

Unclassified

DAF/COMP/GF/WD(2010)29



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

22-Jan-2010

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from the Internal Market and Services Directorate General of the European Commission

-- Session V --

This contribution is submitted by the Internal Market and Services Directorate General of the European Commission under session V of the Global Forum on Competition to be held on 18 and 19 February 2010.

Contact: H el ene CHADZYNSKA, Programme Manager of the Global Forum on Competition
Tel: +33 1 45 24 91 05; email: helene.chadzynska@oecd.org

JT03277356

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

DAF/COMP/GF/WD(2010)29
Unclassified

English - Or. English

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Internal Market and Services Directorate General of the European Commission --

1. This contribution only addresses the above issue specifically with regard to EU public procurement policy which falls under the responsibility of DG Internal Market and services. Other policy areas (criminal law, competition law) are not covered.

2. It must be highlighted that the EU public procurement directives only constitute a basic legal framework, which is implemented into national law by the EU Member States. Contracting authorities in the EU Member States do not apply the directives as such but the national rules transposing these directives. The implementing national law often contains additional rules and principles complementing those of the EU Directives, also with regard to measures to prevent and to fight corruption and collusion in public procurement. As the application of the rules is the primary responsibility of the EU Member States, questions on practical experience with the fight against corruption and collusion will not be dealt with by this contribution.

1. International Background

3. The EU is party to the United Nations Convention against corruption.

4. Annex II of the Council decision on the conclusion, on behalf of the European Community, of the United Nations Convention against corruption sets out those actions which are in the competence of the EU.

5. Among several other actions "*the Community points out that it has competence with regard to the proper functioning of the internal market, comprising an area without internal frontiers in which the free movement of goods, capital and services is ensured in accordance with the provisions of the Treaty establishing the European Community. For this purpose the Community has adopted measures to:*

- *Ensure transparency and equal access of all candidates for public contracts and markets of Community relevance, thereby contributing to preventing corruption."*

2. The Role of the EU Public Procurement Directives in the Fight against Corruption

6. Public procurement in the EU accounts for 17% of EU GDP (around €2,000 billion). The awarding of contracts with values above certain thresholds (representing around 3.25% of EU GDP) is governed by the EU public procurement Directives 2004/17/EC and 2004/18/EC.¹ The goal of these directives is to implement the principles of the EC Treaty:

- Freedom of movement of goods

¹ Texts available under: http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm.

- Freedom of establishment
- Freedom to provide services
- Equal treatment
- Non-discrimination
- Mutual recognition
- Proportionality
- Transparency

7. The directives are designed to ensure the effects of these principles and to guarantee the opening up of procurement to competition. They set out basic procedural requirements for the procurement of goods, services and works in the EU Member States in order to guarantee free and non-discriminatory access of all European undertakings to public contracts.

8. The main contribution of the EU public procurement directives themselves to the fight against corruption consists in strict obligations for transparency at several stages of the procedure (2.1). Furthermore, the directives provide for a special mandatory exclusion of tenderers convicted of corruption (2.2). A remedies directive to ensure that efficient legal review of procurement decisions is available in all Member States completes the picture (2.3).

2.1 Transparency Requirements

9. The strict transparency obligations throughout the public procurement procedure as set out by the EU public procurement directives are an important safeguard against corruption. Transparency is specifically requested in several provisions of the directive, such as the following:

- The relative weighting of the award criteria has to be published in the contract notice and in any case before the submission of tenders;
- Minimum levels of economic and technical capacity used as criteria for selection of suitable candidates have to be set and published in the contract notice;
- Criteria or rules for reducing the number of candidates in restricted or negotiated procedures have to be set and published.

2.2 Exclusion of Tenderers Guilty of Corruption

10. Article 45(1) of EU public procurement directive 2004/18/EC provides for an obligation to exclude candidates or tenderers who have been the subject of a conviction by a final judgement for certain crimes enumerated in the directive. Amongst these, a conviction for corruption is listed as an obligatory reason for exclusion.

11. Contracting authorities shall, where appropriate, ask candidates or tenderers to supply documents specified in Article 45 (3), as evidence that no reasons for exclusion apply: an extract of a judicial record or an equivalent document, a declaration on oath or a solemn declaration before a competent authority.

12. If doubts exist concerning the personal situation of candidates or tenderers, contracting authorities can apply to the competent authorities to obtain any necessary information. If the candidate or

tenderer is established in a different country than the contracting authority, the latter may seek the co-operation of the competent authorities in the country of establishment.

13. If the documents specified in Article 45(3) are submitted, they have to be accepted as sufficient evidence of non-existence of the exclusion grounds under Article 45 (1).

14. The Directive explicitly leaves it to the Member States to specify implementing conditions for the rules of Article 45. However, Member States can only provide for derogation from the obligation to exclude the above indicated criminal participants if there are overriding requirements in the general interest.

2.3 Efficient Legal Review

15. Legal review procedures can help detect and sanction corruption in procurement procedures. The EU remedies directive 89/665/EEC, as amended by directive 2007/66/EC, which guarantees that efficient legal review procedures against illegal award decisions are available in all EU Member States, therefore contributes to the fight against corruption.

3. Collusion in Public Procurement

16. The transparent and non-discriminatory procurement procedures set out by the EU public procurement rules not only prevent corruption but also favour new market entries, reduce or prevent market concentration and therefore create a market environment less conducive to anti-competitive behaviour.

17. The EU public procurement rules do however not contain any specific rules dealing with the issue of collusion / bid-rigging.

18. Collusion between bidders can lead to an exclusion of the undertakings in question from the current and later procurement procedures. The already quoted Article 45 of directive 2004/18/EC provides in its paragraph 2 that any economic operator may be excluded from participation in a contract where he has been convicted of an offence concerning his professional conduct (lit. c) or has been guilty of grave professional misconduct proven by any means (lit. d).

19. Again, the implementing conditions of this exclusion ground (which is, contrary to the exclusion grounds of Article 45 (1) not mandatory but optional) have to be determined by the EU Member States. Depending on Member States' definition of the notions "offence concerning his professional conduct" and "grave professional misconduct" in their implementation of Article 45 (2), collusion between bidders can thus constitute a reason for exclusion.

20. The fact that the EU rules do not specifically address the issue of collusion in public contracts is due to the fact that it is not in the first place the legal framework for the procedure that encourages or discourages collusion, but the way that the rules are applied in practice: The way in which the procedure is managed may have a decisive influence on the tenderers' compliance with competition laws.

21. The "design" of the tendering procedure can make an agreement between competitors more or less easy. For instance, "ascending" auctions enable undertakings to communicate in a covert way during the auction and to identify and immediately sanction any breaches of the cartel. By contrast, procedures with sealed-bids, and award to the highest/lowest bid make it more difficult for tenderers to form a cartel and render breaches of the cartel more advantageous. The choice of relevant and proportionate selection criteria is crucial. Awarding the contract to the lowest price can simplify the agreement between competitors, whilst when there are several award criteria, this becomes more complex. Very specific

selection criteria may be a barrier to market access and, by discouraging the entry of new competitors, may enable undertakings present on the market to maintain existing agreements. Contracting authorities' stability and predictability of demand can make sharing of markets easier.

22. Certain tools in public procurement have to be handled with special care and on the basis of a good knowledge of the structure of the relevant market. Such tools are for instance the possibility to divide contracts into lots, subcontracting and the participation of temporary groups of undertakings. Especially in these cases, procurers' knowledge of market conditions, their awareness of cartels and of the effects of their own buying practices on short and long-term competition are extremely important to apply the rules in a manner that prevents collusion. For instance, when dividing a contract into lots, public authorities should if possible avoid creating lots which correspond, in quantity and content, to the number and activities of possibly interested market players, in order to avoid market sharing.

23. As the EU public procurement rules do not impose specific purchasing strategies, it is first and foremost the responsibility of contracting authorities to ensure that their procurement choices do not facilitate collusion among bidders, and the responsibility of Member States to help procurers in this task. We welcome initiatives to draft bid-rigging checklists in order to help procuring authorities detect bid-rigging and design procedures in a way that limits the risk of cartels, the sharing of best-practices among procurers and the dissemination of training manuals for public officials.