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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from Tunisia

-- Session V --

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Tunisia --

Introduction

1. Because of its economic and financial importance, public procurement is a sensitive area which is given special attention by the Tunisian Government, which has provided the sector with double protection through a particular regulatory mechanism which has been amended repeatedly (Decree No. 2002-3158 of 17 December 2002).
2. This decree lays down three fundamental principles: equality, transparency and competitive procurement.
3. Implemented through stringent competitive procurement rules, these foundations reflect the authorities' determination to ensure optimal competition.
4. In putting these principles into action, public buyers take responsibility not only for efficient procurement but also for the competitive operation of a significant share of the national economy.
5. But it is not always easy to chart a competitive course, especially in a sector in which the characteristics of demand, which is limited in both time and space, are apt to prompt businesses to adopt anticompetitive behaviours. The realm of public procurement is not exempt from the competition legislation that seeks to protect overall market equilibrium.
6. This dual protection is further consolidated by the standard legislative arsenal applicable to the persons responsible for public procurement - an arsenal that includes laws on corruption and the obligations of State civil servants.¹
7. In addition, any civil servant or official of the State, public administrative institutions or local government, or any director, officer or employee of a public company who commits a management offence against an ordinary legal entity that is subject to public accounting rules, or against a public company, shall be held accountable to the Court of Suppression of Fraud. As a rule, a management offence may be deemed to be any act of management that is committed in violation of any law, decree or regulation

¹ Section 87 bis of the Tunisian Criminal Code provides that “*Any civil servant or comparable official who unlawfully obtains for himself or for any another person, either directly or indirectly, any gifts or promises of gifts or presents or advantages of any sort with a view to granting another person an unjustified advantage by means of an act that is contrary to legislative or regulatory provisions instituted to ensure freedom of participation and equal opportunity in procurement by public establishments, public enterprises, offices, local authorities or companies in which the State or local authorities hold a direct or indirect equity interest, shall be subject to five years in prison and a fine of five thousand dinars.*”

governing the revenue collection or expenditure of the State, a public administrative institution or a local government (which encompasses public procurement).²

8. This contribution will focus essentially on the rules against collusion in public procurement as stipulated in the decree on public procurement and the law on competition and prices.

1. The Decree Regulating Public Procurement: A Guarantee of Procedural Compliance

9. The attribution of government contracts is governed by the principles of equality of candidates in public procurement as well as equal opportunity, procedural transparency and competitive procurement.

10. These principles are implemented through compliance with rules of non-discrimination between bidders, adherence to clear and detailed procedures at all steps of the contract attribution process, timely information to bidders about those procedures and widespread disclosure of replies and explanations in response to bidders' comments and requests for clarification.

1.1 At the Level of Stipulating Requirements

11. Contract specifications must:

- State the purpose of the contract and the terms for carrying it out;
- Establish the conditions for participation, selection criteria and the weighting thereof;
- State the obligations and the rights of all parties concerned;
- State the allocation rule: "In formulating contract specifications, the public buyer must take account of the capacities of entrepreneurs, producers, service providers and design engineers."

12. Services must be stated clearly:

- They must be set forth in reference to pre-established technical specifications and any explicitly designated national or international standards that may apply;
- Any indication of brand names or of any other elements apt to limit competition or steer an order towards a given product is forbidden.

1.2 At the Level of Selecting Contract Attribution Procedures:

- Contracts must be in writing;
- It is forbidden to split public procurement contracts. It is formally prohibited to split orders so that they are no longer subject to:
 - The written contract requirement;

² See the judgements of the Court of Suppression of Fraud on the website of the Tunisian Court of Accounts <http://www.courdescomptes.nat.tn/indexsite.php> (Judgement No. 192 of 25 November 2005; Judgement No. 193 of 25 November 2005; Judgement No. 194 of 25 November 2005; Judgement No. 196 of 30 December 2005; Judgement No. 252 of 23 June 2006.)

- Review by the competent contracts committee.

13. Calls for tender constitute the general rule for public procurement. Nevertheless, contracts may also be awarded through either an expanded consultation process or a negotiated contract, subject to prior authorisation:

- By decree in respect of contracts under the jurisdiction of the High Contracts Committee;
- By order of the Minister concerned in respect of contracts under the jurisdiction of other contracts committees.

14. Such authorisation is granted on the basis of a duly justified report and upon the advice of the competent contracts committee.

15. Contracts may be awarded through competitive procurement in the form of the expanded consultation procedure only in such cases as are listed on the decree.

16. In cases where the expanded consultation procedure is used, public buyers must consult with the maximum number of suppliers, depending on the purpose of the contract, and adhere to a written procedure that ensures equality amongst participants, equal opportunity and transparency in selecting the supplier.

17. Negotiated contracts may be used only for the procurement of work or supplies of goods, services or research that may be performed exclusively by a particular supplier or service provider. The public buyer must adhere to a written procedure.

1.3 At the Level of Reception and Opening of Bids

- Notification of a call for tender is published at least 30 days prior to the deadline for receiving bids;
- In an emergency, the deadline may be shortened to 15 days;
- Technical bids must be submitted by registered post or by express post;
- Financial bids are submitted directly by bidders whose technical bids have been accepted.

1.4 At the Level of the Joint Control Exercised by the Various Committees

1.4.1 Opening bids: a guarantee of transparency

- A standing committee:
 - Appointed by the public buyer;
 - A maximum of five members including the Chair (auditor of public expenditure/State auditor).
- Bid-opening sessions are open to the public;
- The bid-opening committee meets a first time to open bids containing technical bids;

- After a review of the report on the opening of technical bids by the competent contracts committee, the bid-opening committee meets a second time to receive and open bids containing financial bids submitted directly by bidders whose technical bids have been accepted;
- Bidders are invited to submit their bids ten business days before the meeting is held.

1.4.2 Reviewing bids and selecting the supplier: the important role of audit bodies

18. The bid-opening committee checks bids against contract specifications and then analyses them, referring to stated criteria, and proposes which firm should be awarded the contract:

- Ordinary services: the lowest bidder;
- Complex services: the best bidder.

19. In the event of obvious collusion between the bidders, or between some of them, it is imperative that the call for tender be declared unsuccessful and a new bidding process undertaken, unless this is materially impossible or in the event of an utmost emergency, in which case the expanded consultation process is used.

20. In addition, the public buyer must inform the minister for trade of the financial bids eliminated because of excessively low pricing in distortion of fair competition. In this case, the minister for trade may file a complaint with the Competition Council regarding the tenderers of these bids, pursuant to the provisions of Act No. 91-64 of 29 July 1991 on competition and prices.

21. In an emergency, the minister for trade may require that provisional measures be taken.

1.4.3 The role of the contracts committees

22. Contracts committees examine the compliance of competitive-procurement and contract-attribution procedures, as well as the fairness and transparency of procurement procedures.

23. They also ensure that administrative, financial and technical conditions are acceptable.

24. Prior advice from the contracts committees is required regarding:

Before competitive procurement:

- Draft contract specifications in respect of open calls for tender, invitations for proposals and consultations;
- Members of the jury and of bid-opening committees in respect of procurement under the jurisdiction of the High Contracts Committee;
- Terms of reference and pre-selection reports in respect of calls for tender preceded by pre-selection.

After bids have been opened:

- Bid-opening reports and reports by proposal juries;

- Draft contracts in the event of a negotiated contract or insertion of any (even partial) amendment to one or more clauses of a contract in respect of which a bid-opening report was first submitted to the committee for review.

During and after the contract period:

- Proposed amendments;
- Final settlement proposals;
- Any problem or dispute involving the formulation, attribution, fulfilment or settlement of contracts under its jurisdiction.

1.4.4 Role of the Public Procurement Monitoring and Investigating Committee

25. The Public Procurement Monitoring and Investigating Committee, set up to report to the Prime Minister:

- Monitors compliance with the basic principles governing contract attribution, including equality of bidders before public procurement, procedural transparency, competitive procurement and public disclosure;
- Reviews information concerning contract fulfilment that could materially alter the factors taken into account when the contract was awarded;
- Investigates contracts, including amendments and final settlement dossiers, primarily on the basis of data collected by the public procurement observatory;
- Reviews petitions from any person concerned by the attribution of public procurement contracts or compliance with the relevant procedures;
- Deals with contract amendments that could increase the aggregate amount of a contract by more than 50%;
- Studies a sample of awarded contracts accounting for at least (10%) of the number of dossiers reviewed by the various contracts committees, as well as any dossier that the committee deems it advisable to review for any reason whatsoever (compliance with deadlines, competitive analysis, concentration index, etc.).

2. Application of Competition Law to Public Procurement; Additional Protection beyond Procedural Compliance Alone

26. Contracts committees play an important role by reviewing contract attribution rules, in particular to ensure compliance with the three stated principles. But this procedural watch does not provide an absolute guarantee against the risk of anticompetitive practices.

27. Under competition law, the matching of a call for tender and bidders' responses thereto constitutes a market in and of itself (the "relevant" market). Here, the conditions for healthy competition do not necessarily exist simply because there has been formal compliance with the rules for attribution.

28. The Directorate-General for Competition and Economic Surveys (DGCEE), which is represented on the majority of contracts committees, has adopted its own method for combating collusion in public procurement by detecting evidence of anticompetitive practices and formulating investigative reports that can be submitted to the Competition Council.

29. A number of choices that public buyers must make regarding the conditions for competitive procurement and the use of procedures may in fact run counter to the desired end of optimal competition and, without appearing to do so at first, restrict free competition. The buyer must exercise vigilance with regard to any evidence of concertation amongst bidders. The Tunisian competition authorities are also empowered by law to intervene in accordance with their methods to combat anticompetitive practices in public procurement.

30. The investigations carried out by the DGCEE begin by looking at any dysfunction stemming from the behaviour of certain businesses, but they make a distinction between such dysfunction and the potential dysfunction resulting from procedures implemented by public buyers, and they deploy technical or economic means that might explain apparent evidence of anticompetitive practices.

2.1 Dysfunction Stemming from the Behaviour of Certain Businesses

31. In contrast to other sectors of activity, public procurement features a single price submission mechanism that does not allow a bidder to position, calibrate or adjust itself vis-à-vis the competition in successive steps.

32. This aspect constitutes an additional element of uncertainty for operators who might be tempted to reduce the uncertainty, e.g. by exchanging information.

33. Exchanges of information promoting concertation between businesses for the purpose of dividing up contracts or eliminating a competitor are prohibited by Act No. 64-91 on competition and prices, as amended.

34. Section 5 (new) provides that “Concerted actions, collusion and express or tacit agreements shall be prohibited if they have an anticompetitive purpose or effect, or if they seek to:

- Thwart the determination of prices by free interaction between supply and demand;
- Limit the market access of other businesses or the free exercise of competition;
- Limit or control production, sales outlets, capital investment or technical progress;
- Divide up contracts or sources of supply...”

35. Public buyers therefore have a paramount position in the mechanism for detecting collusive practices.

36. In this regard, their role in many cases involves merely examining the bids and behaviour of bidders, and on occasion it can involve extensive analysis of market structures and the strategies deployed by businesses.

37. In most cases, the evidence likely to be uncovered can take the following forms:

- Evidence relating to bid amounts:

- Following a misunderstanding in the exchange of information, firms submit identical pricing proposals;
- There are linear coefficients of increase or decrease between the unit prices of different bidders in cases where cover bids are established by the same person;
- Each bidder submits a competitive bid for one lot and non-competitive bids for the other lots, whereas all lots are technically identical and based solely on a geographical criterion;
- The price proposed by a group is significantly below the estimate – a practice that may well reflect a desire to eliminate a new entrant or a competitor who is especially aggressive on a commercial level.

Box 1. Practices Used in Connection with a Call for Tender to Supply Bread

Practices Noted:

Presentation of cover bids.

Proof:

It comes from the financial proposals submitted by bidders:

- In respect of the proposal's appearance: use of the same handwriting and fonts (documents filled out by one and the same person);
- In respect of the proposal's substance: the substance of the proposal is as follows:
 - One bid proposes a price that is lower than the two other bids (pre-designated bidder),
 - Two cover bids propose identical prices higher than those of the pre-designated bidder,
 - Hearing minutes.

IV-DECISION OF THE COUNCIL: Decision No. 2145 of 25 December 2003

Pursuant to Section 34 of Act No. 91-64 on competition and prices, the Competition Council fined the three parties concerned by the illegal agreement practice defined in Section 5 (new) of the Act.

- Evidence based on the project owner's price estimate:
 - All proposed prices exceed the administrative estimate except for one, which is slightly lower;
 - The price proposed by a group is significantly below the estimate (evidence of an eviction practice);
 - A firm enjoying a dominant position in the market proposes excessively low prices (potential evidence of predatory pricing).

Box 2. Practices Noted in Public Procurement Involving the Supply of Red Meat to a Public Establishment

Target of Investigation: Eviction pricing and cover bid practices in calls for tender involving the supply of red meat to educational institutions for the 2006/07 school year.

Parties Involved: Three bidders (red-meat merchants)

Practices Noted:

- Abuse of dominant position by bidder 1 (B1) on the relevant market;
- Collusion amongst bidders: cover bids from bidder 2 (B2) and bidder 3 (B3) to deceive the public buyer as to the level and intensity of competition.

Decision of the Competition Council No. 81159 of 31 December 2008:

- The Council imposed **fin**es totalling 25 000 dinars (approximately EUR 14 700) broken down as follows:
 - 15 000 dinars for B1;
 - 5 000 dinars for B2;
 - 5 000 dinars for B3.

38. All of these practices suggest the need to explore the ability of a project owner or lead contractor to estimate the cost of the work involved.

- Evidence relating to the content of a bid:
 - Bids having similar appearance (page layout, font, spacing between thousands and units in the presentation of prices);
 - Identical additions of a service not mentioned in the contract specifications;
 - An identical and erroneous change to the contract specifications by more than one bidder;
 - Bids featuring identical errors in prices and quantities;
 - Substantial price variances for items usually characterised by fairly similar market prices (such as concrete and steel);
 - Only the lowest-bidding firm completes all items on the price sheet, “forgetting” all sorts of materials (administrative documents, certificates, etc.) which make the bid unacceptable.
- Evidence stemming from bidders’ attitudes:
 - Disproportionate number of bids submitted in relation to the number of applications taken out;
 - Absence of bids from pre-selected firms in connection with a restricted call for tender;
 - Withdrawal of a firm after applications are taken out, after bidders are selected or after bids are submitted, citing an error in calculation or any other argument;
 - Undisclosed legal and economic ties between firms having the same officers;

- Bidders who for the most part belong to the same group and submit independent pricing bids;
- Systematic formation of groups for low-value contracts;
- A single bid received from a group with high prices relative to the estimate whereas a number of firms in the group would be capable of performing the work on their own;
- Absolute stability in the attribution of lots when a contract is renewed.
- Evidence stemming from how work is performed:
 - Groups of which one company alone performs all of the work;
 - The winner of a contract subcontracts the bulk of the work to a rival bidder.

39. Nevertheless, technical or economic factors may explain such empirical evidence.

40. After taking stock of apparent failures of competition on the part of various players in the public procurement sector, the findings should be tempered by the realisation that the behaviours observed may in some cases be the result of technical or economic factors.

41. If this is the case, then the observed practices are not in fact anticompetitive.

2.1.1 Explanations in the realm of prices

42. It is sometimes observed that a firm will propose very different prices for an identical service, depending on the geographical sector for which it is bidding. Such a situation may be explained by the following reasons:

- Knowledge of a particular location or economic environment (delivery of the initial tranche, manager of the facility, holder of a related contract);
- The timetable set by the public buyer may constitute a constraint and generate a higher cost for which some bidders intend to charge;
- A company's backlog of orders may also prompt it to submit "aberrant" bids in the sense that it comes forward to bid but does not wish to win the contract because of its work load and contracts in progress (this may be the case in the summertime, when economic activity slows and demand for work is high);
- The heterogeneous nature of soil in respect of work requiring general excavation work;
- Constraints related to the tourist season in some areas;
- The urban or peri-urban environment of the work;
- Time needed to access the site;
- Economic conditions for supplying the site.

2.1.2 Systematic re-appointment of previous contractors and stability in the attribution of lots

43. When some contracts come up for renewal, it may be noted that firms are the lowest bidders for lots that they had previously been attributed.

44. This renewal situation may constitute an anticompetitive practice if the bidders had held a concertation meeting before bids were submitted.

45. However, re-attribution may be explained by the following reasons:

- Economies resulting from knowledge of the field on the part of outgoing suppliers;
- The size of personnel and materials costs stemming from the distance from the contract locations;
- Even if firms are of nation-wide scale, they are not always in a position to bid systematically on all lots.

2.2 *Dysfunction Stemming from Procedures Implemented by Public Buyers*

46. In many cases, a well-intentioned buyer may nonetheless restrict competition or foster collusive behaviours on the part of firms as a result of the following practices:

- An excessively specific definition of needs (contract specifications too specific) or, conversely, an inadequate definition which dissuades companies from bidding or gives an advantage to firms already in place;
- Firms are required to have excessive technical qualifications unjustified by the type of contract involved;
- Concentration by all public buyers in a given sector of their purchases at the same time of the year (a practice generally fostered by budget procedures);
- Inappropriate allotment or consultation in respect of excessively large lots apt to cause some firms to abandon the idea of bidding;
- Call by the project owner for the formation of groups, whereas the technical or economic features of the contract do not require it;
- Substantial penalties in the event contract completion is delayed;
- Excessively short deadlines for studying a complex dossier or for completing the work.

3. Conclusion

47. The Tunisian legal and institutional framework provides strong protection for public procurement through specific legislation guaranteeing the institution of optimal competition and horizontal legislation (the law on competition and prices) which seeks to prohibit anticompetitive practices, including cartels and abusively low pricing practices. Ordinary and criminal law also establish rules against corruption in public procurement. The Tunisian competition authorities play an important role in combating collusion, and the DGCEE has adopted its own investigative method to detect evidence and successfully carry out its mission.

48. The Ministry of Trade and Handicrafts, which is represented on all tender committees, through the Directorate-General for Competition and Economic Surveys and the Regional Trade Directorates in particular, is available to public buyers for any advice regarding procedural optimisation or competitive procurement clauses, and to examine and act upon any evidence of collusive concertation or restriction of competition.