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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from Pakistan

-- Session V --

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Pakistan --

1. Size and policy objectives

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

1. In most developing countries public procurement amounts on average to between 15% and 30% of GDP¹. In some cases it has also been quoted at 50% of GDP.² In Pakistan, while the exact figure is not determined, public procurement would be towards the lower end of the range for developing countries given the country's low tax-GDP ratio.

2. The principal policy objectives of public procurement in Pakistan are documented in the Public Procurement Rules, 2004, which emphasise fair and open competition³ leading to quality, efficiency, economy and value for money for the procuring agencies and ensuring proper and prudent use of public money.⁴ The Procurement Rules discourage specific or popular brands and encourage a wider participation among suppliers that brings in new entrants⁵ and smaller competitors to take the opportunity of open competition and grow as per their potential.

2. Corruption

2.1. *What is the cost of corruption?*

3. While the precise figures of the costs of corruption are not known, kickbacks in public contracts are estimated to constitute approximately 25% of the relevant project or procurement budget.⁶ Similarly, it has been estimated that corruption in the procurement process alone⁷ came to about 15% of Pakistan's development budget for 2007-8. This would amount to over Rs.150 billion (US\$1,772 million).⁸

¹ Handbook for Curbing Corruption in Public Procurement, Transparency International. See also Fighting cartels in Public Procurement, OECD, 2008.

² William E. Kovacic, "Competition Policy, Consumer Protection, and Economic Disadvantage" (2007) 25 Washington University Journal of Law & Policy 101.

³ Rule 10 & 20 of the Public Procurement Rules, 2004 available at <http://www.ppra.org.pk/doc/rules.pdf>.

⁴ Rule 4 of the Public Procurement Rules, 2004.

⁵ Rule 10 of the Public Procurement Rules, 2004.

⁶ Transparency International, 2008.

⁷ Assessment of the Pakistan Infrastructure Implementation Capacity, 2008. A joint collaboration of World Bank and Planning Commission of Pakistan.

⁸ Amount in rupee converted into dollars at the rupee-dollar rate US\$1 = PKR 84.30) prevalent on 6th January, 2010.

4. The National Corruption Perception Survey 2009⁹ carried out by Transparency International shows that the quantum per transaction of bribe is highest in tendering and procurement. The average quantum of bribe per transaction in nine sectors surveyed has been calculated at US\$876, whereas in tendering alone the average quantum of bribe amounts to US\$849.¹⁰

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

5. The National Anti-Corruption Strategy (NACS) 2002¹¹ notes that need and greed, combined with opportunity when there is little fear of detection and/or punishment are the basic factors that facilitate corruption. NACS further elaborates these factors as follows:

- inadequate pay and pensions and having to support large families;
- political instability and intermittent military rule that have weakened public institutions;
- complex and cumbersome laws and procedures; and
- selective access to justice, which is itself slow.

6. At the institutional level three factors have proved to be highly damaging: (i) abuse of power or discretion, which has enabled officials to make arbitrary decisions; (ii) low levels of transparency that have made it difficult for officials to hold each other accountable; and (iii) lack of job security, which has made it less likely for officials to resist political interference in administrative matters and made it more likely for them to collude with others in corrupt acts.

7. In all the above-mentioned factors, the most compelling one is the lack of accountability. Ineffective detection and absence of deterrent punishment has left public procurement in the hands of weak and/or corrupt public officials who consequently have wreaked havoc on it.

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

8. The Public Procurement Regulatory Authority (PPRA) has been bestowed with the power to lay down a code of ethics for public procurement.¹²

9. Pakistan's Public Procurement Rules, 2004 are aimed at encouraging transparency in procurement. For procurements over Rs. 10 million (US\$ 118,623), all procuring agencies are required to sign an Integrity Pact with their suppliers.¹⁰

10. Wide participation¹³ in tenders is encouraged to avoid tender failure, which would then result in direct contracting and typically increase the scrutiny of procedures. For procurement work up to

⁹ <http://www.transparency.org.pk/documents/NCPS%202009/NCPS%202009%20%20Report.pdf>.

¹⁰ Ten sectors were surveyed in the report that include Judiciary, Land administration, Taxation, Custom, Police, Health, Local Government, Power, Education, and tendering and contracts. Report shows that quantum per act of corruption in public tendering is 49% of all 10 sectors.

¹¹ Page 14, National Anti-Corruption Strategy, 2002, National Accountability Bureau. Available at <http://www.nab.gov.pk/Downloads/Doc/NACS.pdf>.

¹² Section 5(2)(d) of the Pakistan Public Procurement Regulatory Authority Ordinance, 2002.

¹³ Rule 10 of the Public Procurement Rules, 2004.

Rs. 2 million (US\$ 23,724) an advertisement is required on the website of the PPRA. Tenders exceeding that amount need to be advertised in the print media.

11. As soon as a contract has been awarded, the procuring agency is required to make all documents related to the evaluation of the bid and award of contract public¹⁴ and also post contract awards of over Rs.50 million (US\$ 593,119) on the website of the PPRA.¹⁵ Apart from this, citizens can access government documents under the Freedom to Information Ordinance, 2002.

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

12. Firms are required to sign an integrity pact as explained above under question (3) section II. Corruption is a criminal offence under Pakistan's Penal Code and is punishable with imprisonment of up to 7 years or a fine or both.

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

13. Pakistan has two anti-corruption agencies at the federal and four at the provincial level and three sets of courts. The relevant organisations are:

- i) the Federal Investigation Agency;
- ii) the National Accountability Bureau (NAB), with offices both at the federal level and at the provincial level. The NAB is the main anti-corruption body in Pakistan, which is endowed with comprehensive powers to investigate and prosecute cases relating to corruption.
- iii) Special Accountability Courts set up under the NAB Ordinance and the Central and Provincial Special Courts established under the Criminal Law Amendment Act 1958.

14. The Competition Commission of Pakistan does not have power to investigate corruption cases in public contracting.

3. Collusion

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

15. In most of the procurement cases, the number of competitors is limited and this facilitates collusion among the bidders. Collusion is also more likely where the competitors know each other well. Trade associations are the platform utilised by undertakings in Pakistan to discuss their business activities with each other, which has helped facilitate bid rigging and collusion.

16. The construction industry is the most vulnerable to bid rigging. In Transparency International's international surveys, "corruption was most prevalent in the Rs.272 trillion (\$3.2 trillion) construction

¹⁴ Rule 47 of the Public Procurement Rules, 2004.

¹⁵ Regulation 7 of the Public Procurement Regulations, 2008.

sector and plagued both the developed and developing worlds”¹⁶. In Pakistan, too, bid rigging seems to be widespread in government construction contracts.

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

17. Sectors providing utility services like water and power, health, education, privatisation, infrastructure and BOT projects as well as development aid have been greatly affected by collusion in procurement or bidding. The Competition Commission of Pakistan came into existence in November 2007 and has not had the opportunity to design procurement systems that minimise the risks of bid rigging.

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

18. No such certificates of independent bid determination are required in Pakistan. The procuring agencies are required to specify a mechanism and manner to permanently or temporarily bar [suppliers and contractors who are found to be indulging in collusion¹⁷] from participating in their respective procurement proceedings. The PPRA website also list national and international firms that have been placed on the banned list.

4. Fighting collusion and corruption

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

19. Generally, government construction projects, hiring of consultants and the pre-qualification process for purchase of goods by many procuring agencies have involved both corruption and collusion in Pakistan.

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

20. Procurement is done at all levels of government, from municipalities and towns, to provinces and the Federal Government. While contracting at the Federal or National level is larger in terms of value per contract, local government contracting is also significant in terms of volume and its local impact. There is no clear evidence at what level collusion and corruption cases predominantly occur.

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

21. Presently, public procurement in Pakistan is treated mainly as a downstream, largely clerical, buying and selling function and therefore does not attract professional and competent staff to deal with the process. There is a lack of integrity and transparency and no real desire to minimise the misuse of meagre resources. Capacity-building of staff and officials involved in public contracting would be helpful to fight against collusion as well as the methods and techniques mentioned under question number 3 of section II.

¹⁶ Excerpt quoted from the news published in Daily Dawn, Pakistan, March 2005, on the occasion of publication of Global Corruption Report, Dr Peter Eigen, founding Chairman of TI spoke on Corruption in Procurement.

¹⁷ Rule 19 of the Public Procurement Rules, 2004.

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

22. Yes, before the commencement of any enquiries or related proceedings, if the accused voluntarily returns to the NAB any gains acquired through corruption and discloses the full particulars relating thereto, the Chairman NAB may grant leniency or release the accused person with the permission of the accountability court.¹⁸

23. At any stage of the investigation or inquiry, the Chairman NAB may also give a full or conditional pardon to a person on condition of his making a full and true disclosure of the circumstances within his knowledge relating to the offence, including the names of the persons involved therein.¹⁹

5. *Advocacy*

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

24. Competition in procurement markets is limited by regulatory or other barriers to participation by alternative suppliers and complex and ambiguous laws can also affect transparency in the procurement process. These might include licensing or other restrictions on entry or participation in markets that unnecessarily make it more difficult for firms to compete. This, in turn, enhances the likelihood/feasibility of collusion by limiting the number of competitors.

25. In Pakistan the procedure for the evaluation of bids requires that the lowest evaluated bid has to be accepted unless this results in a conflict with laws, rules, regulations or policies of the Federal Government.²⁰ This clause can be interpreted in varying manner and the decision to award could become less transparent. Similarly, a bidder could be disqualified from participating in a single tender for submitting incomplete information.²¹ Further, individual procuring agencies define their own procedures for debarment²² and such provisions of law may themselves lead to an abuse of the process and eliminate competitors (though otherwise qualified) from the procurement process.

26. Discretionary powers of the public officials involved in procurement can seriously hamper the process. Members of departmental evaluation committees under the present tendering system have assumed vast discretionary powers, prescribed under the authority of a clause in evaluation procedure that “provided that a bid is substantially responsive, the purchaser may waive any non-conformity or omissions in the bid that does not constitute a material deviation.”²³ Such discretionary power could be abused for reasons which can be ultimately be detrimental for the procurement process.

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

27. Corruption and collusion both restrict the right to compete among suppliers and increase the price of the goods or services procured and result in wastage of public funds. A competition agency is better equipped to deal with collusive practices than the procuring body and for this reason, public procurement

¹⁸ Section 25 of the NAB Ordinance, 1999.

¹⁹ Section 26 of the NAB Ordinance, 1999.

²⁰ Rule 38 of the Public Procurement Rules, 2004.

²¹ Rule 18 of the Public Procurement Rules, 2004.

²² Rule 19 of the Public Procurement Rules, 2004.

²³ EU-Asia Urb Project, Preventing Corruption in Public Contracting: Capacity Building and Networking for Civil Society and Local Governments. Public Contracting Handbook – TI Pakistan Section.

could be brought under the jurisdiction of the competition agency. A close relationship between both the procurement authority and the competition agency at the pre- and post-bidding stages might help to minimise the risks of corruption and collusion.

28. Another possible way would be to give additional powers to the competition agency to investigate and take action against the decisions of public administrative bodies that affect fair public procurement adversely. For example, the competition agency can help in assessing important documents such as the independent determination of bids and in the vetting of other bid documents.

29. A competition agency can also contribute through advocacy to improve the efficiency of public procurement. Advocacy measures can entail educating public procurement officials on the possible harm and cost of fraud and collusion. Similarly, outreach programs can also help educate public procurement officials about what they should look for in order to detect bid rigging and various types of fraud associated with government procurement and what they can do to protect themselves from corruption and bid rigging.

5.3. *What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?*

30. A detailed discussion on the measures taken to reduce corruption and collusion and improve efficiency of the public procurement in Pakistan has been given under question 3 section II above. These measures have proved fruitful in terms of saving costs. For example, the Integrity Pact was applied and the evaluation criteria for short-listing were made transparent in the Greater Karachi Water Supply Scheme Phase-V, Stage-II, 2nd 100 MGD Project K-III. These measures helped to reduce costs in the contract. In fact, the project was reported as a model for Transparent Procurement Procedures in the report prepared by the Working Party of the Trade Committee of OECD on the Transparency in Government Procurement.²⁴

5.4. *When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?*

31. No, the Commission has not adopted measures to reduce collusion and bid rigging in public procurement and ergo, has not taken into account any potential impact of such measures.

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

32. The Competition Commission of Pakistan is also mandated to ensure and promote free competition; it has also been conferred authority to promote competition using various advocacy measures.²⁵ An advocacy approach was utilised in the matter of the Tractors Subsidy Scheme (2008-09) launched by the Government of Punjab. The CCP received complaints from a number of manufacturers and importers of tractors who claimed that only two local tractor manufacturers had been invited by the Agriculture Department, Government of Punjab to supply tractors under the Scheme. The CCP took cognisance of this apparent exclusion of all other manufacturers, dealers/importers of tractors and informed the concerned authorities of the provincial Government that this action ran afoul of competition principles. The situation was rectified and the provincial Government started negotiations with rest of the manufacturers and importers of the tractors for the supply of tractors under the Scheme.

²⁴ Transparency International, 2002.

²⁵ Section 29 of the Competition Ordinance, 2007.

33. Another example of competition advocacy in public procurement was the recommendation given by the CCP to the Federal Government to rectify the policy of the Trading Corporation of Pakistan (TCP) to purchase sugar from the members of Pakistan Sugar Mills Association (PSMA) only, as this could be considered a prohibitive agreement.

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

34. The CCP took its first action in public contracting in the matter of Karachi Port Authority (KPT) in 2008. A comprehensive inquiry was conducted on complaints filed by TransGlobal Services (Pvt.) Limited (TransGlobal) and Pakistan International Container Terminals Ltd (PICT), against Hutchison Port Holding (HPH), Karachi International Container Terminals (KICT) and KPT. In both complaints, it was alleged that KPT had been engaged in collusive bidding with HPH while granting concessions for the establishment of a new container terminal and had granted HPH concession for more than 80% of the container handling capacity at KPT. A comprehensive inquiry was conducted and Show Cause Notices were issued to KPT and HPH for alleged violations of the Competition Ordinance. However, Show Cause Notices were challenged before the High Court and the matter is *sub judice*. The Commission, has, therefore, not been able to consider appropriate remedies.