



Support for Improvement in Governance and Management
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Protecting integrity in one special area of risk: public procurement

As you may know, public procurement accounts for a substantial part of the global economy. It, indeed, represents 10 up to 15% of Gross Domestic Product in developed countries, and up to 20% in developing countries. How could we define public procurement? It is the procurement of goods and services on behalf of a public authority, or entity such as a government or a public agency. National and local public entities are increasingly looking to the private sector to provide goods and services to their constituents. Such goods and services are often acquired through a public procurement process whereby the public entity contracts with a private sector enterprise to furnish a particular good or to provide a particular service for a fee subject to legal terms and conditions contained in a contract.

To prevent fraud, waste, corruption or local protectionism, the law of most countries regulates public procurement more or less closely. But each day newspapers write about corruption in public procurement. Every day, many people are convicted by the courts of corruption. These convictions concern national and local politicians and civil servants at all levels around the world. And many of these persons are involved in corruption cases of public contracts and public procurement. The reports prepared by the European Commission and the OECD analyze and criticize the corruption in public procurement.

A 2006 report of the World Bank shows that 16 % of public and private companies in the area of the OECD declare undocumented extra payments or bribes concerning their public contracts. The percentage arises to 56 % in Eastern Europe [1]. I do not know if these figures are reliable on the phenomenon. Nevertheless, a report about the French administrative judge's role in the repression of corruption which will be published in one month [2], shows that a significant proportion of cases treated by this judge concerns public procurement.

1) Corruption in the public procurement is a generic classification involving several crimes and offenses and resulting from several operations made by several persons.

Corruption is a general denomination covering others breaches or violation of the legislation. Indeed, the cycle of public procurement is very long: from pre-bidding phase to the post-bidding phase, including needs assessment, publishing, contract, implementation and payment. Just imagine the building of a high way linking Lisbon to Porto in Portugal... In this operation, many people are involved: engineers, land surveyors, lawyers, officials dealing with public domain and public relations. Many companies are in charge of planning and executing/building up the roads, the bridges. Maybe the same companies, or maybe other companies, must implement the public concession. Thus, it is a very complex operation during which a lot of infractions, crimes or offenses may occur. Indeed, first, corruption needs complicities between one or several decision-makers (PP officials, companies, consultants, architects, suppliers... and

bankers); and secondly, corruption profits from lack of rules, lack of controls, heaviness and slowness of proceedings...

Corruption is also mainly linked to other crimes, or infractions such as:

- Bribery: is an act implying offering money or gift in order to alter the behavior of the recipient. Bribery can distort the allocation of resources. For instance, bribery can lead a municipality to take a bidder offering a less good service than another bidder.
- Favouritism is the practice of giving special treatment to a person or a group. For instance, a civil servant gives some secret information to a company about a public contract.
- Nepotism is to favor relatives when granting jobs or benefits. Here is a typical example: a mayor signs a contract with his brother for the construction of a school, propriety of the municipality.
- Embezzlement is the illegal appropriation of property or money entrusted to someone, but owned by others.
- Patronage systems take place when local public office holders grant favours, jobs and contracts in return for political support.
- Fraud involves some kind of deceit and manipulation or distortion of information, by a public officer, with the intention to seek a personal gain.

In fact, corruption and public procurement are frequently mixed with other offenses or crimes, like:

- Illegal taking of interest;
- Money laundering,
- Tax evasion,
- accounting crimes,
- fraud, collusion,
- Political party financing,
- conflict of interest,
- organised criminal associations,
- Blackmail...

So, we've just seen that corruption is multiform. Therefore, we are going, now, to investigate on the origin of corruption in public procurement.

II) Main origin of corruption in public procurement

Thus, public procurement is an area of risk of corruption. Here are the following main reasons:

- The first reason is that public procurement engages huge funds and represents an impressive number of contracts. That is why the amounts of money involved attract greedy interests and the very large number of contracts multiplies opportunities for corruption.
- The second main reason is that public procurement is a technical process involving many actors. A technical process involves operations that are understood only by a small number of people. So those who dominate the art of public procurement can impose their ways on those who do not master so well. Often, the frauds occur also because people who

were in charge of over viewing the public procurement did not understand and notice the violation of the rule.

We must also observe that a significant number of people from public and private sectors participate in different stages of a public contract.

- The third main reason is that public procurement constitutes a major interface between public and private sector. And the logic on this last one is to maximize the profit. And to maximize the profit in a context of increasing competition, works with the fact that private companies adopt legally borderline behaviors and can accept, sometimes, to commit crimes or offences.

I would like to underline some other, maybe less obvious, reasons of corruption in public procurement, such as:

- Complexity of Public procurement laws: Very usually the rules on public procurement count hundreds pages, national rules integrate laws, decrees, orders and instructions. Public procurement is also the subject of the Agreement on Government Procurement, a pluri-lateral treaty under the auspices of the WTO. In the European Union, the rules on public procurement are very important. You know certainly the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and the Regulation of the Commission (EC) No 1564/2005 establishing standard forms for the publication in the *Official Journal of the European Union* of notices in the framework of public procurement procedures. And honestly, European and international rules are extremely complicated to understand and to implement.

- Another origin of corruption in public procurement is the lack of knowledge or dishonesty from public officials. The complexity of rules can justify many mistakes, especially at the beginning of the implementation of a new rule. It was the case in many European countries at the beginning on the implementation of EU rules, for example concerning the publishing of bidding. But, sometime, civil servants in charge to organise the process of public procurement are dishonest. In fact, the perpetrator (convicted) of the malpractice thinks that the profits of the corruption are superior to the undertaken risks. And, therefore, it is necessary to create, maintain and reinforce rules and institutions protecting public money and more generally public interest against the breaches of duties from public civil servants.

- The lack of monitoring and controls gives also the opportunity of corruption. In public procurement weak audits and bodies in charge of supervision allow the corruption.

- Politics and economic circumstances create the opportunity for corruption. For example, during the after war rebuilding period, states bought many products, built many roads, hospitals. These operations were done in a hurry and under the social and political pressure. During these periods, the temptation is very strong to no longer remain within the law. And many cases of corruption occur as it is still happening in the former Yugoslavia.

Circumstances may create a fertile ground for corruption. And the procurement process allows the production of the offense. Therefore, what does the procurement process look like in the main areas at risks in PP.

III) -So let me continue with the classification of risks in the cycle of public procurement

In fact, each step of the process is vulnerable!

Risks of fraud may occur:

In the pre-bidding phase;

In the bidding phase;

In the post-bidding phase.

III-1) Risks in the pre-bidding phase

The risks exist at every stage of pre-bidding phase:

Before the decision to contract;

Before the invitation to bid;

During the choice of procedure.

a) Risks before the decision to contract

At this stage, the main risk occurs in the definition of requirement for the contract: For instance a procurement officer designs the requirements of the contract for a specific company. Usually this kind of risk is mixed with a **conflict of interest**. A conflict of interests occurs when an individual or organization is involved in multiple interests, one of which could *possibly* corrupt the motivation for an act in the other. For instance, a procurement officer works in a public agency preparing a public contract and at the same time, he/she gives advices to a private company bidding for this contract. In this case, the temptation for the procurement officer to design the needs assessment, the definition of requirements, the choice of procedure and the time table for preparation of bid according and in the advantage to a privileged company is high.

Some evidence of this risk appears when the procurement official chooses always the same company for the public contracts he is dealing with, or when a consultant agency taken by the contracting authority belongs to a bidder.

b) Risks before inviting tenders

During the process of inviting tenders there are three main risks:

The first risk is an excessive assessment of the needs. Estimation of the needs can be voluntarily erroneous, for example, the contracting authority may ask for excessive quantities of certain products without needing it.

A wrong definition of requirement is another main risk. For example, the contracting authority asks for extremely resistant materials without real reason.

And, the decision to contract can be a risk also; indeed, the decision may be influenced by erroneous information.

I would like to present you some examples of such cases:

- First example: Risks linked with needs assessment: Some high-level officials impose on the contracting authority the building up of a very large bridge exceeding the traffic circulation needs and this for a very long time.
- Another case could be mentioned: an authority has commissioned in an informal way a company for a mission, such as the construction of a building for the political party that leads the municipality. Then it invites tenders for a different operation that will provide a benefit far greater in order to pay the price for the building constructed for the party.
- Second example, the definition of requirement can be too precise (tailored for one company), or too vague or not based on performance requirement.
- And last example, the Decision to contract

It may be influenced or distorted by:

- Lack of information;
- or too many information;
- or too late information...

c) Let see now the Risks of corruption during the choice of process for public procurement:

The legal process of public procurement protects the public interests. Therefore those who may commit an act of corruption seek to violate these rules. There are several methods to avoid the PP process, for example:

By transferring the PP to a private organisation which doesn't have to respect the PP rules;

By splitting up (artificially) the contract: if you divide a contract into different sub-contracts, you can avoid the limits specified by the legislation on public procurement, and corruption is easier to organise.

III-2 Risks in the bidding phase of public procurement

In the bidding phase of public procurement, there are critical risks for integrity: the first risk lies in the Invitation to bid; and the second risk lies in receiving a compensation for having done so:

a) Frequently, the invitation to bid is inconsistent and does not guarantee the real access to information for bidders. For example, important information is not given to all bidders, or conversely, information that should remain secret until the end of the process is provided to a bidding company.

b) Awarding may contain some risks. For example lack of transparency during the approval process.

III-3 Risks in the post-bidding phase:

The most frequent risks to the integrity of the PP process include:

On the one hand, the insufficient monitoring of the contractor by the public authority; for instance, the contracting authority does not check the effective implementation of the provisions of the contract, such as carrying out the work or delivery of materials purchased.

On the other hand, the lack of supervision of the public officials by the line managers exists. We must not forget that a PP contract involves high amounts of money and then it represents a great temptation for a civil servant earning a normal salary.

IV- Some measures to prevent, control, detect and investigate bribery in PP

In my final section, I would like to focus on the preventive measures, the controls; the detection mechanisms, and the methods of investigation.

IV-1 Preventive measures

Preventive measures must be strengthened:

Procurement rules must be simple, clear and stable;

We need Good practices for promoting good access to the information, transparency and competition before and after contract attribution;

And, we need to train staff to better rule, regulate with integrity better practices.

a) Procurement rules

I would like to emphasize the formal aspects of procurements rules:

Procurement rules must be:

- Stable, stability implying security and transparency;
- Clear, clarity means avoiding ambiguous terms in the laws, legislations, bids...;
- Exhaustive. The rules must be the more general possible and concern most cases.

b) In same time, we have to promote publicity, transparency and competition before and after contract attribution

c) Finally we have to train staff members, for instance by making them aware of rules and regulations;

IV-2 Controls

The controls must concern the whole process of public procurement. They are internal and external:

The Internal controls are implanted by the administration itself (hierarchic and legality controls, inspections);

The External controls are made by private auditors or judges.

IV-3 Detection mechanisms:

It is necessary to create some detection mechanisms of corruption in public procurement. They must be established by:

Mapping the risks;

Reporting to the PP authorities.

a) Mapping the risks

- The first goal of mapping the risks is taking into account illegal acts but also insufficient monitoring or money wasting;
- The second goal of mapping the risks is recommending strategy, methods and tools.
- Mapping the risks is composed of several steps:
- The First step imposes to identify the main risks by sector and by activities.
- Risks sectors: civil engineering, energy, arms trade, banks, health sector...
- Risks activities: PP but also town planning, subsidies...
- In a second time, identification of the risks factors within the PP unit:
- Failure of functioning;
- Delegation of powers;
- Lacks of code of ethics, guidelines...
- Conflicts of interests...

In a third time, it is important to put a stress on identifying of the risks' functions and risks' "human profiles"

Mapping the risks must enable us to make an inventory of:

- Internal procedures;
- Decision-making;
- Laws in force

Finally, mapping the risks may lead to improve the functioning of the buying unit

b) Reporting the information to the PP authorities

Public officials dealing with a public procurement must report the process of public procurement. And a report is a document containing information organized in a narrative, graphic, or tabular form, prepared on ad hoc, periodic, recurring, regular, or as required basis. Reports may refer to specific periods, events, occurrences, or subjects, and may be communicated or presented in oral or written form.

First, for the civil servant, the report must be made according to the hierarchic way;

But it may be useful to set up mechanisms of denunciation. For example, free phone number, mechanisms protecting the whistleblower against reprisals...

IV-4 Methods of investigations

Let me finish with the methods of investigation. The main difficulty in the investigation is that the practices of corruption are hidden...

So investigation should be wide-ranging and based on multidisciplinary analysis;

a) The corruption may be directly identified

In certain situations, corruption may be directly identified. The use of accounting is a very effective way to uncover cases of corruption. For example analyse of the count concerning “Gifts and public relation” (representation, travelling...) of a company dealing with public procurement is very interesting. If there are a lot of gifts given by the company without any compensation to state employees... You must investigate.

b) The frauds may be identified on the basis of the “red flags”

Another way to identify corruption is the use of “red flags”. A red flag is a warning of a danger or of a problem. Let me propose you two examples of red flags: the bids submitted by different contractors contain the same line items or the same bid or all bids are higher than the projected cost. If you note the apparition of the red flags, you have to investigate

[1] Kaufmann, World Bank (2006), quoted by Integrity in Public Procurement – good practice from A to Z, OECD 2007.

[2] Rapport pour l’année 2010 du service central de prévention de la corruption, section on « Le juge administratif et les atteintes à la probité, 2000 à 2010. A paraître. Paris-France.