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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Introductory Paper by the Secretariat

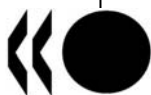
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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

INTRODUCTORY PAPER BY THE SECRETARIAT

Introduction

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

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

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

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

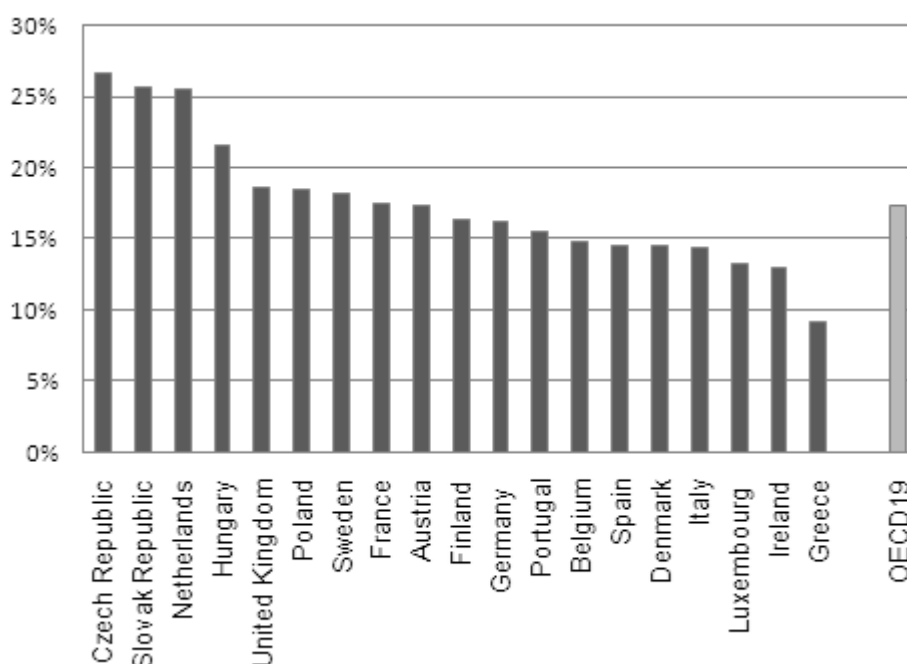
4. Annex II to the Issues Paper includes the issues and questions listed in the letter calling for country contributions of 1 December 2009 [DAF/COMP/GF(2009)14].

1. Collusion, Corruption and Public Procurement

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

¹ OECD (2005), Public Procurement in OECD, Fighting Corruption and Promoting Integrity in Public Procurement, Paris.

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



Source: OECD, 2006

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

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

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

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

Box 1. Examples of Cases Involving Collusion and Corruption

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

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

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

2. The Role of Transparency in Public Procurement

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

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

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

2.1 *Relationship between Transparency and Corruption*

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

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

2.2 *Relationship between Transparency and Collusion*

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

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

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

2.3 *Policy Considerations*

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

- Only information on the winning bid should be released, while information on the losing bids could be made available only to issuers of tenders and controllers, and not to competitors generally;
- Because of the potentially destabilising effect of non-identifiable bidders on bid rigging, the procurement official might consider keeping undisclosed the identities of the bidders, perhaps referring only to bidder numbers, and the number of bidders remaining in the bidding process;
- The procurement official might allow bids to be telephoned or mailed in, rather than requiring that bidders turn in their bids in person at a designated time and place where all can observe;
- The procurement official might allow a bidder to submit more than one bid under different bidder numbers, or under different identities;
- The timing of the disclosure of sensitive information (such as the losing bidders' identity and their bids) could be delayed to ease the effects of such disclosure on collusion.

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

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

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

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

18. If the risk of anti-competitive conduct is significant, the procurement official should preferably use a *sealed-bid tender* model which minimises the bidders' ability and incentives to collude. In sealed-bid tenders each bidder submits one single "best and final" offer, typically in writing, and the bid is kept secret from the other bidders. In a sealed-bid tender, a collusive outcome is possible but it is more difficult: effective prior communication between the conspirators prior to the tender is required and incentives to

cheat on a collusive understanding are significantly higher because the ability to punish deviations is reduced, if not eliminated.

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

3.2 *Direct Negotiations and Framework Contracts*

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

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

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

22. Similarly, procurement officials might find it more effective to use *framework contracts*, i.e. standing agreements used as a basis for purchasing goods and services from pre-qualified firms meeting a number of quality standards. Again framework agreements can save time and resources by eliminating numerous bidding processes, hence reducing the overall costs for procuring the goods or services.

However, the use of framework agreements may raise ethical concerns, particularly if prices are not fixed before frameworks are drawn up. In this case, the agreement is left opened to the risk of discrimination and favouritism.

3.3 Policy Considerations

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

24. The choice of the bidding model largely depends on the circumstances of the procurement. If the risk of collusion is limited (because, for example, there are many potential suppliers) an open tender would be preferable. If the risk of collusion is significant, then it would be preferable to use a sealed-bid system. If the risk of both collusion and corruption is significant, procurement officials should still consider using a sealed-bid tender, but make the tender “corruption proof”. In this case, the use of electronic or on-line bidding systems, for example, could ensure that both the risks of collusion and corruption are limited. Electronic bidding allows for a dynamic tender to take place, and at the same time ensures that a record is made of each bid and of each the person who had access to the bid. This prevents corrupt procurement officials from having had improper access to the bids before the bidding window is closed and the possibility of influencing the bidding process for personal gain. Similarly, to avoid improper manipulations, the sealed bids could be opened in public, after the closure of the bidding window, and a requirement that no bid can be destroyed and replaced could be foreseen. Alternatively, technology which makes it impossible for the procurement official to tamper with the bids could also be used.

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

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

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

Box 2. The OECD Bid Rigging Guidelines

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

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

OECD Principles for Enhancing Integrity in Public Procurement

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

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

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

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

Box 3. Examples of National Co-operation Networks

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

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

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

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

Box 4. Self-certifications

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

Disqualification Orders

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

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

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

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

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

5. Finding the Most Effective Institutional Framework

28. In many countries the enforcement of antitrust laws (usually entrusted to the competition authority) is entirely unrelated to the enforcement of anti-corruption statutes (usually entrusted to the judiciary or anti-corruption body). The complementarities between corruption and anti-competitive practices noted earlier suggest that a lack of co-ordination unnecessarily diminishes the deterrent effect of both competition and anti-corruption law. Conversely, a co-ordinated approach is likely to increase the probability that objectionable practices are identified and it makes punishment of complementary corruption/collusion practices more effective. In the long run, a unified approach is likely to yield larger social benefits.

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

Box 5. The German Bundeskartellamt as Public Procurement Tribunal

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

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

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

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

Box 6. The Japanese Involvement Prevention Act

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

6. Final Remarks

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

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

ANNEX I - MAIN REFERENCES

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ANNEX II - QUESTIONS AND ISSUES FOR DISCUSSION

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

1. Size and policy objectives

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

2. Corruption

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

3. Collusion

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

4. Fighting collusion and corruption

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

5. Advocacy

- How do regulatory or institutional conditions help facilitate bid rigging and corruption?
- In what ways can competition authorities work to improve the efficiency of public procurement?
- What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?
- When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?
- Has your competition agency undertaken competition advocacy in this area?
- If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?