibilities to expand the contract at a later stage to recover the economies for the vendor, etc.

Selecting a business: Fraud in the selection of tenderers may occur, with unqualified or untested companies being licensed to be a vendor or a bidder. This may result from various shortcomings. The participation criteria may be excessively selective, specifying features that are provided by only a few businesses. These features may or may not be relevant to the project. Unclear or ambiguous clauses may be included, or insufficient explanations given as to the tendering arrangements. Any of these defects could result in the exclusion of a large number of bidders; the contract can then be awarded to those familiar with the clauses and conditions. When no tenders have been made in the public procedure, due to various types of built-in subterfuges, tendering authorities will resort to a private treaty, which provides a greater discretion.

The bidding procedure: Certain bidding procedures lend themselves more easily to hiding bribery and corruption. The procurement process may be more vulnerable to corruption when non-competitive procurement has become the norm. Although this kind of contract is not in itself proof of corruption, opportunities and inducements for corruption may increase. Similarly, competitive procurement cannot be a guarantee of integrity.

Non-competitive procurement contracts are awarded by a government to a company without competitive process. Such contracts, also referred to as sole-source, single-source, or no-bid, are justified by reasons of expediency in emergencies, or when national security interests are at stake. Non-

competitive procurement contracts have been identified as a source of concern for reasons of transparency, democratic oversight, value for money and corruption risks.

Procurement officials authorised to make single-source decisions have great power over which companies receive the most lucrative contracts. Without evaluative guidance and oversight, individual preference can easily become part of their decision. Receiving lucrative contracts without facing competition is highly desirable from the vendor's point of view. Companies can see the benefit of cutting out the risk of losing a bid by influencing and/or bribing key officials to obtain a non-competitive contract. Ongoing, long-term relations between a vendor and a procurement official may provide for the continual award of such contracts in exchange for personal gain.

Framework contracts are standing agreements used as a basis for goods and services purchases as needs arise. Such agreements can save time and money by eliminating numerous bidding processes. However, some experts are concerned that they may represent "a huge growing wedge of contract dollars" that lack transparency and are unaccountable regarding competition. Prices are often not fixed before frameworks are drawn up, leaving the agreements open to corruption risk. However, it was noted that electronic reverse auctions based on price may only cure problems that framework agreements are supposed to address.

Competitive bidding or restrictive competitive bidding involve prequalification of vendors and are considered to offer fewer chances to favour a company seeking to influence the right people. Usually, competitive processes also include various levels of supervision, with expert bodies evaluating bids for quality, specificity and value for money. Furthermore, companies that are not awarded a contract theoretically have the opportunity to call public and judicial attention to their concerns about potential irregularities. Due to the different layers of appraisal, corruption is considered more difficult to conceal. However, diverse sets of corruption risk remain at the various stages of the procurement process and integrity depends on the application and objectivity of the selection criteria. Furthermore, this does not prevent accomplices within the procuring entity calling for tenders. Nor can agreements between the different bidders, with a view to reciprocating benefits in the framework of the public works, be excluded either.

Experts shared the view that competitiveness, notably by means of advertising and opening markets, as well as transparency through clear and foreseeable contract conditions, should be promoted as best practice and a means of achieving value for money. However, they suggested that further

attention be paid to newly established areas, such as e-procurement and competitive bidding dialogue. Technological sophistication, on which these techniques are based, may not be sufficient to counter potential corruption.

Contract award: This is the phase during which the winner of a contract is determined. Ineffective control structures along the process provide for frequent manipulation. Lack of transparency in the attribution of the contract may also occur as all bids may not be publicly opened, or their content may be subject to manipulation. Inadequate communication with participants is another widespread feature. The absence of objective decision criteria (see above) or the inadequate weighting of the various criteria are further ways to influence the awarding process. For instance, costs are only one among a number of components to be considered. It is often found that technical features of a proposal, the fact that it meets community requirements or the time required for its implementation, are given excessive, poor or no consideration, as the case may be. The fact is that the evaluation is being left to the individual discretion of the official.

Some models have been moving towards dispersing the authority, including by committees, so that there is not a single person taking the decision. In this case, attention needs to be paid to the composition of the committee and how effectively it carries out its duties.

Experts suggested that transparency is absolutely indispensable in preventing corruption. The decision criteria and objectives should be known and communicated to all bidders. This means that all bids are opened publicly with their content registered immediately to prevent them from being manipulated.

Contract execution: This phase is less susceptible to regulation. Techniques to hide bribes during the execution of a contract are manifold. Rendering of fictitious work, inflating the work volume, changing orders, using lower-quality materials than specified in the contract, supplying goods of a lower price and quality than quoted, and rendering contracted services in an improper way are some of the most common ways of defrauding the public budget. Alterations between the decisions made and the conclusion of the contract may also go unnoticed and provide ample room for bribery and corruption.

In addition, flaws in the technical and administrative supervision of the works may be exploited. Interventions by the public service to control the quality of the materials, the completion of deadlines, the quality of the services, the financial accuracy and the full execution of a contract may be insufficient. Certification of the execution of the works may not correspond with the real supply.

In the execution phase, new corruption challenges may emerge with officials threatening to withhold payment unless they are remunerated by a percentage of the contract. In such cases, officials delay due payment in view of bribe payments, creating serious liquidity problems for the companies that have adequately executed the contract (this qualifies as 'solicitation'; if in addition the supplier is physically threatened it qualifies as 'extortion').

Box 2. **Recent World Bank Experience***

The World Bank has been informed by its business partners that whereas the award of large international contracts is reasonably well supervised, payments extorted during contract implementation have become increasingly common and significant, thus displacing opportunities for corruption from the procurement selection process to the contract stage. These payments, which can be seen as corrupt payments or large and repeated "facilitation" payments of a very significant aggregate amount, may be required against the provision/delivery of permits, licenses, approvals or other authorizations (for example, licenses to use explosives or for delivery of goods, permits to import/re-export contractor's equipment, etc.) or simply to receive timely payments that are properly due. They are perceived as practically unavoidable, since the risk -- and hence the direct and indirect cost implication -- of delay in these cases is with the contractor or equipment installer, possibly triggering a cascade of contract consequences (e.g., when authorizations, licenses etc. are not obtained in a timely fashion). While contracts usually provide for "reasonable assistance to the contractor" in obtaining such authorizations, this in itself is insufficient to effectively shift the risk entailed in such delays. At this point it may well be that the only manner in which to tackle this issue would be to revise contract provisions to make all such authorizations, permits and licenses the responsibility of the employer/client or to introduce payment conditions involving invoice tracking systems or revolving advances.

* Françoise Bentchikou, Chief Counsel, procurement and Consulting Services, the World Bank**.**

Experts recommended focusing on the contract-execution phase to prevent and detect corruption. Effective internal controls during the period following the award of a contract could discourage the bribee from choosing manipulative techniques during the execution phase. Detection during the contract-execution phase is easier as it is possible to look back over all the previous stages of the procurement process and analyse departures from the rules, or unusual events, in the course of the process. Finally, it was recommended to: (1) use standard contract specifications and conditions; and (2) involve the final user of the facility services or supplies as much as possible.

Box 3. **International tender: An example in the arms sector**

Countries spend important amounts on the acquisition of military materials. Military supplies tend to be purchased through single-source contracts, which may not be scrutinised for national-security reasons.

When there are international public tenders in this sector, the customer solicits the potentially interested foreign manufacturers and makes its precise requests known. In certain cases this stage may simply be a sham; the official procedure acts as screen to conceal arrangements already concluded.

The various manufacturers make their proposals known in writing, in large volumes of technical references. The deadline for reply being rather long - for instance 6 to 8 months for a vessel - the manufacturers develop sophisticated arrangements with staff charged to cover the proposal's technical, commercial, legal and financial aspects. Engineering and design departments are often asked to contribute to meet the customer requirements.

The response to tender comprises both a technical and an economic note. The technical document details the characteristics and the performances of the product offered; the economic communication describes the financial conditions. The notes are placed in sealed envelopes, then enclosed in a case or a metal trunk. On a given date, each case is conveyed by special mail to the customer. Within the interested ministry, the mails are opened in turn and the documents given to the local public officials. The deposits are registered and then stored.

The local authorities subsequently examine the submissions. The technical experts assess whether the products offered correspond to the specifications, putting obviously unsuited documents on the side. This sorting phase may last several months and is of great importance for possible continuation of the process. Operational personnel in charge have a casting vote because what they register in their evaluation report will influence the political decision makers. It may be noted that high dignitaries may impose their favourite product by placing their own staff within the technical evaluation committee.

The first institutional filtering will retain a sample of three to five competitors. The discussions on the product specification then start; they may last up to one year.

The economic negotiations phase follows the technical selection. Bargaining resumes and the objective then is to obtain support by the exporting authorities, who will provide access to export credits and insurances.

Source : « Marchands d'armes », Jean de Tonquedec avec Jérôme Marchand, Flammarion, 2003, 355p

1.3. Other risks in relation to tendering

Ignorance of procurement procedures: although contrary to the regulations in place, procuring entities may ignore the tendering procedures. This can be due to a lack of knowledge, but it can also be a deliberate decision to avoid due procedures and rules of fair competition. In the absence of announced procurement contracts, information about the contracts can only be obtained through audits, competitors or citizens.

Confidential bid information: Experts noted that in principle, the release of confidential information is regulated. Confidential information may for instance relate to the tendering procedure, the evaluation criteria or the oversight process. Of course, bid information or documents pertaining to transactions, business, technical or financial structures may also be secret and should thus be handled with care and not released to competitors. It was noted that little attention is actually paid to the information that is released. Since confidential information dealings raise bribery and corruption opportunities, experts suggested that further attention be given to where, when and how information is disclosed.

Procurement complaints mechanisms are destined to bring forward possible violations of procurement procedures. While these procedures are generally very useful, they can also be misused. For instance, companies can file unfounded complaints to delay the process or harm competitors selected for the attribution of the bid. Indeed, the submission of a complaint suspends the competition and delays the contract until the complaint has been processed and reviewed. Experts stressed, however, that corruption is far more frequent when no mechanisms to report corruption exist.

Note

1. See also "Inventory of Mechanisms to disguise corruption in the bidding process and some tools for prevention and detection " in "Fighting Corruption and Promoting Integrity in Public Procurement", which contains the proceedings of the OECD Global Forum Governance Conference held in November 2004.

Chapter 2

Vulnerabilities Relating to Project Size, Sector or Tendering Administration

Deficiencies and weak governance triggering corruption may be more severe for projects of a certain size, within certain sectors and markets, contracted by specific agencies or countries.

2.1. Contract size

Experts noted that there exist a multitude of examples of corruption in large public procurement projects. They also acknowledged that many of the attributed contracts are based on a collegial decision, sometimes involving even a selection commission. This raises issues of integrity and control (see below).

Procurement authorities frequently subdivide projects to ensure that the different parts of a project fall beneath the thresholds that require calling for public tendering or publicity. This gives the appearance of various small contracts when, in fact, it is a single large project.

Experts suggested setting threshold levels and trying to "harmonise" thresholds. It was acknowledged that this is a difficult task because thresholds at an inappropriate level may not capture misdeeds and could possibly bring the tendering system to a halt. Nonetheless, it was stressed that unless there is clear knowledge of what the thresholds are, best practice will not be achieved.

2.2. Sector risks

The energy sector, exploitation of the mining resources, major construction or infrastructure projects, telecommunications and the arms sector are identified as particularly prone to corruption, although it is undoubtedly also a severe problem in other sectors.

The sectors identified as vulnerable combine various aspects which may lend to bribery. It was noted that vast, highly centralised and capital-intensive new projects give decision-makers opportunities to reap hidden commissions, exert bureaucratic control and acquire political prestige.

It is also noteworthy that the abovementioned sectors or works have a strong capital intensity, involve new and often high technologies, call for sophisticated materials and are characterised by economic rarity. This means that projects are usually large and their occurrence is rather seldom, if not unique. This makes cost assessments and comparison difficult. An additional distinctive feature of infrastructure and construction projects is that they involve network activities. Such projects build on the intervention of many actors calling for numerous skills, thus different teams and competencies are involved at various project phases. The complexity and magnitude of projects combined with difficult cost assessments provide for opportunities to hide bribes through inflated prices which can be blamed on other factors. Certification of these works would be essential. However, concealment is often possible due to information asymmetry and lack of transparency of such projects. Government involvement as well as frequent support by institutional investors is noteworthy in major international infrastructure projects.

According to some experts, the arms sector is particularly susceptible to corruption. Arms dealers are considered to be operating in a "*buyer's market", i.e.* production capacities are higher than demand. Overall, legal exports are scarce. Long periods of low levels of exports are punctuated by short hyper-active periods. Arms prices are generally unknown and similar or identical products may be sold at a variety of prices, leaving multiple options for building commercial facilities into a contract. The market lacks transparency and has limited democratic supervision. Tenders are restricted since companies are classified for "national security" reasons[1]. This certainly acts as a shield against scrutiny.

Corruption is less publicised in health and education, particularly because dealings involve smaller-size contracts. However, this does not mean that these sectors are free from corruption. In fact, when combined, corruption in those sectors can result in the diversion of very significant amounts of money (see also 2.1 Contract size).

Services are also susceptible to corruption, as there exists a great deal of subjectivity and discretion in these industries. Consultancy services for technical evaluations of tenders or assessments of competences and experiences easily lead to single source tenders on the basis of the argument that the preferred vendor has been involved before or has gained knowledge of the organisation and its particular problems etc.

2.3. Other areas at risk

The cases also illustrate that, mirroring the corruption culture on the industry or vendors' side, a culture of corruption can develop and be maintained over years in certain public administrations. Indeed, it would seem that a corrupt system can be operational over many years despite the knowledge of many members of the business world, the public service and the supervisory organs.

While public administrations of all countries may lack integrity, some countries are more at risk than others. The World Bank, for instance is of the view that certain practices are likely to develop in circumstances combining: (i) a lack of rule of law; (ii) powers concentrated in the hands of a few government officials; (iii) absence of fiduciary checks and balances; and (iv) an isolated environment. This set of circumstances led the World Bank to revisit its definition of fraud and corruption, and to include "coercion"—a form of misconduct closely related to extortion.

Risks are also linked to countries that offer guarantees of obscurity, confidentiality and banking secrecy combined with a lack of available customer information regarding deposit and transfer funds. Such countries may also provide anonymous numbered accounts which belong to companies or corrupt officials, to a political party or an intermediary society.

Note

1. This is a valid exception under both the EC Directives and the WTO Government Procurement Agreement (GPA).

Chapter 3

Links to Other Offences

The ways in which the actors organise a bribery offence illustrates the complexity of such acts and the frequency of associated malpractices and crimes (see also Part II on ways to organise the quid pro quo). Procurement can indeed be tainted by bribery and other crimes leading to projects which are uneconomic, unsuitable, initially over-priced and subsequently costly to maintain. However, although the overall impact may be similar, these other crimes and misdeeds are distinct and must be differentiated. Some of the crimes are well-known and experts called for further analysis of their link to bribery and corruption, with a particular emphasis on how to unmask corruption by uncovering other related offences.

Money laundering is frequently associated with corruption and bribery. Slush funds are frequently used to collect and distribute the sometimes enormous amounts of money necessary to engage in corruption agreements. In their most basic form, such funds may consist solely of cash. In more sophisticated methods, they are managed through bank accounts generally situated in other countries, preferably in offshore centres ensuring secrecy of the accounts and the beneficial owners. Management of the accounts by a trustee will disguise the system further. To ensure concealment, assets in the slush fund are acquired secretly. Hidden funds, which are often huge, give rise to a parallel financial economy as related transactions are not recorded, or falsely recorded, in the balance sheets (this again links up to accounting crime or organised crime). Experts stressed that the discovery of slush funds following the payment of a bribe may trigger the discovery of other bribes.

Tax evasion is also associated with the briber frequently declaring the expenses as a deductible business expense. This, in turn, may involve accounting crimes.

Accounting crimes**,** including the falsification of books, records and accounts are methods used to hide funds. Most frequently companies will issue and record false invoices to conceal improper payments. False invoices are used for sales of goods and studies. Falsification in the sales of goods

can consist of an increase in the number of items sold, an increase in the unit price or modification of product quality. Falsifications in studies may include an increase in one of the parameters that determine the cost of a study (*e.g.* work carried out by the firm's employees, work sub-contracted to a third party, machine time, travel expenses, secretarial costs, copying, binding, etc.).

Fraud is most common and experts are of the view that when there is corruption there almost always is fraud. Suppliers may pervert the truth through intentional false and deceptive statement of facts. This misrepresentation will allow the supplier to obtain public contracts to which he is not normally entitled. For instance, there can be fraud in the declaration of facts or in the invoices. Bribery normally involves a degree of fraud – a project will appear from the outside to have been won on a genuine and legitimate basis. While fraud does not necessarily involve bribery, many acts of deception may need an act of bribery in order to complete the deception. One form of fraud is the secret collusion between bidders during a tender.

Collusion is a joint effort by potential competing suppliers to maximise their profit. Collusion in public tendering processes can involve foreign as well as domestic suppliers, and can occur with or without the presence of corruption. The most common collusive practice in public procurement is bid-rigging, in which firms co-ordinate their bids on procurement or project contracts. They may agree to submit common bids, thus eliminating price competition. Alternatively, firms may decide which firm will submit the lowest bid and agree to rotate in such a way that each firm wins an agreed number or value of contracts. Sub-contracting to a losing bidder may be used as a compensation mechanism. Indeed, the losing firms often have a central role – they may be witnesses or participants.

Political party financing was identified as a very serious problem area associated with corruption and bribery. Examples of corruption in public procurement associated with political party financing have been identified in many countries around the world and public procurement is certainly a means by which political parties divert public funds illegally to finance themselves. Corruption can be seen to enter the political scene in several cases. Politicians may use their powers in view of establishing networks seeking control over sources of rents provided by public procurement. Once the network group obtains access to the administration, it may then put in place its own persons. Resources levied are then used to favour political parties. Bribes or kickbacks do not necessarily involve personal enrichment. Experts noted that corruption in public bidding and within public administrations may reflect a wider corruption phenomenon. Corruption in

public markets may lead to a debate on the transparency of political party financing, and *vice versa*.

Conflict of interest occurs when an individual or a corporation (either private or governmental) is in a position to exploit his or their own professional or official capacity in some way for personal or corporate benefit. Experts noted that many cases of corruption in public procurement seem to involve conflicts of interest. A common form of conflict of interest is self-dealing; in such cases, public and private interests collude and an official may, for example, involve privately held business interests in the contract. Another common form of conflict is the involvement of family interests. In such case a spouse, a child, or another close relative is employed (or applies for employment) by the contractor, or goods and services are purchased from such a relative or the firm controlled by a relative.

Organised crime, blackmail and ***other misdeeds*** frequently arise in connection with corruption. They are usually damaging far beyond the direct results of bribery.

Box 4. **Bribery and other crimes ***

Bribery, as defined in the OECD Convention, differs from other criminal and/or civil offences, such as conflicts of interest, misappropriation of public funds, collusion and breaches of public procurement regulations. Examining definitions of bribery in non-legal terms allows us to explore grey areas and analyse the relationship between bribery and other forms of fraud.

Breach of public procurement regulations

Breaches of the rules of procedure for public procurement contracts can go hand in hand with bribery. However, a breach of the regulations does not always involve bribery. In the case of bribery, the company gives or offers an undue advantage to a public official who awards the company a contract. However if the public official fails to comply with a procurement regulation without seeking or receiving an advantage, there is certainly fraud in the process of awarding the contract, but not bribery.

What other reasons might there be for fraudulent conduct by a public procurement official? Explanations might include the following, although this list is by no means exhaustive:

- Ignorance on the part of the procurement official (who does not know that he or she is breaking the law): in some states ignorance is no excuse, even for minor public procurement officials as no one is deemed ignorant of the law; however, ignorance is often taken into consideration when deciding what penalty will be applicable to a government procurement official.

Box 4. **Bribery and other crimes** (cont.)

- Negligence on the part of the public procurement official: daily routine, particularly if there has been a change in public procurement rules, or laziness, particularly if rules have become more complicated, can lead to breaches. For instance, it was pointed out that in France three reforms were brought in between 2000 and 2006, each involving changes to procedures and thresholds.

- Acting in the interest of procurement efficiency, especially in cases where the regulations are complex: either because the public procurement official does not see the necessity of a rule any more (insufficient training), or because of problems with the rule itself (needlessly complex and costly to implement).

- Protectionism or localism (regional or national) or the resolve to protect local jobs in the short term, which is prohibited chiefly under community regulations.

Regulatory fraud in the award of public contracts is always a warning signal that bribery may be involved. Therefore, some consider localism to be a form of bribery. Indeed, when a contract is awarded to a local company in breach of the rules of procedure, as a general rule the public official concerned expects to be re-elected--this would be sufficient to consider the agreement as corrupt.

One may note that the electoral « pay-off » is not directly for the public official; it is the result of the influence of saving local jobs on public opinion. The question then is, at least as concerns the offence of bribery under the OECD Convention, whether localism is punishable as bribery, although prohibited by the rules applicable to public procurement, thus constituting grounds for cancellation of the procurement contract.

The reverse can also apply. A corrupt contract might not breach any of the rules of procedure for public procurement; either, because there are no rules of procedure, in which case there are no rules to break, or because the rules are very flexible, allowing face-to-face negotiations and legally opaque arrangements.

It should be noted that this refers to specific rules of procedure, not general principles governing the award of public procurement contracts. If such principles state, for instance, that the procedure for awarding public procurement contracts must ensure that potential bidders are all on an equal footing, then any act of bribery is a breach of the (substantive) rules for public procurement contracts.

Abuse of public office for private gain

Quite clearly, bribery is always an abuse of public office for private gain. However, the reverse is not the case: some abuses do not constitute bribery. For instance, the misappropriation of supplies for one's own benefit, without the knowledge of the supplier, is misappropriation of public goods, not bribery.

Equally, if a public official awards a contract to a firm which he owns, that is a case of conflict of interest, not bribery. It may also be an instance of anti-competitive practice or favouritism.

*Mr. Guillaume Daieff, Magistrate of France, Chair of the *Ad Hoc* Expert Meeting.

Part II

Analysis of the Actors Engaging in Bribery and Typical Corruption Agreements

Corruption may be the result of acts by many. Knowledge of the actors involved in bribery and the understanding of their underlying motivations, as well as the means and techniques used to carry out corrupt agreements may assist in determining the nature of the criminal acts and the criminals' modus operandi.

This part aims to identify those persons – natural or legal – who may be involved in a bribery offence. Various categories of actors can be identified. There are those who normally qualify as "briber" and "bribee". However bribery and corruption are frequently multi-person crimes, involving "intermediaries" and "third party beneficiaries".

Chapter 4

Parties Involved in Bribery

4.1. The Briber

Experts noted, based on the case samples and their personal observations, that there is not a single type of person responsible for bribery. Rather, all sorts of people as well as legal entities may act as "briber". Cases illustrate bribing by project owners or contractors, their employees, subsidiaries[1] or associated companies[2], joint ventures and consortium partners, sub-contractors, agents, consultants and suppliers.

Corruption may be the act of a single person operating in his or her personal interest. Employees, representatives or associates, as well as intermediaries or agents, may engage in corruption practices without the knowledge or approval of the project owner or the company for which they carry out a task.

Frequently, however, the briber engages in a deliberate, approved and arranged act. If the project owner does not execute the bribery himself, an employee or a person acting on his behalf will take action. In such cases, any one of these people may also become involved. They will do so in full knowledge and in a planned and organised way.

It was stressed that most of the time a person will bribe a public official upon instruction, and on behalf of, a legal entity. The latter arranges and puts various elements of the act in place, in particular the promised or offered advantage. The legal entity may also organise the transfer of the advantage to the bribee (see below). Experts questioned whether situations occur in which a person is instructed to execute acts without full knowledge of the criminal nature of his or her intervention.

Bribers are frequent in domestic procurement as the examples in Part III illustrate. However, bribery and corruption risks were reportedly even higher in transnational business transactions. Various reasons for this have been suggested. First, thresholds of vigilance may be lower abroad.

Secondly, companies may have complex business and corporate structures which make the identification or traceability of bribery difficult. Large multinationals, for instance, are incorporated in different countries and have thousands of employees worldwide. Controls and identification of bribery transactions may also be difficult when diverse business practices and cultures operate simultaneously in companies. This may result in cases of mergers and acquisitions. Finally, certain companies specialise in activities or regions particularly prone to corruption, where paying bribes is part of the corporate culture.

Experts recommended strong vigilance. In their view any company could become involved in bribery and corruption.

4.2. Intermediaries

Experts referred extensively to persons acting on behalf of the briber and stressed the need to pay particular attention to these persons, be they actual persons or legal entities. Several different sorts of persons can act on the behalf of the briber, such as intermediaries, agents, consultants as well as subcontractors or joint ventures. Intermediaries are also called sponsors or middlemen, particularly in connection to bribery. For the purpose of this report, "intermediary" encompasses all these potential actors.

Companies frequently call upon persons to act on their behalf, in particular in international business transactions. These persons have various important functions. For instance, they may be hired to steer contracts from the company to the purchasers.

Companies can generally refer to intermediaries of their choice, with the intermediary being established domestically or abroad. Certain jurisdictions may however impose specific constraints on business operations within their markets. For instance, some countries require the employment and intervention of a local agent for any business transaction within the targeted market. Other countries formulate further mandatory prerequisites to any involvement in the local market, such as local content requirements, local investments or the creation of a joint venture with a domestic partner.

While both natural and legal persons can be intermediaries, natural private persons frequently act as intermediaries. When intermediation is a local business requirement, public officials or persons associated with the public function may operate as intermediaries. Experts discussed whether barristers and counsellors could be considered intermediaries. They noted that although their involvement is not required, barristers and counsellors are transmitting bid offers. Examples of legal persons intervening as intermediaries include consulting or engineering companies, or joint ventures.

The involvement of an intermediary may be perfectly legitimate, with the intermediary providing a real service. For example, intermediaries may be hired to help clients understand a market or a country; they may also sell their specific skills or technical knowledge in relation to a contract. They can generate interest or create a need among potential clients for specific goods and services and recommend the most appropriate equipment or techniques.

However, intermediaries may also be hired to help conceal bribery and corruption. In fact, persons seeking a business advantage through a bribe payment will frequently hire an intermediary. While the intermediary may be identified and hired by the briber, in certain countries or sectors the bribee will designate or recommend the intermediary.

The intermediary would typically have an influential position in a market or a country. The intermediary may also have good contacts with persons involved in the attribution of a contract, for example, persons who exercise discretion or have influence on the bid evaluation. Consultants appointed to evaluate the development options of a particular sector are generally aware that their customers may find it beneficial to promote investments in new installations. They also know that the evaluations of environmental impacts should not block political support for a project. Experts acknowledged that an intermediary may transmit both the briber's offer to the public official as well as the public official's solicitation requests.

The briber who appoints an intermediary to conceal a bribe generally seeks to obscure his or her own identity and expects the intermediary to hold the bribery act and purpose at an arm's-length distance. The employer expects the intermediary to reduce the potential frictions and misunderstandings as well as to establish hidden financial circuits in order to prevent judicial complications. In case of serious legal or judicial difficulties, the intermediary takes responsibility for the act(s) and is expected to remain as discreet as possible.

Intermediaries more frequently intervene in export markets. Companies unfamiliar with foreign market may feel insecure. Not knowing how to react to or act upon intermediaries, they may tend to believe that intermediaries can help them in their business activities. Experts suggested that there may also be a deliberate wish not to see or understand what is happening abroad. Of course, as mentioned in the above section, intermediaries may be involved in corruption tainted transactions without the employer's knowledge.

Experts stressed the difficulty for law enforcement authorities to determine the reality and the legitimacy of intermediaries' involvement and

whether the associated fee is justifiable. Intermediaries hired to mask a bribery-tainted transaction will generally have the appearance of providing a legitimate service. For instance, the official duty may be a consultancy and the contract provides only a vague job description, but the actual function of the intermediary may be organising the bribe and possibly also the kickbacks[3]. Law enforcement experts stressed that investigating these types of situations is very difficult as it requires a lot of information from abroad.

Joint ventures that mask bribery were identified as particularly problematic. A case was mentioned in which a joint venture had been established in a client's country to arrange a bribe payment to the country's president. The joint venture was financed through a refundable loan. The investment by the joint venture led to the payment of a dividend well above the repayment of the loan. The differential between the reimbursement of the loan and the dividends amounted to the bribe payment, which was very difficult to identify.

Experts questioned the application of the OECD Anti-Bribery Convention to intermediaries operating in international markets. They discussed whether intermediaries would be considered active bribers, although they are executors or whether they would be falling under "trafficking in influence" provisions. They also questioned whether this issue is addressed in a common manner by all countries.

Another concern is how to deal with countries' requirements that certain companies or intermediaries intervene in the transfer of funds. Experts considered whether these requirements, being obligatory within a country, may be questioned in the case of an investigation.

4.3. The Bribee

For the purpose of this report, the bribee is a person who carries out a public function and accepts, directly or indirectly, a bribe. While neither bribery between private entities nor the active bribery of private entities is addressed in this study, it should be acknowledged that private persons (natural and legal), may act on behalf of public authorities. In this case, the private person would be associated to a public official, the bribing of whom is considered a crime pursuant to the OECD Anti-Bribery Convention.

The bribee is often determined by the magnitude of the contract and the type of business involved. In the cases submitted, some bribees held an elected public function. However, most were public officials or persons carrying out or executing works for a central or local state, an administration or a public service, either in accordance with statutory rules or in the framework of a contract.

In the arms sector, for instance, it seems that high level politicians (monarchs, representatives of the ruling dynasty, presidents, prime ministers, members of government) are targeted. Parliamentarians in key positions as well as persons supervising acquisitions of the army (presidents and reporters of the technical commission or the financial commission) will also be approached by the briber. The next level would be high public officials controlling the technical aspects of public orders. Finally, executing officials in charge of the technical evaluations would also be targeted.

Although the briber – usually a private person – is considered to commit the active offence, it was acknowledged that the bribee may be at the origin of a corrupt transaction. Indeed, government officials may solicit bribes. For instance, senior government officials may notify a project owner that he or she will only be awarded a contract, or receive a payment, upon the payment of a bribe. A junior government official may refuse to issue a visa unless he/she receives a bribe.

Experts questioned whether domestic or foreign officials would act similarly, in particular in relation to bribery in public procurement. On the basis of the cases provided, no difference could be determined either in the methods used to organise corrupt transactions or in the treatment of officials.

The World Bank and the Inter-American Development Bank were reported to consider acts by their international staff to be no different from those carried out by domestic public officials. Consistent treatment is justified since both types of staff have the authority to assign public funds. Directives adopted by the Commission of the European Union foresee equal treatment of domestic and international officials for the active and passive corruption offence as well. This being said, international officials have immunities which may be difficult or lengthy to lift.

The main concern raised by the experts with regard to the bribee was the determination of who would fall under the Convention's provisions. As cases illustrate, bribees may be elected for a certain mandate, or they may hold an indefinite public contract, or they may have a statutory and temporary contract to execute a public function. They may also be working in the context of a private entity that carries out an activity of public utility. Experts expressed concern that jurisdictions may have different definitions of the bribee.

4.4. Third party beneficiaries

Bribes are not necessarily directly addressed to the bribee. They are frequently transferred to designated third parties. A wide variety of natural or legal third parties was identified.

Natural persons acting as third parties can be family members or relatives of the bribed official. Natural persons with whom the bribee shares common interests may also be designated to receive the bribe. Further, barristers and counsellors can act as third parties. Bribes are also frequently directed to political parties; and a multitude of legal persons such as fiduciaries, banks, fictitious companies or companies offering services to hide the proceeds of corruption may be designated as the recipient of a bribe (for example enterprises may produce market studies which already exist or studies without real content). Beneficiary companies may be owned by the bribee or family members. It may be noted that the direction of the bribe to such companies is not to be confused with conflict of interest situations where the agent of a contracting authority attributes the bid to the company owned by a family member who executes works (see main section of the report).

Third parties may certainly intervene voluntarily. However, some may have received orders or been delegated powers which they do not necessarily understand or control. This was illustrated by a case where a city mayor had created selection committees to attribute public contracts. A subsequent investigation determined that the selection committee had not followed the procurement rules in awarding contracts but instead had followed the mayor's recommendations. Selection committee members were convinced that they had acted adequately by following the advice of the mayor, the highest ranking official in town!

Finally, although competitors are not normally referred to as third parties, they may be involved in corrupt transactions. Indeed, the briber may have reached side-agreements with one or several competitors in view of organising the attribution of the public tender. This may lead to payments of bribes both to a public official and designated competitors. In such cases, one generally confronts two crimes, corruption and collusion.

Enhanced understanding of the impact of the link between the bribee and third party beneficiaries was judged to be key. Experts noted that they were uncertain as to which relations could be linked and fall under the Convention's provisions. Experts also wondered whether and how to identify, on the basis of existing instruments, the public agent through the veil of the legal personality. For instance, public agents may create fictitious companies, and the fictitious nature of the company would need to be demonstrated during investigations.

4.5. Others involved in international procurement contracts

Domestic or international governmental institutions may be involved in transnational procurement transactions. These institutions may even be at the origin of the transaction or instrumental for the realisation of a project. The absence of their involvement may create a challenge for the execution of projects. Their role may be key or complementary to that of the purchasing procurement authorities. Indeed, funds for major foreign transactions essentially stem from international development banks and commercial banks with government financed expert credit agencies ensuring the risks of the projects.

In light of their financial support to a country, Multilateral Development Banks (MDBs) have an important role and influence in public procurement and project realisation. They also have a decisive impact on the companies that carry out the contract. Providers may, unbeknownst to the MDB, corrupt MDB officials or consultants responsible for project evaluations.

Export credit agencies of industrialised countries usually provide export credit guarantee coverage to domestic companies involved in major foreign public procurement contracts. Often, the conclusion of a procurement contract depends on the credits, financial guarantees and facilities provided by these institutions. Temptations, on the part of contractors, to influence export credit personnel in charge of the attribution of financial support and guarantees may be high.

Official development assistance by development agencies also plays a key role in the financing of developing countries' development and infrastructure projects. Their staff may be targeted by competitors who wish to gain support for their projects through bribes.

Most agencies that offer funding or coverage from public resources allow rejection of claims in cases of bribery. The MDBs are also active elaborating a joint strategy to prevent, detect and sanction bribery by contractors.

Notes

1. A subsidiary company is normally one over which another company exercises control, by owning more than 50% of the shares, or controlling more than 50% of the votes.
2. An associated company is normally one in which the other company owns less than 50% of the shares, or controls less than 50% of the votes.
3. In certain circumstances, actions are indeed taken to ensure that parts of the bribe payments come back to the briber (*i.e.* are kicked back).

Chapter 5

Content of the Bribery Agreements

Private and public actors will develop different logics of action for seizing corruption opportunities. This chapter seeks to assess the motivations and expectations for engaging in bribery and aims to determine how the parties involved try to hide and organise the bribery agreements. First, the briber's perspective is described and then that of the bribee.

5.1. Viewpoint: the briber

5.1.1. Motivations to engage in bribery

A key question when analysing a corruption agreements relates to a person's motivation to engage in such a severely sanctioned crime.

A briber generally expects something in return for the bribe. Ultimately, the briber hopes for a better outcome than the one that could be expected without the bribe. Bribery acts are thus organised and planned for a calculated profit.

Bribery is rarely a single act. Many cases are illustrative of bribery schemes that take place over a period of time, often over many years. Longer-term schemes aim at securing the exchange after both parties are tied. This means the briber may not obtain all he or she expects at the beginning of the agreements but secures greater gains once the relation is well-established.

Experts highlighted that the briber also feels he or she will gain a personal advantage. If the project owner wins the contract, that will be to his or her direct benefit. An employee winning the contract for the benefit of the company may see increases in remuneration and bonuses, or improved chances of a promotion. The briber is often the person, or is close to the person, who decides on the allocation of financial resources. This position may increase wealth and power.

The question was raised whether the quality of the products traded has an impact on the willingness to bribe. For instance, will the propensity to bribe be higher among suppliers of uncompetitive or less competitive products? Corruption by parties who deliberately intend to gain a bid despite the low quality of their products or lack of competitive advantage certainly exists, as do bribes to obtain additional, unjustified compensation.

Experts acknowledged that there are circumstances where corrupt practices aim at "levelling the playing field," *i.e.* a contractor feels compelled to offer a bribe during a tender, believing that the market is distorted and competitors offer bribes. In such cases, the briber may offer quality products that could be expected to win a fair and transparent tendering award.

Finally, in some cases bribery may result from solicitation or extortion. For instance, a contractor may be informed that a contract that has already been executed will only be remunerated upon payment of a bribe.

5.1.2. Expected returns

To win a procurement contract, parties may have different needs. Bribery payments may be made to obtain due or undue advantages, depending on the sector and the market in which a party operates as well as the procurement process.

Parties interested in establishing and maintaining long-term relationships will bribe a pubic official to secure future interventions to the party's benefit.

Most obviously, a party gives or promises to give a bribe in exchange for a contract. However, if a party operates in a complex market where preparation time is long – such as construction, heavy infrastructure or the arms sector – bribes may be promised or paid at different stages. For instance, they can be used to influence the tendering process and influence the design and decision-making stage of the tender. Bribes can also be promised or paid in exchange of information. For example, information on the specifications of the tender, the products or the prices submitted by the competitors carries a high price and certain industries and sectors have developed well-remunerated information networks.

As mentioned above, the attribution of major, international procurement contracts frequently depends on credits and other payment facilities. The supplier may seek a vast range of institutional support from politicians, high public officials, diplomats and bankers. Bribes and kickbacks are used to garner support for the project by officials operating in the supplier's home country.

5.1.3. Advantages offered, promised or given

The briber may directly or indirectly offer, give or promise to give various advantages in exchange for what he or she wishes or expects to receive.

While advantages are usually of value, they need not be pecuniary. The cases submitted illustrate that a range of tangible benefits may be given. For instance gifts, travel, entertainment, payment of domestic expenses, works in private homes, computers, jewels or expensive watches, free shares in companies and sexual services are advantages frequently provided. However, money is always of interest because it is rapid, simple and practical. Also, the bribee need not wait for the bribe to be valuable as would be the case for stamps given to a stamp collector, for instance. Money may be given in hand; but money is most frequently transferred to the official's account or an account designated by the official (*e.g.* a third party beneficiary). The account may be located in a foreign bank, perhaps in an offshore centre. Bribers may also give the bribee or a third party free disposal of a credit card on a company's account or offer free shares in a company. Finally, a case was presented where the bribe was organised via a loan that was never reimbursed. The types of arrangement in these last two examples are considered particularly difficult to detect and investigate.

Offers are made progressively, so that the value of gifts or advantages gradually increases as parties gain certainty about their mutual intentions. On a contract basis, bribery payments may occur at different stages of the procurement process. Generally it would seem, however, that significant payments are made after the contract is fully awarded, executed and paid. The recipient of the contract may be unwilling or unable to afford the bribe payments beforehand.

Bribes may reach extremely high amounts in major international procurement contracts. Cases illustrate that bribes may amount to up to several million US dollars or euros, and can represent a substantial part of the value of a contract. The bribe will be determined by the amount of the contract, the nature of the material sold, the situation of the purchasing country and expectations regarding kickbacks.

Expressed as percentage of a contract, bribes in transnational business may range from 5 to 25 per cent or even more. It would seem that for military supplies the bribe may reach 30 per cent in the Gulf region, 10 per cent in Africa, 5 to 20 per cent in Latin America and 5 per cent in Taiwan. Kickbacks seem to play an important role in that sector; they also seem to be a common practice in major civil infrastructure projects such as nuclear power stations, refineries, water treatment, waste recycling, transport projects, etc.

Experts underlined the need to determine what may or should be considered acceptable with regard to enterprise relations. Some countries impose value limits on gifts. But it was stated that gifts often precede pecuniary relations. Thus, do banks that provide financial support take these practices into account? Are these practices considered normal? Are they part of formalised standards? Or are they unspoken or prohibited norms?

5.1.4. Organisation of the bribe payment

The payment of a bribe or a kickback will frequently, although not always, be an institutional act, whereas the receipt of the bribe will often be a personal act (*i.e.* for the personal benefit of the recipient).

Experts shared the view that the person paying the bribe rarely acts alone. They suggested that knowledge by senior management and the company's board may be assumed for high value transactions. It can also be presumed that the briber's employer organises the bribe as the contract awarded will benefit the entire company.

Multiples methods are currently used to hide bribes. These methods include: cash payments, payments disguised as consulting fees, remuneration of false services, overpayment of goods and services, subcontracting, delivery of materials for the private benefit of an agent, payments to a front company owned by the bribee or to the bribee's hidden accounts or to a third party beneficiary.

Corrupt practices can be carried out by an owner, an architect, an engineer, a contractor and by sub-contractors or suppliers down the contractual chain.

When an intermediary is appointed, the latter generally has contacts with key local representatives and public procurement officials. The intermediary is paid a percentage of the contract upon contract award. The intermediary keeps a part of the payment as his remuneration and passes the other part of the sum on to the local representative in return for winning the contract. The bribe will be hidden in the formal agreement that mentions some key tasks for the intermediary to carry out as well as the retribution for obtaining the contract. The scope of work will often be false or exaggerated and the size of the payment significantly in excess of the value of any legitimate services the intermediary provides. The ambiguity of the contract will allow the intermediary to organise and remunerate the different officials involved in obtaining the contract or the related information. The intermediary may also be in charge of kickbacks.

In the beginning, the intermediary may invite the official for dinner and provide other advantages to raise the official's interest. Upon

commencement of the negotiations, the intermediary may enhance mutual understanding and prevent disagreements. The intermediary generally carries out and handles the discussions relating to the determination of the advantages. Upon conclusion of the contract, the intermediary distributes the respective advantages among the different personalities and officials involved.

In some rare cases, the intermediary may enable or establish direct contacts between the briber and the bribee. Often though, contacts will remain indirect and the intermediary will be the channel enabling the hidden and opaque transfer of the bribe. In certain cases, for instance the Lesotho Highlands case, the briber and the bribee had well-established contacts. They nonetheless hired an intermediary to disguise the corrupt acts and relations between the main parties.

Various examples illustrate that a contractor may also channel a bribe through a disguised sub-contract arrangement. For example, a sub-contractor might agree to provide services to a contractor in return for a certain payment, but in reality he or she will not provide these services or provide services of a vastly lower value than the price agreed. The balance of the payment can then be passed on by the sub-contractor to the relevant party as a bribe. Another method that allows the contractor to pay bribes by using a sub-contract arrangement is to engage in a contract with a front company owned by the bribe receiver. In such case, goods and services purchased by the contractor may not be needed. The contractor may also over-pay those goods and services, or there is no exchange and the bribe is organised through false billing.

Recently more sophisticated arrangements have developed. Contactors may bid for a contract as part of an international consortium or a venture of several companies from a variety of countries. International joint ventures may arrange for the agency agreement to be executed in, and the commission paid from, the country least likely to discover the bribe. Similarly, a contractor can be part of a multinational group. The bribe may be organised by a subsidiary of a country unlikely to detect the act. The subsidiary will be reimbursed by the contractor through inter-company charges for false services, or services of inflated value. Finally, a joint venture arrangement may be done with a third party close to the bribee and the compensation of the participation of the joint venture includes the payment of a commission. This case may probably be associated to another type of bribe i.e. that of the free attribution of shares by the contractor to the bribee or a designated third party beneficiary.

As money is often transferred, experts are of the view that companies must be well organised prior to being able to spending large amounts. In

order to pay bribes, they will probably have to engage in false accounting and establish off-the-books accounts, *i.e.* so-called slush funds. These funds are frequently opened in financial centres – often offshore – where secrecy is granted thanks to domestic bank and tax regulations. Furthermore, examples illustrate that the transfer of funds through various financial centres or the investment into complex financial products help hide both funds to be used as bribes, and the proceeds of bribery crimes. Indeed, the Elf case inquiry has shown that a substantial part of the commissions were kicked back either to bank accounts of the firm's key managers or to the company's off-the-books accounts[1].

A key question is whether the briber can be identified, or more easily identified, in specific stages of the procurement process, *i.e.* during the preparation of the bid, during contract award or during the contract execution? Also, do bribes at different moments correspond to the same needs and are the bribers the same for all tendering techniques?

5.2. Viewpoint: the bribee

5.2.1. Motivations to engage in bribery

Determining the motivations of the officials for becoming involved in bribery agreements is as important as understanding what drives the conduct of the briber. Civil servants who engage in corrupt transactions generally take a high risk. If uncovered, they may be sanctioned, lose their professional status and be disqualified from employment. They may also lose entitlement to a secured pension as well as other benefits. Furthermore, the authority's reputation is at risk if it comes to be known that suppliers can bribe the contracting authority.

Experts questioned the particular reasons that may prompt an official to accept a bribe and suggested that the cases reveal distinct patterns.

Greed was considered a major driving force. Officials accepting to take part in corrupt transactions may perceive their remuneration as insufficient for the job they do. They may also feel that their salary does not meet their personal consumption needs. An official may also confront financial difficulties and believe that bribery is a solution. The enrichment component entails preference for money that is relatively easy to obtain, transfer and hide.

Second, politics within the public administration may be a driving factor. Civil servants may wish to improve their personal position within the

administration's hierarchy. Aspirations to increase influence, power and authority will determine agents' acts.

Thirdly, the official may have a higher appreciation of his or her own job than the recognition of supervisors. The "frustrated" official who believes he or she is doing a good job and deserves a salary increase or a promotion may be tempted to seek recognition outside the administration. The official may feel appreciated by a supplier, not seeing that his/her professional position is the basis for the supplier to engage in that relationship.

Finally, there are a number of situations where officials have a connection to suppliers through their common interests and private activities, their friendships, family bonds, etc. These private connections may be strong and have an influence on the officials' acts.

Insatiability, aspirations for promotions, self-indulgence, or strong personal relations may be initial driving forces. However, experts stressed that they are not in themselves sufficient for the official to engage in corrupt acts. They considered that the official must also have the confidence to carry out the corrupt acts.

The official may base this confidence in his/her technical skills and the exploitation of information asymmetries. Indeed, the bribee will often have an excellent knowledge of the procurement rules and regulations, allowing him/her to engage in corrupt acts which he/she knows are unlikely to be uncovered. The official may also be aware of the administration's limited knowledge of either the exact costs or the precise technicalities of a project. In which case, it may be difficult for the procurement body to verify the applicable regulation and the official may use discretion in the application of procurement rules[2].

Experts noted that corruption in public procurement obviously raises issues in connection with administrative professionalism.

Examples of corruption in public procurement also lead to the more general question of the rules applicable to political party financing. In various countries around the world political parties have been observed diverting public funds, including through bribery in public procurement, to ensure incomes. In some countries, corrupt administrations are the reflection of a much wider corruption problem. In fact, the debate on transparency in political party financing is related to the transversal issue of corruption in public markets.

5.2.2. Returns in exchange for an advantage

This section mirrors the briber's expectation in return for an advantage (Chapter 5.1.2.). As described, the bribed official may duly or unduly assign or facilitate the assignment of a contact to a supplier. He may, for that purpose, also "sell" confidential key information.

In addition, it is worth noting that in certain circumstances corruption and collusion merge. In such cases, the public officials may be rewarded for (i) turning a blind eye to collusive tendering patterns; and (ii) releasing information that facilitates collusion. Procurement officials also sometimes intervene in the organisation of the market by requiring that the firm that is to "win" reaches side-agreements with other potential suppliers.

The involvement of competitors may lead to different types of scenarios. For instance, one expert mentioned having investigated a case where a firm admitted having obtained a bribe payment in exchange for a false bid.

Ultimately, it is essential to understand how the public official may attribute the due or undue advantage to the supplier. This is detailed in the first part of this typology.

Notes

1. Eva Joly, Est-ce dans ce monde-là que nous voulons vivre, p. 217, Editions des Arènes 2003
2. Information asymmetries may be exploited jointly by the supplier and the official or by the supplier only as the latter may have far more information on the real costs of a project than the purchasing authorities.

Part III

Preventing, Detecting and Sanctioning Bribery in Public Procurement

After having discussed the various characteristics of bribery in public procurement – the environment in which such acts can take place, the methods used as well as the actors involved and their motivations - experts considered ways to prevent, detect, investigate and ultimately sanction bribery which are reviewed in the following part.

Chapter 6

Preventive Measures

The bribee usually has personal reasons for taking steps towards corruption and carrying out related actions. While public authorities can probably do little to directly counter greed or other personal aspirations, they may put in place mechanisms to make corruption difficult and prevent this phenomenon from flourishing. Experts mentioned some key measures but did not elaborate or discuss them in further detail.

6.1. Public notice and transparency

Publicity and transparency are crucial for sound and open procurement practices. These principles also act as deterrents to corruption in public procurement. Equally, experts suggested that the lack of public notice and transparency create a haven for corruption.

Publicised and transparent procedures allow a wide variety of stakeholders to scrutinise public officials' and contractors' performance and decisions. This scrutiny, in addition to other mechanisms, helps keep officials and contractors accountable.

In designing rules and procedures, serious reflection must be given to clarify what kind of information is required to be disclosed, as well as when and to whom the information is made available. Nevertheless, enhanced transparency should not increase the scope for anticompetitive practices, which may consequently favour collusion and corruption among bidders. These and other related elements call for further debate by anti-corruption and competition experts, as highlighted during the 2004 OECD Global Forum on "Fighting Corruption and Promoting Integrity in Public Procurement".

Experts also brought forward the concern that transparency be maintained after contract attribution. They stressed the need that information on the beneficiaries be filed and that beneficiaries remain identifiable even

after the contract execution. France reported that the 2004 public procurement code makes it mandatory for public procurement administrations to list all beneficiaries of contracts valued above EUR 4 000. While the provisions still contain some deficiencies, it is considered an important and interesting step forward in facilitating investigations.

Finally, the variety of practices that are developing in several countries and regions in balancing transparency and other concerns may lead to some harmonisation concerns if conflicts are to be prevented in the future (see also below, D.3. International harmonisation and co-operation).

6.2. Training of procurement personnel

Training may apply to various aspects of the procurement process. Procurement personnel may be familiarised with the *rules and regulations* applicable to public procurement as well as anti-corruption measures.

Experts noted the importance for procurement personnel to be well-trained in purchasing techniques and in understanding of the importance of rules. To ensure that adequate rules are applied, training may encompass explanations of the usefulness and the reasons for the rules.

Training may also sensitise purchasing authorities and their personnel to the detrimental effects of corruption and the benefits of ethics for the contracting authorities and officials. Additionally, officials may sign *ethical codes*. Prosecutors consider that although internal codes do not necessarily prevent corruption, they may be useful during investigations as they help gain time.

Procurement personnel may be familiarised with *indicators of suspicion* that may alert them to the occurrence of corruption (some examples are listed in box below). Indeed, officials from within the public administrations are most likely to be in a position to observe behaviour that may indicate misdeeds. Training on the identification of these indicators that may signal bribery is therefore of primary importance.

6.3. Good practices

Experts also highlighted the need to make procurement authorities and procurement officials familiar with *best practices,* including for instance personal asset declaration, defining standards of conduct and adopting the "four eyes" principles in the bid selection and attribution as well as the rotation of staff in key positions[1].

Box 5. **Some signs which may raise suspicions of bribery**

- Unjustified and unexplained favourable treatment of a particular supplier from a particular contracting employee over a period of time, including number or amount of contracts awarded to a given firm or supplier
- Unjustified high prices and important price increases
- Low quality and late delivery acceptance by procurement official
- Unusually high volume of purchases to a single source
- Unusually high volume of purchases approved by a single procurement official
- Unnecessary or inappropriate purchases
- Recurrent and systematic rejection of firms who ultimately act as sub-contractors
- Procurement official accepting inappropriate gifts or entertainment
- Close relationship (including social) between the procurement official and the vendor
- Unexplained sudden increase in wealth of the procurement official
- Supplier has a reputation of paying bribes
- Commercial contracts different from the suppliers core business
- Intermediary charges high commission, claims special influence on buyer
- Unnecessary middleman involved in contacts or purchases
- High risk sectors or countries
- Procurement official has undisclosed outside business
- Procurement official declining promotions to other non-procurement position
- Procurement official acting beyond or below normal scope of duties in awarding or administering contracts
- Long and unexplained delays between announcement of the winning bidder and the signing of the contact (this may be an indication of the negotiation of the bribe)
- Frequent open or restrictive calls for tender that are inconclusive, ending in negotiated procedures

Experts recommended the establishment of incentives to seek out fraud or corruption within procurement authorities. The main criteria for evaluating the performance of a procurement agent are the rapidity of establishing a contract and the speed of obtaining the good or service.

Experts saw that those agents who completed procurements in a shorter time were regarded more highly than those who were slower. Dangers regarding corruption are inherent to this type of evaluation; increased focus on integrity and possible corruption should be built into the system.

The usefulness of certifications was highlighted. Certifying knowledge of the law is not only a preventative tool, but can also assist in detection and prosecution because it helps to prove bad faith, which is often hard to do. Certification facilitates establishing the intentional element of the offence.

Box 6. **United States' experience**

Amendments were introduced to the US procurement legislation following scandals involving intermediaries and consultant companies that were paid to obtain proprietary information on contracts.

Government officials participating in the procurement process must now:

1. certify that they have no knowledge of or did not improperly release procurement information.
2. attend trainings and certify attendance of those trainings.
3. provide financial disclosure requirements (to rule out conflict of interest). Since this is a voluntary effort, officials can of course withhold information.

Companies must also certify that they did not receive nor solicit procurement information.

These steps have been helpful to accredit knowledge and build cases regarding corrupt activities involving the improper release of procurement information.

Note

1. The OECD reviewed countries' good practices for promoting integrity in public procurement at the different stages of the procurement process. Interested readers may consult "Integrity in Public Procurement: Good Practices from A to Z", OECD, 2007.

Chapter 7

Controls

Establishing controls is deemed essential to preventing and detecting bribery and corruption. It was experts' view that investigations are difficult in the absence of controls or in case of ineffective controls.

7.1. Internal controls

Barriers against corruption must be established within the procurement administration. First and foremost, contracting authorities need to implement internal controls. It is the tendering authorities' responsibility to perform these controls and to have the necessary knowledge to do so. Indeed, procurement authorities and agencies know the administrative regulations and the internal system of administrative work. This understanding allows the verification of the legality of the performance of the public administration. Officers inside the public administration should be in charge of control functions and should be operating them effectively. This is not the role of investigators, nor do they have the adequate or sufficient knowledge and background to do it.

Internal controls may relate to the decision-making process and structure as well as to the procurement process itself. Analysis of the administrative organisation may give indications as to who makes decisions and how the projects can be designed, organised and manipulated. Control of the administrative organisation involves risk analysis of the top management as well as the administration that does the procurement.

Internal controls also relate to the verification of the procurement process. Experts reported on various checks at domestic level. The United Kingdom has designed a Gateway process whereby contracting authorities verify the tendering procedure by following a checklist to ensure everything is in good order. In the United States, the contracting officer drafts an affirmative decision prior to making a contract award. In this document, the officer confirms that he or she has examined the contract and has verified

the corporation's financial capability, previous performance, monetary situation and assets as well as confirming the absence of the corporation on any national debarment list.

Although these checks are important, experts noted a number of outstanding problems. Certifications are often inappropriately verified or not verified at all. Sequential checking may entail difficulties as this does not provide a complete overview of the process.

Box 7. **Organisation of the procurement process ***

In considering problems such as integrity breaches, corruption or fraud in public tender, one tends to look only at the actual procurers, *e.g.* the decision making, execution and payment. This is a problem as the procurement process is much larger: it is part of the whole organisation, in which the top management, the controller and auditor also play a role.

Top management is responsible for the entire operational management of an organisation, including procurement. Top management wants the systems to be arranged in such a way as to enhance integrity in procurement as much as possible. For this purpose, an administrative organisation and internal control report (AO/IC) will be drafted, generally by a controller. For the design of the AO/IC and the monitoring system the controller will obtain advice from the internal auditor. Therefore it is interesting to include the controller's and the auditor's vision on this topic. Ultimately, an independent supervisor will be appointed to monitor the implementation and compliance with the AO/IC.

The *controller* is responsible for the design and effective operation of the financial processes of the organisation. The controller draws up budgets, implements rules and provides financial statements. Furthermore, it is the controller who monitors whether the organisation complies with the (financial) rules. The task of the controller is to ensure that the AO/IC will reduce integrity breaches to a minimum. His/her responsibility is also to monitor the organisation's compliance with internal and external regulation; for instance the separation of certain functions and procurement regulations (law).

The *internal auditor* has responsibility for the financial and the operational audits. At a financial audit he/she approves the annual reports, which are drafted by the controller under authority of the top management. To be able to validate the data in the annual report the auditor must have assurance on the reliability of the systems (AO/IC) delivering those data. This being said, the auditor advises on the design of the AO/IC (and possible adjustments thereto in the course of time), and also performs operational audits for the top management. If the top management has any suspicion of irregularities in the operational management, it will give the auditor the assignment to carry out integrity audits. In case of far-reaching suspicions of fraud, a forensic audit can be requested.

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The views are those of the author; they may not reflect those of his government

To improve controls, experts recommended that all changes to a contract, including small ones, be recorded. Indeed, small or minor modifications and amendments can amount to large-scale additional costs, which sometimes hide corruption. Several experts also thought favourably of multiple levels of supervision and approval. Others however suggested that the only effective way of policing or regulating a procurement process is to provide participants with an opportunity to effectively challenge other competitors' bids, and bid irregularities. Finally, many supported the suggestion that the auditors, controllers and forensic auditors, *i.e*. those who determine the administrative organisation, provide their points of view on prevention and detection of bribery and corruption.

7.2. Additional controls

It was suggested that including external auditors could enhance prevention and improve controls. Internal audits and controls as well as audits by private companies can provide effective inspections that permit the discovery of significant deviation in government expenditure, even at a late stage. For instance, external financial auditors could check high-risk procurement, including sole-source procurement, suppliers that have been contracting for a long time with the same contracting authority or high-value contracts. Performance audits could assess whether the processes are respected. Should auditors discover deviations they could refer those to internal investigators who can decide whether to actually transmit the information to the judiciary. The judiciary may call for the establishment of clear rules that require external auditors to declare suspicions that arise in the review of the procurement process and internal controls.

It was further recommended that the expertise in accounting and investigations of *forensic auditors* be called on more often. Forensic auditing can be defined as the application of auditing skills to situations that have legal consequences. Forensic auditing can be used by management or by auditors to carry out general reviews of activities to highlight risks. It can also apply in cases of investigation of fraud or corruption to gather evidence to be presented in court.

Finally, other stakeholders may also be involved in the public procurement process, including representatives of non-government organisations (NGOs), end-users and the wider public. Such actors have the potential to monitor tenders; NGOs can challenge government procurement decisions as they may be less constrained than procurement officials and other potential whistle-blowers. Their involvement may also lead to the enhancement of the overall efficiency of public procurement processes.

Chapter 8

Detection Mechanisms

8.1. Red Flags

The European Anti Fraud Office (OLAF) gave a report on its red-flagging exercise, aimed at providing tools to investigators analysing grants from the European Union. The exercise builds on the approach by the French "Service Central de Prévention de la Corruption", which emphasises the need to look closely and chronologically at all the stages of the procurement or grant-making procedure, in order to identify problems which typically arise at each stage. It also draws on the work of the United Nations Office of Internal Oversight (OIOS) Investigation Division and of the World Bank on red flagging.

This OLAF red-flagging exercise concluded that detection possibilities vary considerably according to the procurement stage. During the design and preparation of the tender, collusion is frequent. However, since agreements are secret, investigations are difficult. During the selection procedure, some information may be submitted by unsatisfied competitors, whistleblowers and anonymous referrals. Corruption is most easily detected and investigated during the contract's execution. At that stage, complaints are submitted and facts are documented. OLAF's conclusions may contradict the original belief that corruption takes place most often at the contract execution stage.

8.2. Facilitating and encouraging reporting

Experts noted that the starting point of an investigation almost always comes from a filed complaint, or from information provided by private individuals, communications from representatives of the competing parties or even newspaper articles. Whistle-blowing procedures and other mechanisms that allow people to come forward to alert authorities to

possible suspicious acts can be very effective in detecting bribery and corruption.

The necessity of reporting was raised as well as the need to make public officials aware of their obligation to report irregularities. Clear rules on reporting requirements of corruption of which public officials become aware while administering the procurement process are essential. Indeed, officials who observe signs of wrongdoing should have an opportunity to report internally and/or externally.

Public procurement complaint or appeal mechanisms, where competitors can file protests in case of violations of all sorts (*e.g.* bid protests) are also considered to be very helpful. However, as mentioned above, these mechanisms can be abused through malicious stalling of procurement procedures by competitors. Acknowledging that delays can deliberately be introduced and that those tools should be used with care, they were nonetheless recognised as being helpful in revealing fraudulent and corruption activities.

In addition, countries or institutions can adopt reporting provisions and establish facilities for those involved in misdeeds. Different approaches are envisaged to relieving those who come forward with reports.

Experts discussed whether Multilateral Development Banks (MDBs) have a particular role to play in this area. They noted that people seem uneasy to report domestically – in some countries the issue of "denunciation" is very sensitive. However, people seem to be comfortable reporting to MDBs and do so more easily and more frequently.

8.3. Teamwork

Promoting contacts and communication between officials from different public agencies may be a means to enhance mutual understanding and prevent bribery. This may also improve detection and enforcement of anti-corruption laws. Contracting authorities generally have administrative powers. Judicial authorities are able to ensure that investigations take place and that coercive powers are applied. The variety of skills and practices required to uncover bribery may call for multidisciplinary co-operation (see Part II).

It may be recalled that the creation of national networks of public procurement offices, competition authorities and judiciary bodies to combat bribery in public procurement was among the conclusions which came out of the OECD 2004 Global Forum discussions (see also reference above under II.A.1.)

Box 7. **Multilateral Development Banks: A framework for preventing and combating fraud and corruption***

On September 17, 2006, the heads of the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank Group, the Inter-American Development Bank Group, the International Monetary Fund, and the World Bank Group agreed on a framework for preventing and combating fraud and corruption in the activities and operations of their institutions. The agreement resulted from the work of a joint Task Force established on February 18, 2006 by the leaders of these institutions.

The institutions recognise that corruption undermines sustainable economic growth and is a major obstacle to the reduction of poverty. The leaders have outlined the following joint actions to combat fraud and corruption:

- agreement in principle on standardised definitions of fraudulent and corrupt practices for investigating such practices in activities financed by the member institutions;
- agreement on common principles and guidelines for investigations;
- agreement to strengthen the exchange of information, as appropriate and with due attention to confidentiality, in connection with investigations into fraudulent and corrupt practices;
- agreement on general integrity due diligence principles relating to private sector lending and investment decisions;
- agreement to further explore how compliance and enforcement actions taken by one institution can be supported by the others.

Furthermore, the institutions agreed to continue to work together to assist their member countries in strengthening governance and combating corruption, in co-operation with civil society, the private sector, and other stakeholders and institutions such as the press and judiciary with the goal to enhance transparency and accountability.

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Chapter 9

Investigation and sanctions

A number of precautionary measures against bribery can be taken. The establishment of clear rules and regulations complemented by substantial and effectively enforced penalties, applied by public administrations and courts, are considered to be the most effective deterrents to bribery and corruption in public procurement. Experts noted key difficulties which will have to be overcome relating to evidence gathering and the applicable legal provisions.

9.1. Effective regulations and sanctions

Questions were raised as to whether corruption risks are increased by stronger regulations or by more flexible procedures, which are justified by greater market efficiency despite the fact that they give more discretion to the official in the attribution of tenders. Overregulated systems may generate corruption as rules are frequently overlooked, broken, or applied misleadingly in order to favour a specific bidder or to exclude others. Examples again show that less regulated environments are susceptible to higher corruption. Nonetheless, operating public procurement in a flexible environment was considered preferable provided that severe deterrents and sanctions apply in case of violation. More flexible procurement arrangements call for enhanced integrity by officials as well as a strong and well-enforced legislation, matched by reporting obligations and effective reporting mechanisms (see above). Without these elements, corruption frequently flourishes.

Various examples illustrate the detrimental effects of exemptions from, or the non-application of, sanctions. These may concern both administrative penalties in relation to procurement rules or criminal law provisions. For instance, persons involved in "national security" classified contracts may consider that they run only a slight risk of being detected and sanctioned, and thus are more likely to engage in bribery and kickbacks. In one case,

although rules were in place against violations of procurement procedures, no penalties were brought against a wide number of people who were involved in a large domestic corruption scandal which affected a major domestic contracting authority. There have been examples of a number of countries who, despite having detailed anti-bribery rules, have never prosecuted a bribery case and did not act upon the evidence of bribery of foreign public officials in four jurisdictions. Finally, experts noted that European Member States have made exclusion from public procurement mandatory for individuals or parties involved in bribery[1]. This however raises problems: For instance, it is extremely difficult to obtain criminal records from abroad. Consequently, tendering authorities may ask for self-certification. However, self-certification may be considered complicated or unreliable, in which case there is no certification at all.

The ultimate deterrent to bribery is a clear regulatory framework that is effectively enforced. Regulations need to address and provide clear definitions of public tendering, bribery and associated crimes. Meaningful sanctions need to be associated with specific violations of the rules. Furthermore, the courts need to be aware of the seriousness of these crimes. Knowledge about the rules and their effective and rapid enforcement are of utmost importance. If laws and rules are not enforced, or only partially enforced, and paperwork is widely forged then the probability of being detected and sanctioned is low, meaning that it is more likely that offenders will remain unpunished, and therefore corruption risks are high.

Administrative and criminal sanctions need equal enforcement. While experts suggested that temporary suspension could be implemented with greater flexibility if it is a preventive measure, procuring entities should not be given the possibility to exempt a company from the application of an administrative sanction including on grounds of public interest. Criminal investigations leading to prosecutions and effectively enforced penalties will act as the strongest deterrent to bribery and corruption.

9.2. Multi-disciplinary investigations

It was suggested that investigation methods not only provide a control process for the legitimacy of the procedure, but also identify the criminal content of acts by both the offenders and public authorities. This could bring to light the whole network of the external preferential channels used to reach illicit agreements between private groups and public managers and officers. The background of corruption, its organisation, the alliances and compacts could be brought to light if investigations are widened, rather than focusing only on the moment at which an individual takes the bribe or the infringement committed at one specific stage of the procedures.

Investigations should be wide-ranging and should aim to discover distribution channels, professional firms, business and intermediation (agencies), zones for protected relationships, clearinghouses for the converging need of private operators and public officials.

To enhance the chances of uncovering the facts and obtaining relevant evidence, experts recommended that investigations build on solid, well-staffed teams that cooperate with non-judicial experts with a range of skills. A diversity of experience in an investigation can be vital; one bribery case was successful due to the work of a team which included prosecutors, police investigators, tax authorities/auditors and the Municipality of the Audit Office. An expert from the German Bundeskartellamt submitted a contribution on the co-operation between his authorities and the prosecutor's office in case of suspicion of collusion involving bribery (see Box 8).

Some countries already rely on the collaboration of non-judiciary experts, specialised in a particular technical or commercial field that is related to procurement, to provide assistance in assessing relevant information. They may advise on the selection of the documents to be seized, help analyze the data included in these documents and aid is assessing the conclusion and performance of the contract. This specialised expertise can also be useful in the questioning of witnesses or suspects, as the specialists can advise on specific questions and the need for technical clarifications or details. These experts' assistance may also consist of comparing the processes and facts under investigation with other similar administrative acts in order to identify and call attention to any departure from customary practice, which could itself be considered a sign of misconduct. For instance, specialised lawyers may be charged with analysing the terms of a procurement in respect to procurement rules. Engineers, architects and specialists in building materials or in civil engineering may provide technical advice, such as questioning the choice of materials available at the time of supply or they may carry out quality controls or run checks on the amount of material supplied to a worksite. Accountants, forensic auditors and computer experts may examine a company's accounts, look at its financial relations with suppliers and contractors, and assess the existence of "slush funds".

Box 8. **The role of the German competition authority in the fight against corruption***

The *Bundeskartellamt*, a government agency, is Germany's federal competition watchdog. The legal foundation for its work is the Act against Restraints of Competition (GWB), generally referred to as the Competition Act. The Competition Act came into effect on 1 January 1958 and has been revised seven times since, most recently in 2005.

The Act starts by prohibiting agreements restricting competition; it also contains measures to stop enterprises from abusing a dominant position on the market. The second revision of the Act in 1973 introduced the preventive control of business concentrations. The sixth revision in 1999 introduced a Part Four containing rules to protect bidders in public procurement procedures. Other revisions have adapted the Act to substantive and procedural changes in EU competition law.

Eleven Decision Divisions, organised by economic sector, are responsible for implementing the Act in the original areas of protection of competition. They take decisions on business concentrations (Section 35 et seq.), agreements restricting competition (Section 1 et seq.) and abuses of dominant position (Section 19 et seq.). A special central unit was created in June 2005 to combat cartels. In addition to the Competition Act, the Decision Divisions also apply European competition law, especially on the basis of Articles 81 and 82 of the EC Treaty, unless the European Commission, as the competition authority at EU level, has competence under the Merger Control Directive or Regulation 1/2003 and existing criteria for allocating cases.

Three public procurement tribunals review proposed awards of contracts attributable to the German Federation at the request of bidders who consider that their rights have been violated by non-compliance with public procurement rules. Certain thresholds must be exceeded for an application to be admissible.

The Decision Divisions and public procurement tribunals, as collegial jurisdictions, sit with a chairman and two assessors and make their decisions by a majority vote. They are independent, *i.e.* free of internal and external influence.

An anomaly arises when the administrative fines procedure is used to take action against agreements restricting competition, since there is a coextensive offence of tender fraud (Section 298 of the Tax Code) for which the prosecuting authorities are competent. To ensure that the *Bundeskartellamt's* experience of action against cartel agreements is preserved, Section 82, paragraph 1, point 1 of the Competition Act states that the cartel authority is exclusively competent in proceedings to assess an administrative fine against a legal person or association of persons in cases where a criminal offence is also constituted. It follows that in such cases the prosecution service, as the prosecuting authority, can engage criminal proceedings only against the individual offender. The resulting close co-operation between prosecutors and the Bundeskartellamt guarantees that tough action is taken against agreements which restrict competition.

Box 8. **The role of the German competition authority in the fight against corruption** (cont.)

It is apparent from the scope of the *Bundeskartellamt's* missions that it has no powers to prosecute bribery offences. However, overlaps with the formation of cartels do exist in bribery cases. As cartel agreements may, in some cases, be associated with bribery offences, suspicion of bribery is always followed up in the context of investigations conducted when the existence of a cartel agreement is suspected. Because of the above-mentioned division of competence in cartel matters between the *Bundeskartellamt* and the prosecuting authorities, the two agencies co-ordinate their action and co-operate closely. Prosecutors are informed of planned enquiries or investigations when agreements restricting competition are suspected and can decide on a case-by-case basis whether to take part. The prosecuting authorities generally participate in important proceedings. This ensures that suspicions of bribery offences are followed up in a structured way and that the *Bundeskartellamt* does not merely stumble over bribery offences during its investigations.

* Mr. Wolrad Burchardi, Director, *Bundeskartellamt*, Germany. The views are those of the author.

9.3. International harmonisation and co-operation

There are severe limitations in the prevention, investigation and sanctioning of transnational bribery, as experts highlighted. Restrictions are due to a lack of harmonisation and difficulties encountered in international co-operation.

Firstly, variations in domestic legislation and in the definitions of different acts or offences make bribery investigations in transnational public procurement difficult. Experts considered the harmonisation of tendering thresholds to be crucial due to observations that cross-country tendering with different thresholds can create situations that encourage corruption. Although texts may be harmonised, there may be different enforcement provisions. The European Union's Directive 2004/18/EC[2] (Article 45) aims at preventing bribery in public procurement among European countries. It would seem, however, that individual countries have introduced enforcement procedures that are widely varied.

Judicial assistance was characterised as difficult, slow and insufficient. Prosecutors acknowledged some relative ease in obtaining criminal records of people within Europe, although a European criminal record does not yet exist. Overall, further efforts are required to reduce procedural and bureaucratic obstacles with a view to enhance and accelerate mutual legal assistance.

Criminal records can be extremely difficult to obtain, and are sometimes unattainable. Indeed, as the liability of legal persons is not recognised in all countries, records on the civil and commercial performance of those legal persons hardly exist at all. It was questioned whether procurement contracts should only be attributed to known legal persons that have been in business for some time, considering the ease with which legal entities can be created. Experts were well aware of the limits of this proposal, and its inherent contradictions with competition rules and concepts.

The merits of the United Nations Commission on International Trade Law (UNCITRAL) were underlined but the insufficient focus on anti-bribery was considered regrettable. Experts suggested that there was a need for an international agreement linking corruption and public procurement. Such international agreement could, for instance, be inspired by the European Union's Directive 2004/18/EC (not taking up the harmonisation issues noted above). The implementation and enforcement of such international agreement could be relevant for all countries.

Finally, experts concluded that internationalisation of the incrimination and international exchanges of data and experiences should be enhanced between multilateral actors. They suggested the possibility of establishing a database accessible to all professional organisations to enhance co-operation. The content of the database was not addressed and would call for further discussions among experts.

Notes

1. See Article 45 of the Directive 2004/18/EC on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Services Contracts.
2. Directive on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Services Contracts.

Part IV

Ten Anonymous Studies on Bribery in Public Procurement

The OECD Secretariat received several cases that illustrate the analysis of the typology report. Experts agreed to standardise the presentation of those cases to be released to the wider public in order to help the reader understand the cases clearly and establish links to the typology analysis. The descriptions of the submitted cases follow a common template and are numbered from 1 to 10. This order is random, and does not indicate rate or rank of the cases.

Template for the description of the cases of bribery in public procurement

1) Parties involved

2) Content of the bribery agreement

Quid pro quo

Organisation of the bribery agreement

Methods and means for dissimulating the bribe

Methods and means to attribute the market and sealing the bribery agreement

Elements of the case which are or could be relevant to the enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

3) Detection mechanisms

4) Consequences of the bribery agreement

I. A senior civil servant and a subcontractor from another state

1) Parties involved

The chairman and vice-chairman of a company R, specialised in electronic components, and located in State Z;

A senior civil servant in another State (X), who had been technical advisor to a minister and subsequently *Prefect* during the period covered by the acts of bribery;

An offshore company and a foreign trust company;

A consultant working under contract for Company R.

2) Content of the bribery agreement

Quid pro quo

A company R (from State Z), acted as subcontractor of a public company BB in State X. This company R indirectly bribed a senior civil servant of State X (*via* the payment of kickbacks on offshore bank accounts), in order to influence, or at least to collect information on, the main sales contract between company BB and a Southern state.

Organisation of the bribery agreement

The managers of Company R hired a consultant to develop business relations with the company making the sensitive equipment (BB), the aim being to work with an influential person within the government of that company's country. The consultant approached the senior civil servant of country Z. This civil servant acted as an intermediary between, on the one hand, the consultant working for Company R and, on the other hand, ministerial civil servants and the staff of Company BB, which was under this ministry's supervision and had signed a contract for sensitive equipment with a southern State.

Methods and means for dissimulating the bribe

The senior civil servant did not come directly into contact with the manager of Company R. It was a "double-blind" (double intermediation) system, passing first via the consultant and then via the civil servant. Payments were made by Company R to an offshore company, before being transferred to an account handled by a foreign trust company, and then channelled into accounts opened in the foreign country for the consultant and the senior civil servant.

Methods and means to attribute the market and sealing the bribery agreement

Of the many interesting aspects of this case, it is worth noting that the bribery was not aimed at obtaining a contract but rather, once the contract had been signed, at ensuring that it was executed in such a way as to benefit the briber, i.e. Company R.. The senior civil servant made use of his influence (influence-peddling) to perform his task. The specificity of the agreements, i.e. the contract following rather than the market attribution, contributed to dissimulate the fraud, as the attribution of a public procurement was not the aim of the bribe. Once again the sealing agreements between company R and company BB was not explicit because of the double-blind system

Relevant elements regarding the enforcement of the OECD Convention

In this multilateral case, a quality cooperation between investigation and judicial services was necessary. The consultant and the senior civil servant being judged by the same jurisdiction (while they are from different countries), it raises the issue of the choice of the competent jurisdiction and of the harmonisation of offences and repression in the different countries concerned.

3) Detection mechanisms

Investigations on the civil servant (for another fraud) led to the findings of his foreign bank account and eventually to the discovery of this case of corruption.

4) Consequences of the bribery agreement

The agreement was successful. Thanks to the complex and transnational bank system, the civil servants and the consultant received huge amounts of money (hundreds of thousands Euros).
The senior civil servant performed his task and succeeded in appeasing company BB by using his logistic support and resolving technical conflicts between the company R and the company BB.

II. Bribery relating to public procurement within a local authority

1) Parties involved

Local government officials and the chairman (an elected representative) of the procurement bids committee in that local government

Several building and renovation firms.

2) Content of the bribery agreement

Quid pro quo

In the course of construction markets attribution, some officials in charge carried out illegal disclosure of confidential information to specific firms in counterparts of cash payments (through a system of false invoices and a shell company, comparable to money laundering) and benefits in kind.

Organisation of the bribery agreement

In this country, the mandate of the local government includes the management of lower secondary schools in terms of their construction, extension and maintenance. It accordingly organises the competitive bidding process for public procurement contracts awarded under the departmental budget; the responsibility for decisions to proceed with calls for tender and then award contracts to successful bidders lies with an ad hoc committee (the bidding Committee) whose six members are all from the local council(composed of elected representatives).

In this local government, the chairman of the bidding committee (who was therefore an elected representative) together with two local officials in charge of departmental services, devised a system whereby confidential information was disclosed to the heads of specific firms and research departments during the public procurement bidding process for the construction or development/maintenance of lower secondary schools.

The Chairman and the two heads of departmental service enjoyed benefits in return for providing information that would sway bidding Committee decisions

Methods and means for dissimulating the bribe

The bribe was difficult to detect because it was split into different kinds of kickbacks: benefits in kind, cash payment, and payment through false invoices. Benefits in kind appeared to be duties carried out free of charge or at cost price in several homes belonging to the Chairman (and in the homes of members of his family) and the production of a DVD film for his electoral campaign. With regard to the false invoices, a relatively complex arrangement was set up by one of the local service directors, namely a holding company and subsidiaries (all owned by him and members of his family) that worked for the research departments of building firms. These business links made it possible to draw up inflated invoices as means of passing on the bribes.

Methods and means to attribute the market and sealing the bribery agreement

This competitive bidding was based on geographical lots and operational lots (e.g. roofing or electrical work). Notional prices would be indicated in the bidding documents so that firms could then propose discounts. To enable the bidding Committee to compare the bids and award the contracts to the firms proposing the highest discounts, the Committee members would be given studies drawn up by the local technical services indicating, for instance, the price levels and range of discounts that might be acceptable. In actual fact, before submitting their proposed discounts some bidders would be given details of the studies and price levels by one of the directors of the departmental services that had drawn them up. Using this information, the firms would divide up the lots between them and submit appropriate bids, while the Chairman would influence the Committee decision-making.

Relevant elements regarding the enforcement of the OECD Convention

The fraud even involves the mechanisms created to fight corruption (open bidding process and collective structure of the Committee)
This case also tackles the problem of controlling public agent resources and assets.

3) Detection mechanisms

Denunciation (anonymous letter)

4) Consequences of the bribery agreement

The fraud lasted for years and the markets were procured according to the fraudulent system described.

III. Bribery related to procurements within an international aid organisation

1) Parties involved

Mr. X (the bribee) was a manager and a civil servant in an international aid-organization. His section within the aid-organisation was i.e. responsible for procurements through international bidding. He himself influenced on procurement decisions.

Several persons (bribers) whom he knew and cooperated with, had ownership and/or leading positions in small "selected" trading companies supplying goods and equipment to the aid-organisation. The companies/persons operated in different countries, mostly in Europe.

2) Content of the bribery agreement

Quid pro quo

Mr. X's section was procuring various goods and equipment. The aid-organisation was a large end-user of several types of commodities and thus an important potential customer to the manufacturers. Still, Mr. X disregarded internal procurement guidelines, manipulated or influenced procurement processes in favour of selected companies that bought the goods and equipment from other suppliers/manufacturers. The total value of his section's purchases from the selected companies exceeded USD 20 million. Mr. X received bribes from several companies or from their representatives amounting to more than USD 0.6 million.

Organisation of the agreement – methods and means to attribute the market and sealing the bribery agreement

Mr. X was a highly trusted civil servant, and his crime was to a large extent made possible by this trust, which he abused.

Only to a small extent did he invite the manufacturers themselves of the equipment to tender in the bidding process. Instead he placed most of the orders with small trading companies, some of which had only one or two employees, and the aid-organisation was their only, or nearly so, customer. Mr X had a 30 % ownership in one of these companies.

Some of the selected companies appeared in some cases as subsuppliers to others. The use of unnecessary intermediaries was designed to spread the profits among persons/companies in Mr. X's circle. Mr. X made close personal ties to the persons owning and running these selected companies. Some of these persons knew each other. Mr. X created a hidden, but to some extent organized, criminal circle where everyone was aware of each other's roles, and more or less dependent on each other, and on Mr. X.

The selected companies frequently appeared on the invitation lists, often without any "outsider"-suppliers being invited, at other times together with one or a few more bidders that were almost irrelevant under the circumstances. Sometimes it was clear in advance which of the companies would get the order, even when several of the selected companies appeared on the invitation list. The remaining ones were put on the invitation list only to make sure that the requirement of a certain number of invitations to be sent out was met.

Bribers paid money to Mr. X, allegedly on instructions as to when and how this should be done.

Methods and means for dissimulating the bribe

Mr. X held private accounts in several countries. Bribes were deposited in cash, by transfer ("consultancy/marketing fee") and by checks. One of the persons paying bribes was given a paying-in book to one of Mr. X's account.

In one case Mr. X received a car, which was invoiced as part of a delivery of compressors ordered and paid for by the aid-organisation.

Mr. X allegedly also received cash payments from some of the selected suppliers.

3) Detection mechanisms

Mr. X's camouflage operations were not hard to reveal, but the atmosphere of trust within his organisation gave him an easy game over a long period of time.

The aid-organisation initiated an internal investigation, due to suspicions of irregularities in procurements. The suspicions seem to have been the result of an approach made to the organisation by a representative of one of the selected suppliers.

The aid-organisation later filed a complaint to the relevant District Attorney.

The police investigation focused mainly on two issues: a survey of the purchases where Mr. X was responsible, and on Mr. X's private finances.

4) The consequences of the bribery agreement

The Court estimated that the direct financial loss suffered by the aid-organisation amounted to at least USD 1.5 million. The court furthermore pointed at the fact that an aid-organisation is dependent on trust from contributing governments and private donators.

IV. Fraudulent bid evaluation by an "independent consultant" in international limited bidding

1) Parties involved:

With funding from a multilateral financial institution, the Central Bank of Country X sought procurement of equipment for a telecommunications network through a Project Implementing Unit and an independent consultant. Consultant N was hired to provide expert and independent advice on the evaluation and award of the contract. The limited restricted bidding resulted in the submission of four bids including those from Companies A and B, both providers of IT systems. The winning bidder engaged Company C, a fictitious sub-contractor.

2) Content of the bribery agreement: Quid pro quo; the corrupt act; methods and means of bribery and awarding of contract

This Case dealt with the procurement under limited international bidding (i.e., bidding by invitation addressed to a limited number of apparently qualified companies). The Project Implementation Unit recommended an award to Company A, although it had received a lower overall score than Company B. Consultant N, which originally had ranked Company A technically lower than Company B, prepared a new evaluation report, based on "additional information," giving Company A a slightly higher technical score than Company B. In addition, the consultant (and subsequently the evaluation committee of the Project Implementation Unit) distorted the financial evaluation in favour of Company A by excluding its recurrent cost from its financial bid while including such costs into Company B's financial bid. This was done by inserting misleading cross-references into the bid and as such was extremely difficult to detect. Consultant N's revised evaluation report made Company A the highest ranking bidder. This revised evaluation report was endorsed by the Project Implementation Unit and submitted to the multilateral financial institution which gave no objection to the proposed award to Company A. Subsequently, the multilateral financial institution dismissed a bid protest from Company B on the legitimate ground that addressing that

complaint would have delayed the award further and compromised the timely implementation of the project.

In addition, evidence showed that after its bid Company A had been dispatched to the Client's country, entered into a contract with a company called Company C, under which Company A agreed to pay to Company C a "contingent fee" of 5% of the contract price, a kickback meant for government employees, if it should be awarded the contract through its already submitted bid. Company C happened to be controlled by an individual already debarred in another case of fraud and corruption. The Company C contract did not have any identifiable scope of services, and Company C was, according to internal investigators, a fictitious entity. Company A agreed to pay to Company C a fee in excess of the equivalent of USD 150,000. Subsequently, Company A conceded that there was no legitimate assistance that Company C could have rendered at the time the two companies entered into contract.

Elements of the Case Relevant to Enforcement of the Convention

This case illustrate payment of a kickback through a subcontracting entity, which was facilitated through a system of restricted bidding and with the assistance and collusion of an "independent" consultant vested with wide discretion to evaluate bids on the basis of a "point system."

3) Detection mechanism:

The losing bidder filed a bid protest, which could have presented an opportunity to detect the bribery early on. However, the bid protest was dismissed on the grounds that it would have unduly delayed the award and the timely implementation of the project. A subsequent investigation conducted by the internal investigators of the multilateral financial institution led to the discovery of the corruption.

4) Consequences of the bribery agreement:

It was found that Company A's payment of a contingent fee to Company C was a kickback intended to be channelled to a government official in order to influence the contract award to Company A. Company A had engaged in corrupt practices in connection with the procurement process, by entering with Company C, a fictitious entity, into a contract without any identifiable scope of services. With respect to Consultant N, the failure by this consultant to conduct an objective evaluation (or willingness to pervert the process) constitutes a serious form of misconduct under the rules of the multilateral financial institution. Consultant N's defence and admission that it had simply been acting as a "subordinate" of the Client which had decided to make the award to Company A even before the evaluation report was drafted established a deliberate intent to assist and participate in the corrupt act.

V. Award of a consultancy contract to fellow national in exchange for bribes

1) Parties involved:

A multilateral financial institution hired consultants to undertake studies. The selection and award were made by staff of the institution who are nationals of the same country pursuant to payments made to a staff who is a relative of the consultant.

2) Content of the bribery agreement: Quid pro quo; the corrupt act; methods and means of bribery and awarding of contract

This Case dealt with the selection of consultants by a multilateral financial institution. Four consulting firms were hired to prepare certain sector studies. In the four instances, in order to obtain consulting contracts from the multilateral financial institution, the consultants made improper payments to the hiring multilateral financial institution staff member either directly or through a relative, for services purportedly "sub-contracted" to that relative. This arrangement was made possible by the fact that the services were limited to consultants from the donor's country and, coincidentally, multilateral financial institution staff members who were responsible for these sect oral activities were from the donor's country. When the multilateral financial institution conducted a review of the allegations pertaining to the four contracts, it found that the studies carried out under these contracts (by the multilateral financial institution staff relative, or in certain instances, by the staff himself) were incomplete, of a poor quality and hardly relevant to the core activities in the sector in question, while the remuneration paid or to be paid was very high in comparison with the output expected from the consulting firms. It was concluded that in all four cases, there was evidence reasonably sufficient to show that the consultant in question had engaged in corrupt practices by making improper payments to the hiring multilateral financial institution staff member directly or through a relative of the hiring staff member.

Elements of the Case Relevant to Enforcement of the Convention

Trust Funds restricting award of contracts to consultants from donor country may be susceptible to nepotism and favouritism in an environment of lax approval and supervision mechanisms within an organization. There should be review of contract outputs that should match contract inputs (particularly critical in the case of non-physical services), comparative pricing, use of procedures involving peer review and additional approval mechanisms, and enforcement of the prohibition against hiring close relatives.

3) Detection mechanism:

The corrupt arrangement was discovered in an internal investigation by the multilateral financial institution of implicated staff and review of covered contracts as a result of allegations surrounding the contracts.

4) Consequences of the bribery agreement:

Two of the consultants were declared permanently ineligible to be awarded a multilateral financial institution -financed contract, while the other two firms were declared ineligible for a five-year period in view of their willingness to repay to the multilateral financial institution the improper payments. The multilateral financial institution considered as an aggravating factor the fact that the corrupt activities involved staff of the multilateral financial institution. This Case led the multilateral financial institution to re-examine its internal review mechanisms for the award of small contracts, which now necessitate that the award be approved by a sector manager. Separate from that, the multilateral financial institution had, and continues to have, a policy prohibiting the hiring of staff close relatives on projects that it executes or that it finances. These prohibitions are incorporated in the contract form that consultants (firms or individuals) have to sign when hired by the multilateral financial institution.

VI. Susceptibility of international bidders to influence peddling and coercion in bid tendering

1) Parties involved:

Mr. X, an influence peddler, made it known to potential bidders that he was able to secure them the award of a major equipment contract and to facilitate the securing of requisite licenses and permits and facilitating contract payments. In exchange they would testify to the provision of subcontracts and consulting assignments for shell companies he owned.

2) Content of the bribery agreement: Quid pro quo; the corrupt act; methods and means of bribery and awarding of contract

This case involves various forms of fraudulent and corrupt practices that took place in a transition economy, in connection with the procurement of a large turnkey contract for specialized equipment and related consulting work. The invitation to submit bids for a large equipment contract (representing a major portion of the project expenditures) led to the submission of two bids. Before bid opening, a Mr. Z, claiming he had government connections, approached these two bidders as well as other companies that he thought intended to bid. Of the two bidders, the lower had been informed by Mr. Z in advance of bid submission that the bid price should not exceed a certain amount; the bidder submitted a bid priced accordingly. However, the bid was disqualified due to the bidder's lack of qualifying experience and resources. Ultimately, the bidder submitting the higher bid won the contract. A noteworthy feature of this case is that a single individual (Mr. Z) controlled access to all the project bidding and contract opportunities (up to and including payment of invoices during contract execution) through his government connections. Mr. Z. was seemingly able to sell his protection to the companies involved in the project, while at the same time obtaining subcontracts or consulting assignments for the shell companies he owned. This Case contains an unusual combination of pervasive forms of misconduct engaged in by a single individual (it is worth noting that one person was killed in connection with the implementation of that same project). The multilateral financial institution concluded that certain practices are

likely to develop in circumstances combining (i) the absence of laws; (ii) the concentration of power in the hands of a few government officials; (iii) absence of fiduciary checks and balances; and (iv) an insulated environment—one of the reasons Mr. Z could continue his activities unchecked was that there were very few individuals or companies able to provide at the same time both international and domestic expertise. For example, Mr. Z. was able to speak the local language and thus submit requests for building licenses and permits. Less unusual was the practice of facilitation payments, which caused the multilateral financial institution to examine the type of sanctions that may be appropriate to impose on companies that seek the services of a "service provider" to collect legitimate contract payments. At the same time, this case also underlined the relationship between facilitation payments and corrupt practices in attempts to influence public officials in order to obtain contract awards.

Elements of the Case relevant to enforcement of the Convention

Mechanisms should be put in place to accelerate contract payments and the issuing of licenses and permits susceptible to manipulation by influence peddlers. Whistleblowers can provide valuable information on corrupt practices and should be protected especially in a legal environment conducive to fraud, corruption and coercion.

3) Detection mechanism:

Statements made by the disgruntled disqualified bidder, who participated in the initial corrupt scheme and subsequently blew the whistle, triggered an investigation by the multilateral financial institution, which revealed that both the low and the higher bidder had accepted to pay a percentage of the contract price in return for Mr. Z's assistance to secure the contract award.

4) Consequences of the bribery agreement:

This set of circumstances subsequently led the multilateral financial institution to revisit its definition of fraud and corruption, to include "coercion"—a form of misconduct closely related to extortion. The multilateral financial institution also decided that Mr. Z and his companies should be declared permanently ineligible to be awarded a Multilateral financial institution -financed contract, as Mr. Z had engaged in corrupt practices by (i) soliciting and obtaining payments partially intended to benefit government officials in order to ensure that a consulting firm be awarded a contract and receive payment under that same contract, (ii) soliciting bribes from a bidder for the large turnkey contract (which was eventually awarded to another company), and (iii) soliciting and obtaining bribes from the (subsequently) winning bidder. The winning bidder, who had (i) grossly overpaid Mr. Z and his companies for alleged services under various contracts signed with them, knowing that it was acceding to a bribery scheme to ensure a favourable award and facilitate implementation of that

contract, and (ii) created fraudulent documents to support the corrupt practices, although the only qualified bidder would be declared ineligible for a certain period. The fact that it would have been entitled to receive the contract award in any case was not considered as a mitigating circumstance. Other companies received a milder sanction for the following reasons: (i) the consultant, since payments made by the consultant to Mr. Z could be seen as "facilitation payments," and as such, should not be treated as "corrupt payments" particularly in a business environment entirely controlled by corrupt individuals; (ii) the whistle-blower (the company that lost the award of the turnkey contract to a higher bidder), since it had alerted the multilateral financial institution to Mr. Z's activities and had subsequently provided its unconditional cooperation.

VII. Collusive bidding and overpricing in international shopping/international price quotations

1) Parties involved:

This case involves the solicitation of price quotations from a limited number of international suppliers through the method of "International shopping".

2) Content of the bribery agreement: Quid pro quo; the corrupt act; methods and means of bribery and awarding of contract

This Case relates to four distinctive schemes (involving both individuals and companies) of collusive bidding in connection with the procurement of numerous small contracts for equipment and agricultural services in several projects in a developing country. All four schemes involved "international shopping" (also known as "international price quotations"), a procurement method by direct invitation based on the comparison of price quotations obtained from several foreign suppliers, with a minimum of three suppliers to ensure competitive prices. In this case, foreign suppliers responded to price quotation invitations by submitting collusive quotations to ensure that contracts were awarded among themselves at artificial price levels. While each purchase was, by itself, of low value, the combined amount of all the transactions—more than 100—exceeded USD 25 million. The corruption likely extended to other contracts awarded under International Competitive Bidding, one of which had been awarded to one of the colluding companies after eight lower bids had been rejected under various pretexts.

Elements of the case relevant to enforcement of the Convention

There is a need to limit the use of shopping and to aggregate requirements into larger openly-tendered invitations, to check prices of common items on Internet, and to maintain a database of small, repeated transactions in order to detect patterns of irregularities. The inappropriate use of international shopping, which involves a procurement method by direct invitation based on the comparison of price quotations obtained from several foreign suppliers with a minimum of three suppliers to ensure competitive prices, may be susceptible to capture by the same or related firms colluding

to submit overpriced quotations or artificial prices for small transactions of common goods.

As reflected in the policies of the multilateral financing institution, "International Shopping" should be used only to procure readily available off-the-shelf goods or standard commodities of small value. Quotations may be submitted by letter, facsimile or by electronic means. The evaluation of quotations follows the same principles as in the case of open bidding; and the terms of the winning bid are incorporated in a purchase order or short contract. The multilateral financial institution's policies preclude procurement requirements from being split into transactions for the purpose of avoiding international or domestic competitive bidding, both of which are more open and transparent than International Shopping.

Other findings in this case revealed that the multilateral financial institution (i) had not carefully supervised the project; (ii) had issued waivers to procurement methods not stipulated in the Loan Agreement; and (iii) had failed to inquire from the borrower whether the proposed winners were bona fide suppliers nor had it conducted any independent verification. Documentation retention was lax both on the part of the multilateral financial institution and the borrower. Essentially, fiduciary mechanisms were either inexistent or had failed. Finally some prices for common goods vastly exceeded the market price (in one case, the price of a shovel reached **100** times the market price).

3) Detection mechanism:

In the course of a systematic search in its procurement databases for names matching the names of entities already debarred by the multilateral financial institution, an internal investigation uncovered clusters of contract awards in this case made to groups of companies sharing the same addresses, fax numbers, bank accounts, etc., as well as government records, of deliberate bid rigging. Some of the companies were fictitious, and others had common ownership or control; in each of the transactions reviewed, at least two bidders out of three were related to one another and, in the majority of cases, also related to previously debarred companies. There was also direct evidence that one of the individuals involved in the schemes had made payments to one of the Project Implementing Unit staff.

4) Consequences of the bribery agreement:

Except for a few firms and one individual against whom the multilateral financial institution was unable to gather sufficient evidence, it was concluded that all the firms and individuals involved the International Shopping direct invitations should be declared permanently ineligible to be awarded a contract. The multilateral financial institution also determined that the debarment should in all cases be on the basis *not only of fraudulent practices* (i.e., the collusive price quotations) *but also of corrupt practices,*

because of the continuing scheme of collusion which could not have occurred without the active participation of the purchaser, and that the sanctions should reflect the fact that some of the companies and individuals involved in the schemes were repeat offenders.

VIII. Preferential treatment in exchange for gratuities and family-member employment

1) Parties involved:

An agency employee overseeing contracts with a company providing transportation services to the agency;

Transportation contractor.

2) Content of the bribery agreement:

The agency employee with responsibility for overseeing the performance and payment of transportation contracts accepted gratuities from the contractor in exchange for ensuring that the company continued to receive contracts. For approximately three years, the contractor paid USD 100 a week for meals and alcoholic beverages for the agency employee. The contractor also provided a cash loan to the employee and allowed the employee's son and spouse to work for the company during the contract term Despite the fact that the son and spouse did not have the requisite experience for the jobs they held. The agency manager, who was in a position to influence contractor selection, ensured preferential treatment for the contractor by suggesting that factors other than low price be considered in the award of the contract. As a result, the company not only received the contracts, but also inflated their pricing for the life of the contracts.

3) Detection mechanism:

An agency employee who regularly observed the agency contract manager dining and drinking with representatives of the company at a local dining establishment knew that such practices violated the agency's ethical policies. The employee anonymously reported the improper activities to a fraud hotline maintained by the agency.

4) Consequences of the bribery agreement:

The agency manager was fired and a prosecutor is currently pressing for criminal prosecution.

The company was suspended from doing business with the agency and debarment from future contracts may be sought.

Pursuit of a civil false claims case against the contractor is in process.

IX. Bribes in exchange for awarding contracts

1) Parties involved:

An agency purchasing specialist who had worked at the agency for over 20 years;
The purchasing specialist's tax preparer;
Six vendors who provided printing services to the agency.

2) Content of the bribery agreement:

An employee who managed multiple printing contracts for the agency misused his position for personal benefit. The value of the contracts ranged between USD 1,000.00 to USD 1,000.000.00. Over a 12 year period, the purchasing specialist received over USD 770,000.00 from the six companies to ensure they received agency contracts.

The purchasing specialist routinely worked alone to select potential vendors from a "qualified vendors list" to procure printing services. He would rotate contracts among his preferred six companies to avoid detection by consistently recommending the same contractor to the contracting officer.

The contracting officer always accepted the specialist's recommendations. At the time, the vendors faxed their bids into the purchasing specialist who alone reviewed and selected the winning company. Vendor representatives were also allowed into the agency work space where the purchasing specialist could easily provide them access to proprietary information on prices bid by competitor companies. In exchange for money and items of value, the specialist would advise the companies what numbers to bid to ensure that they were the lowest bidder from those he selected. He also advised them in exactly how much they could inflate their bids above costs and still ensure that they would remain competitive.

In order to hide the proceeds from his illegal activities, the specialist conspired with his tax preparer to create shell companies (existing only on paper) through which he could receive and disburse the monies from the vendors. In lieu of cash, some of the vendors also paid for services, entertainment, trips and home repairs for the specialist or one of his relatives. To initiate the bribe, the specialist would award a few small contracts to a

company and then advise a company representative that if the company wanted to stay on the qualified vendors list and receive awards, they needed to show their appreciation through one of the methods described above, preferably cash payments. Since it was a small community of businesses that did this line of work, the vendors said they had come to understand that payment of the bribes was the only viable way of doing business.

3) Detection mechanism:

An investigation was initiated by the agency in response to an anonymous call to the agency's fraud hotline. The caller identified the specialist and stated that he was living in a manner that appeared to be too high based on his salary. A financial analysis of his assets quickly confirmed that the specialist owned sports cars, a boat and other items of high value. Public records searches identified a person close to the specialist who knew about the existence of the shell companies. Once the first participating vendor was identified and confronted with evidence of his crime, he offered to assist law enforcement officials by recording sessions with other participating vendors and the specialist.

4) Consequences of the bribery agreement:

The purchasing specialist was sentenced to 46 months of confinement and restitution in the amount of USD 771,363.00. Vehicles and other items obtained with the illegal proceeds were seized and sold through asset forfeiture procedures.
A number of vendors pled guilty and are now serving sentences of various lengths. Associated companies were debarred from doing business with the agency. Prosecutors are still considering whether to press charges against the tax preparer.

X. Bribes from contractor to increase quantity of work

1) Parties involved:

Four agency managers who oversaw work performed by a contractor servicing agency vehicles.

The President of the company that provided services to the agency.

2) Content of the bribery agreement:

The contractor approached managers at a vehicle servicing facility and offered them cash payments in return for recommending that repair contracts be sent to his company. Since these contracts were frequently awarded and were for relatively low dollar volumes, supervision of the contracting process was minimal. In addition, the managers allowed the contractor to recover some of the funds he gave them by signing off on invoices the contractor submitted that contained inflated charges and charges for work the company did not perform.

3) Method of detection:

Another company seeking to do business with the agency's vehicle repair facility reported to law enforcement officials the solicitation of the bribe by the agency employee. Law enforcement officials then identified a recent, former employee of the repair facility who was able to confirm the practice and explain the scheme.

4) Consequences of the bribery agreement:

The four responsible agency employees were fired. However, since testimonial evidence was contradictory and evidence regarding the exact amount and dates of the payments was missing, prosecutors declined criminal prosecution of the parties.

Annex A

The OECD Anti-Bribery Instruments: How They Address Public Procurement

I. The OECD fights foreign bribery

The fight against corruption is one of the priorities of the OECD's work. Over the last 10 years, the OECD has become the leading source of anti-corruption tools and expertise in areas including business, taxation, export credits, development aid, and governance. The OECD has paved the way for an end to bribery international business transactions through the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which has established rigorous anti-bribery laws and measures in 36 countries.

The OECD Anti-Bribery Convention

This Convention, and other related OECD international legal instruments[1], require that all 30 OECD countries[2] and six non-OECD economies[3] implement a comprehensive set of legal, regulatory and policy measures to prevent, detect, investigate, prosecute, and sanction bribery of foreign public officials[4]. The

1. The Revised Recommendation of the Council on Combating Bribery of Foreign Public Officials in International Business Transactions and the Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials

2. The Member countries of the OECD are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

3. The six Parties to the OECD Anti-Bribery Convention who are not OECD Member countries are Argentina, Brazil, Bulgaria, Chile, Estonia, and Slovenia.

4. A foreign public official is anyone who holds an appointed or elected office of a foreign country or international organisation, or anyone who exercises a public function or undertakes activities in the public interest in a foreign country. The OECD Anti-Bribery Convention applies to bribery of public officials of any foreign country—not only countries that are party to the Convention.

Convention requires that Parties impose tough sanctions—including fines and imprisonment—for bribery of foreign public officials, also referred to as "foreign bribery". These sanctions must apply to both individuals and companies who commit foreign bribery. The convention also requires that a nation's courts confiscate any bribes and all profits obtained through foreign bribery. Parties must also work together to ensure its effective application—for example, in gathering and exchanging evidence, or through extradition.

The OECD Anti-Bribery Convention is making a difference. Since entering into force in 1999, there have been important changes to strengthen national anti-corruption laws in every country party to the Convention. Nonetheless, there has also been a marked increase in the number of foreign bribery investigations and prosecutions. At the beginning of 2007, there were more than 100 ongoing investigations into foreign bribery cases. Prison sentences have been handed down in several countries and individuals and companies found guilty of foreign bribery have been penalised with fines of up to USD 28 million.

Monitoring countries' implementation of the Convention

The OECD Anti-Bribery Convention's peer review mechanism sets it apart from other anti-corruption tools. In signing and ratifying the Convention, countries agree to be part of this monitoring process. Each country must undergo systematic and thorough evaluation of its implementation and enforcement of anti-bribery laws and policies by the entire group of States Parties to the Convention. In addition, each country must take an active role in evaluating other States Parties. Representatives of each of the 36 States Parties make up the OECD Working Group on Bribery in International Business Transactions. The Group meets in Paris four to five times a year, and works together year-round to ensure that each country is meeting its commitments as laid out in the Convention. The self-assessment and mutual evaluation of countries' work to implement the OECD Anti-Bribery Convention has unfolded in two phases.

This international, mutual evaluation process and the peer pressure generated within the Working Group have stimulated and guided governments to take concrete action to promote integrity in the corporate sector, prevent corruption and investigate and prosecute cases of foreign bribery.

II. The public procurement provisions in the Anti-Bribery Instruments

An important share of the corruption practices targeted by the Convention and the Revised Recommendation, i.e. bribery of foreign public officials in order to obtain or retain business in international transactions, involve public procurement deals.

Also, both OECD anti-bribery instruments address aspects related to public procurement which are indispensable in the fight against bribery. The Revised Recommendation touches on three items relating to bribery and public procurement: two concern good public management and governance through improved transparency and enhanced bribery prevention; the third relates to sanctioning. A Commentary to the Convention reinforces the Revised Recommendation sanctioning provisions.

Article VI of the Revised Recommendation on Combating Bribery in International Business Transactions

The Council recommends that:

"i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;

ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that Member's national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials[5].

iii) In accordance with the Recommendation of the Development Assistance Committee, Member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts*."

* "This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD Members and eventually non-Member countries which adhere to the Recommendation."

1. Transparency and enhanced bribery prevention

Section VI paragraph i) of the Revised Recommendation refers to the World Trade Organisation (WTO) and encourages pursuance of an agreement on transparency. This provision, adopted in 1997, was aimed at ensuring that all WTO counties take action to fight the demand for bribes.

5. "Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence."

Indeed, action aimed at reducing the demand for bribes is complementary and reinforces the efforts by Parties of the Convention to eliminate the supply of bribes.

The WTO Government Procurement Agreement is in force for adhering countries. However for the time being, the WTO decided not to engage in further, enlarging negotiations regarding transparency in public procurement.

The Chair of the OECD Working Group on Bribery in International Business Transactions indicated during the OECD 2004 Global Forum on Public Procurement that this provision should actually be read in an open manner, as a reference to the work of international organisations and Multilateral Development Banks (MDBs) in general.

Section VI paragraph iii) recommends the safeguard of foreign aid assistance, notably through the adoption of clear anti-corruption clauses in bilateral aid-funded procurement. This incorporation of the 1996 Recommendation by the OECD Development Assistance Committee (DAC) reflects the wish to prevent corruption's negative affects on good governance and developmental co-operation. However, the Recommendation does not apply to procurement carried out by developing countries, whether or not financed by aid.

2. Sanctioning bribery of foreign public officials

Analysis of the experiences of the OECD Member States had shown that the denying access to public procurement could effectively sanction corruption. Hence, the OECD Working Group on Bribery decided to extend the application of the sanction of suspension from competition as well as other existing procurement sanctions to enterprises that are determined to have bribed foreign public officials [see Article II paragraph v) and Article VI paragraph ii) of the Revised Recommendation]. In other terms, Parties providing for procurement-related sanctions in cases where companies are found to bribe domestic public officials should provide for the same sanctions if an enterprise is found to bribe a foreign official.

These provisions must be regarded as part of a wider arsenal consisting of criminal as well as civil and/or administrative sanctions. Indeed, the general obligation in relation to criminal sanctions for foreign bribery offences are contained in the Article 3 of the Convention (Sanctions), which requires Parties to apply "effective, proportionate and dissuasive criminal penalties". While countries were convinced that sanctioning legal persons for foreign bribery was particularly important when negotiating the terms of the Convention, they did not stipulate that sanctions be of a criminal nature.

Article 2 of the Convention (Responsibility of Legal Persons) asks countries to introduce the "responsibility of legal persons" while Article 3 (2) states that non-criminal sanctions against a corporation are also acceptable, provided that they include monetary sanctions and are "effective, proportionate and dissuasive". In Commentary 24 to Article 3, an explicit reference is made to the "temporary or permanent disqualification from participation in public procurement".

It is noteworthy that the provisions both in the Convention and the Revised Recommendation aim at sanctioning companies.

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Bribery in Public Procurement

METHODS, ACTORS AND COUNTER-MEASURES

Public works contracts mean big business. From road-building to high-tech communication infrastructure, public procurement averages 15% of GDP in OECD countries – substantially more in non-OECD economies – and it is a major factor in the world trade of goods and services. The large volume of contracts and the very high stakes often involved – in terms of both money and prestige – are the driving force behind thousands of potential suppliers' vying to win. And this can open the door to corruption. Left unchecked, a culture of corruption can take root, sabotaging a country's financial and political well-being.

Given the growing complexity of bribe schemes in today's globalised markets, the problem is how to identify corruption in public procurement so governments can work toward effective prevention and apply sanctions if necessary. This report provides insights on all three fronts. Based on contributions from law enforcement and procurement specialists, the report describes how bribery is committed through the various stages of government purchasing; how bribery in public procurement is related to other crimes, such as fraud and money laundering; and how to prevent and sanction such crimes. The typical motivations and conduct of the various actors engaging in corruption are also highlighted, as well as ten case studies.

The end result is a ground-breaking report that throws new light on the shadowy mechanisms and patterns of bribery in public procurement, and offers insider expertise that governments and international organisations can use to improve their anti-corruption policies.

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