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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from Colombia

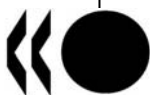
-- Session V --

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Colombia --

I. Size and policy objectives

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

2. According to the OECD (2007), public procurement accounts for about 15% of the GDP in OECD countries¹. Public procurement accounts for a large percentage of Colombia's GDP, near 25% as an average estimation. It is also one of the most important activities regarding private participation in public programs, since the legal framework (especially Law 1150 of 2007) establishes that most of the provision of goods and services, and the development of national and local infrastructure, should be carried upon by public procurement processes.

3. The principle policy objectives of public procurement in Colombia are contained in provisions in the Constitution, mainly laws 80/1993, 1150/2007 and the decrees that develop them. They are the following:

- **Transparency:** every public procurement process should be visible to the public in general and to its participants. Every decision regarding the winners of public tenders and the like has to be publicly announced².
- **Agility:** administrative proceedings should be carried on with the least minimum requirements necessary to insure their adequacy and without undue delays³.
- **Responsibility:** public officials and private contractors are held responsible for violating the applicable legal regime, thus producing injuries through their actions or omissions⁴.
- **Economic and financial balance of public contracts:** the balance of duties and rights that result from a contract should be preserved, and a no-fault disruption creates a right for the affected party to ask for damages in order to restore the balance⁵.

¹ OECD, Bribery in Procurement, Methods, Actors and Counter-Measures, 2007.

² Law 80/1993, Art. 24. Also, from this principle stems the principle of objective selection of the contracting party, established in article 5 of law 1150/2007, according to which the contracting party should be selected according to the most favorable offer for the contracting administrative institution.

³ Law 80/1993, Art. 25. This principle is called, in Spanish, "Principio de Economía"

⁴ Law 80/1993, Art. 26.

⁵ Law 80/1993, Art. 27.

- ***Bona fide interpretation of contracts***: those provisions regarding the selection of contracting parties as well as those that constitute the contracts themselves should be interpreted according to their purposes and the principles mentioned above⁶.

4. Every Colombian public entity has to carry on a detailed procedure for contracting, that can be summarised in the following steps: 1) the contract has to be previously authorised by the entity (and by the rules that determine what the entity may do), 2) it has to be backed-up by a budgetary provision, 3) the selection of the contracting party has to draw from a database that presents and ranks the available contractors⁷, 4) the institution has to choose among the different available contractors, 5) the contract has to be signed and, finally 6) published or given public notice in a nationwide media⁸.

II. Corruption

1. *What is the cost of corruption?*

5. Corruption has many costs, both to the public administration and to the general population. Regarding the public administration has to assume a series of costs that it should not assume under an honest and transparent set of procurement processes. For example, it has to assume the acquisition of goods and services that do not meet the expected requirements, and thus are ill-suited for their purposes. Therefore, it has to afford the costs related to improve these goods and services in order for them to be adequate. It also has to afford the costs related to vigilance and punishment of corrupt officials and employees who benefit from corrupt practices. Recently, the Colombian Anticorruption Czar (see more below) stated that about \$2 billion dollars (about 1.5% of the Colombian GDP) are lost annually in bribes and handouts for corrupt officials⁹.

6. Regarding the population in general, corruption affects the people that depend upon government investments more than other groups of the population. In this sense, corruption is profoundly regressive, since it hinders the State from providing people with the goods and services that they need in order to overcome particular conditions related to poverty and deprivation. However, corruption also affects other segments of the population as well. It prevents both local and international actors from investing in the country, thus hindering the investments necessary for carrying through different economic activities that are both profitable and socially desirable.

7. These two types of costs are closely related, with corruption contributes to what are generally referred to as the traps of poverty. By obstructing the provision of social goods and services, the general population finds it harder to overcome their conditions of poverty; by hindering private investment, corruption impedes people and organisations from making investments both in the public and private sector that are socially beneficial. Thus corruption is a malaise that has to be fought upon with all the tools available to both individuals and the State.

⁶ Law 80/1993, Art. 28.

⁷ According to article 6 of law 1150/2007, every eventual contractor has to register in a unique database of contractors administered by the State (referred to as “Registro Único de Proponentes”), in which they have to rank themselves in terms of experience, legal and financial capacity to subscribe contracts, and corporative organisation. The score that results from this ranking is taken as the maximum capacity to contract of each contractor registered.

⁸ Law 80 /1993, Art. 41.

⁹ <http://www.anticorrupcion.gov.co/DiaContraLaCorrupcion.asp>. Visited on: 15/01/2010.

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

8. There are many factors that facilitate corruption. Among the most relevant ones are the economic incentives that stem from engaging in corrupt practices both by individuals and by public officials. Private actors can, at a particular moment, decide to offer bribes and hand-outs as means to circumvent cumbersome regulations and achieve whatever purposes they seek. At the same time, public officials may accept these bribes and handouts as means to complement their wages and increase their incomes. In order to reduce these incentives, the Colombian government has expended considerable resources in increasing the penalties for engaging in corrupt practices and investigating the probity of administrative proceedings.

9. Another particular factor that facilitates corruption is that ineffective law enforcement allows interest groups to permeate state institutions and “seduce” the authorities so that certain agencies, like competition agencies, refrain from conducting investigations in particular markets. This particular manifestation of corruption does not necessarily require bribes or hand-outs, since it is usually done via political pressure from certain government institutions.

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

10. Transparency programs help fighting corruption by making it harder for corrupt practices to go unnoticed by the supervising authorities. In this sense, transparency programs facilitate the detection of corrupt practices as they take place or after they have been committed. In the Colombian case, transparency programs are complemented with high sanctions, thus aiming at deterring effectively the occurrence of these practices.

11. Other policies that help fighting corruption are the creation and protection of independent and technical agencies that have capable personnel for the detection of corrupt practices. By remaining independent and having a technical staff, these agencies increase the probability of detecting these practices, for both independence and technical preparation are crucial for carrying forth successful investigations. Independence assures that the investigations are carried on without undue delays or obstacles, and that explore all the relevant details. In turn, a technical staff is better suited for understanding how the corrupt practices take place – a key element in terms of gathering evidence - and its possible implications.

12. Another important aspect is an effective judicial review of administrative decisions. Judicial review is based on the idea of an impartial analysis of the decisions taken by administrative agencies and individuals. Since corrupt practices may seem as jaundiced to an impartial reviewer, judicial review plays a key role in assessing whether the actions carried forth by both public officials and private parties in the procurement were legal. At the same time, this impartiality assures affected parties that their complaints and observations will not be discarded arbitrarily or as a result of undue political pressures.

13. Finally, criminal and administrative sanctions explained in point 4 below have proved to have an important deterrent effect on corruption practices.

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.*

14. In Colombia, firms are not obliged to certify that they have not bribed an official during a procurement process. However, there are administrative and criminal laws that severely punish both officials and private actors engaged in corrupt practices. Administrative sanctions include the prohibition of assuming public offices for an extended period of time (from five to twenty five years), the duty to

return any public resources that were unlawfully appropriated, and the payment of a fine proportional to the amounts appropriated. Criminal sanctions include a sentence of jail and the payment of a fine related to the amounts appropriated.

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

15. In the Colombian legal system there are several authorities competent for prosecuting corruption cases. They are the following:

- **Procuraduría General de la Nación:** This agency has the objective of carrying forth all the proceedings required to establish the administrative and disciplinary responsibility of a public official in administrative proceedings that may violate the law. Its investigations can begin by its own initiative as well as by a claim presented by any citizen, and take place during visits after which briefs are made reporting any findings. This agency has the faculty to oversee all the public procurement processes carried out by public institutions and to intervene when a process seems suspicious. It also can intervene in judicial cases related to public procurement processes.¹⁰
- **Fiscalía General de la Nación (Office of the Attorney General):** This prosecuting agency has the duty of investigating any behaviour that amounts to a criminally relevant behaviour, including collusion and corruption in public contracting involving both individuals or public officials¹¹. It may begin its investigations either by its own initiative or on behalf of a claim presented by any citizen, and depending on its merits, a final report is issued suggesting prosecution, which, in turn, is directed by a judge¹².
- **Contraloría General de la República:** This agency is responsible for controlling how public resources are spent through public contracts¹³. It exercises its control by having investigative offices at the different levels of territorial governance (at the national level, the department level, and at the town or “municipio” level) and through different procedures, some of which take place after the contract has been celebrated. This entity can review the proceedings undertaken once the contract is binding and in full force; after the payments stipulated in the contract have been done, and after the contracts have ended. Also, before the contract has ended – like when it supervises the expenditure record of the different state institutions at the different levels of governance¹⁴ – or at any particular time of the contracting process – like when it issues a requirement to any public official and state employee to inform of their actions during any proceeding related with public procurement¹⁵. The Contraloría can also issue a report in which it certifies the probity of the

¹⁰ Constitución Política de Colombia, Art. 277.

¹¹ As a matter of fact, there are several criminal law provisions that sanction different aspects of corrupt behavior from public officials and employees. For example, articles 405 & 406 of law 599/2000 penalise any action or omission incurred by these that slows down a lawful duty or allows an action that goes against an established duty based on a promise of a reward. Articles 408 to 410 penalise any state contracted celebrated by a public official that ignore the regime of personal limitations, establishes a direct benefit for the official or is celebrated without de the due requirements.

¹² Law 80/1993, Art. 66.

¹³ Constitución Política de Colombia, Articles 267 and following.

¹⁴ See Law 87/1993.

¹⁵ Law 80/1993, Art. 65.

actions undertaken. Furthermore, the Contraloría can carry on investigations against officials involved in corrupted practices and impose monetary fines.

- **Zar Anticorrupción** (“Anticorruption Czar”): The official in this post can ask for the prosecution of public officials or employees and private parties that are suspected of engaging in corrupt practices, since it has no power to judge or sanction administrative actions (or omissions) on its own. Also, the Anticorruption Czar regularly presents information regarding the costs and consequences of corruption in Colombia, and engages in ongoing campaigns related to these topics¹⁶.
- **Superintendencia de Industria y Comercio (SIC)**: This agency, Colombia’s sole competition authority, has the power to investigate collusion in public procurement proceedings as an anticompetitive practice. Its approach is very different from that of the aforementioned institutions. It focuses on how the behaviour of private contractors participating in public procurement processes (with or without the help of public officials or employees) resulted in an undue selection of a contracting party, which in turn may produce an inefficient assignation of the resources assigned via the contract. The SIC can impose fines for both the company and the directors involved up to USD 25 millions¹⁷.

III. Collusion.

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

16. The Colombian government considers that corruption in public procurement processes should be tackled by approaching the issues related to both private and public behaviour. In this sense, just as corrupt practices affect the state’s budget, so does the collusive behaviour that renders prices higher compared to what otherwise would be the result of the competitive behaviour of rival participants. In this sense, collusive behaviour is also deeply regressive and as socially harmful as corruption is deemed to be.

17. The 2009 OECD Guidelines for preventing collusion in public procurement suggest several factors that facilitate this practice. Among the ones that have been perceived in Colombia are the standard character of certain goods and services, the reduced number of participants in some procurement processes, and the close communications rival bidders can have among themselves. Almost all industries that engage in frequent acquisitions of standardised goods and services and that face a reduced number of sellers or buyers are vulnerable to bid rigging. The State is no exception to behaviours that fall within this category.

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?*

18. There are many sectors in the Colombian jurisdiction that have been affected by bid-rigging conspiracies in public procurement. Some of them include the acquisition of standardised goods, like cement and computer software for keeping school grades and medical records, while others include the construction of public infrastructure, like highway systems and State facilities.

19. As of the last months, the Colombian competition agency (SIC) has been actively participating with other authorities in the development of procurement process systems designed to minimise the risks of

¹⁶ This institution was originally created by decree 2405/1998, and is currently governed by decree 519/2003.

¹⁷ Collusive behaviour is sanctioned by article 47 of decree 2153/1992.

bid rigging. Also, this agency continues to work in preparing guidelines that will be given to the different State agencies that enter into contracts via public procurement processes in order for them to be alert regarding suspicious behaviour. These guidelines will be the joint result of the efforts underwent by SIC as well as by other very important institutions for this purposes like the Procuraduría General de la Nación, among others. The release of the guidelines will be accompanied with a training program of officials directly involved in public procurement and a follow-up scheme to evaluate the handout's impact.

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?*

20. The Colombian laws regarding procurement processes do not require from their participants certificates of independent bid determination, since the applicable laws prohibit that rival bidders determine their bids in a co-ordinated manner. Also, when collusion takes place, the enforcement of the applicable laws may result in a prohibition from participating in successive procurement processes for an extended period of time. Furthermore, this prohibition applies to joint ventures expressly created for participating in a particular process, as well as to its members, thus preventing that bidders who have been condemned on grounds of bid-rigging circumvent the restrictions imposed to them.

IV. Fighting collusion and corruption.

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

21. There are several cases in Colombia that have involved both corruption and collusion in public procurement. To name the most recent one, in December of 2009 the Anticorruption Czar suggested that the CEO of Colombia's social security agency, known as the "Seguro Social", was fired from his post after he awarded a contract to a private party in a procurement process in which several ex-employees of the aforementioned institution worked just after they were fired and participated in the bid. The Czar considered that the process presented several irregularities that merited its termination and renewal. This case showed what is considered today to be a common practice, that is, that former employees of a State institution or agency find jobs in participants in procurement processes, in order to take advantage of their connections and the knowledge of how decisions are taken within these institutions.

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

22. Unfortunately, collusion and corruption cases and allegations are a general malaise of the different government levels. However, not much has been properly documented, and the available information is insufficient to warrant a detailed analysis.

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

23. There is a well known trade-off between transparency and collusive behaviour in both State and privately held procurement processes. Although transparency measures improve the accountability of the decisions taken by public officials and expose their behaviour both to the incumbent agencies and the people in general, they also facilitate co-ordination among bidding rivals, since it makes it easier for them to meet, make agreements and monitor their compliance given that more information, necessary for colluding strategies, is available. Therefore, most of the methods and techniques for fighting corruption would hinder instead of facilitate the fight against corruption.

24. However, certain approaches could be made to maintain transparency while making more difficult the occurrence of collusive behaviour. For example, public hearings in which the winner bids are chosen from all the available bids should be either replaced by private hearings in which impartial observers - like members of NGO's and research centres - guarantee the probity of the election, or modified so that all the bids are considered but only the winning bid is publicly announced. The key aspect to preserve from this hearings is that the winners are chosen fairly and in accordance to the established rules; in order to do this, not all the bids that were handed in have to be known to the public, or they could be held on reserve until a certain amount of time has passed.

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

25. Yes. Individuals or firms that have engaged in bribery or corruption are able to receive leniency in the Colombian jurisdiction by the incumbent authorities, like the Fiscalía General de la Nación. The leniency figure is called "Principio de Oportunidad" and it is contained in the criminal law provisions – article 250 of Law 906/2004. Regarding the leniency regime in competition law, since it was founded only a couple months ago, the details regarding its implementation are still being discussed by the Colombian competition agency (SIC).

V. *Advocacy*

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

26. It is a well-known fact that regulatory or institutional conditions could help facilitate bid rigging and corruption. In the case of the bid – rigging, the regulatory or institutional conditions may create artificial barriers of entry that diminish the number of participants willing or able to participate in procurement processes, thus facilitating that the remaining participants reach agreements for bid rotation and similar practices. Also, these conditions may establish particular conditions that are hardly met by all the available participants, enabling only a few to participate. In turn, these conditions can be about the required goods or services to be provided, or about certain conditions that have to be met along the procurement process itself. In the case of corruption, regulatory or institutional conditions may create incentives for participant firms to circumvent the requirements established by offering bribes or handouts to the officials in charge of the procurement processes. Also, they can create such an unviable atmosphere for doing business that honest, private actors decide to search somewhere else for friendlier environments, thus leaving dishonest, private actors as the only ones available for contracting. In either case, regulatory or institutional conditions may hinder both transparency and competition, thus creating more harm than benefits.

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

27. Competition authorities can work to improve the efficiency of public procurement in several fronts. One of them is through real time council and supervision regarding how public procurement processes as they take place. Another one involves advice and training in procurement processes, in order to prevent collusive behaviours before the aforementioned processes actually take place. A third possibility is through careful research about the behaviour of the firms that participate in particular markets in which public procurement processes are used in order to find patterns of bid rotation and the like. These three fronts are conceived as interventions that increase the probability of detection. A fourth possibility is by increasing the sanctions imposed to colluding participants; this last front deals with the sanctions imposed. Together, these fronts may increase the deterring effect of the competition law regime, enabling it as a more effective tool for improving the efficiency of public procurement.

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?*

28. So far, the approach that has been adopted by the Colombian government has consisted in making public procurement processes more transparent and raising the penalties and fines in order to discourage the occurrence of collusion in public procurement processes. Recently, and thanks to the enactment of Law 1340/2009, the Colombian competition agency is implementing advocacy programs and a leniency program. The advocacy programs have been conceived in order to reduce the anticompetitive effects that some regulatory and institutional conditions have on determined markets. Also, the advocacy programs include the development of guidelines about collusive practices in public procurement that is to be handed out to any agency or public institution that undertakes public procurement processes. On the other hand, the leniency program is being conceived as a mechanism that facilitates information regarding specific collusive behaviours that are taking place or that have done so in the past.

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?*

29. The Colombian competition agency (SIC) is aware that measures adopted for reducing collusion and bid rigging in public procurement may have an impact on corruption. As mentioned above, the agency acknowledges that there is a trade-off between transparency and efficiency.

30. In this case, the trade-off suggests that to make public the full details about the merits of the selections implies making public information that facilitates future collusive behaviours and that allows monitoring its compliance. However, if public officials are not required to justify their decisions on the full merits of the bids and offers presented, it is likely that corruption will increase, since arbitrary considerations for selecting a winner will not be disclosed. Nevertheless, the agency considers that a sensible balance can be reached, in which transparency can be preserved while diminishing the risks of collusive behaviour, by for example modifying certain public hearings that allow rivals to monitor each others' compliance to their collusive agreement. Such modifications may include the participation of officials from agencies or entities different from the one conducting the procurement process and that vouch for its integrity.

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

31. The Colombian competition agency (SIC) is currently undertaking competition advocacy in this area, by approaching agencies that commonly undergo public procurement processes, and by drafting guidelines about collusive behaviours in public processes, and how to spot them.

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

32. In the cases regarding procurement collusion that the Colombian competition agency (SIC) has prosecuted, different types of remedies were considered. The most common remedies in these cases have been conduct-based remedies, and more particularly, direct prohibitions regarding management and independent bid elaboration by rival bidders. However, the agency has not disregarded the possibility of using structural remedies as long as they seem more adequate given the particular conditions of the markets affected by collusive behaviour.