

Anti Corruption measures including rules of conduct - seen from private sector

Annemarie Mille
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Integrity, ethics + conflict of interest (Col) in public procurement

- no uniform definition in the EU
- shared competences between EU and Member States (MS)
- considerable differences between MS due to different legal traditions + cultures
- hardly any comparability between MS



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Integrity, ethics + conflict of interest (Col) in public procurement

Corruption thrives on secrecy!!!

- transparency in the entire pp cycle to promote equitable treatment for potential suppliers
- transparency due to competitive tendering
- monitoring of pp and sanction of misconduct



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Why are anti-corruption measures important in public procurement?

- pp accounts for an important percentage of national GDP, estimated 10 to 15% of GDP across the world
- pp is vulnerable to waste, fraud and corruption due to its complexity, contract volume and the close interaction between public and private sectors
- bribery in government procurement is estimated to be adding 10-20% to total contract costs (OECD, 2009)



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Anti corruption measures: Safeguarding competition

- Competition as a guarantee for open markets + integrity in pp
- From its origins, one of the main objectives of the EU has been to create a common market that eliminates barriers to trade in goods and services between EU MS (**Gemeente Arnhem, ECJ C-360/96**)
- **Recital 2 DIR 2004/18/EC**: EU and national provisions to guarantee the **opening-up of pp to competition**
- **General principles emerged from ECJ case law (Lombardini and Mantovani, ECJ C-285/99)**
 - public procurement rules must be interpreted and applied in a **pro-competitive way** so that they do not limit or distort competition;
 - CAs must refrain from implementing any procurement practices that prevent, restrict or distort competition.



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Anti-corruption measures: Principle of competition

- Fair competition as key concern for achieving efficient and economic procurement results.
- Procurement legislation seeks to prevent any distortions or restrictions of competition within the EU.

Protecting competition is also a question of:

- maintaining equality of treatment
- avoiding discrimination
- applying mutual recognition principles (of equivalent products and qualifications) and
- ensuring that any exceptions are proportional.



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Anti-corruption measures: Principle of competition

Barriers to competition can be erected by several pp stakeholders:

- **legislation** can create barriers by imposing “buy national” policies including import restrictions, national technical specifications or standards that prevent the sale of non-domestic products, attempts to restrict foreign bidders from tendering through the use of local registration requirements, possession of local qualifications,...
- **CAs** can impose barriers by making discriminatory award decisions
- **Economic operators** can also create barriers by colluding together to rig tender prices and/or conditions

Keeping competition fair (or maintaining a “level playing field”) is a key concern for achieving efficient and economic procurement results, **fostering integrity** and **reducing the opportunities for corrupt practices**.



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Anti-corruption measures: Codes of Conduct (CoC)

- Procurement legislation imposes accountability and transparency requirements so that the activities of procurement officers as well as economic operators can be checked and verified,
- thereby reducing the possibility that such stakeholders will act in their own self-interest (legal, financial and political control).
- Some national laws make **probity and integrity an explicit objective** (e.g. conflict of interest provisions or compulsory application of “integrity pacts”).
- Economic operators respond to these requirements often with **codes of conduct** or **compliance schemes** based on **OECD or ICC/chamber of commerce models** including provisions combating extortion and bribery, CSR,...
- Integrity Pact - Transparency International (Germany)



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Anti-corruption measures:

OECD Principles for Enhancing Integrity in pp (2009):

- transparency
- good management
- prevention of misconduct (compliance schemes, best practices and monitoring)
- accountability, control and remedies



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Anti-competitive behaviour of economic operators

- **bid rigging**
- **cartel agreements**



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What is bid-rigging?

- **illegal anti-competitive cooperation** between self-interested participants in a procurement process to **eliminate competition** thereby denying the public fair price/high quality services **(be aware: consortia or groups of economic operators bidding together are compliant with EU DIR and often strengthen competition - SME participation!!!!)**
- **economic operators fix the outcome of a pp process**
- economic operators attempt to “share the pie” by deciding in advance which firm is going to bid and also the amount of the financial offers to be submitted
- fellow conspirators are not undercut as long as the fixed price is high enough to deter the cartel member from taking the whole pie
- many different forms (e.g. increase of the winning-bid price, sharing of the profits, allocation of market shares) but the general objective is to soften price competition



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How does bid-rigging work?

Types of bid-rigging:

- **cover bidding:** a competitor agrees to submit a non-competitive bid that is too high to be accepted or contains unacceptable terms for the CA
- **bid suppression/withdrawal:** a competitor agrees not to bid or to withdraw a bid from a procurement procedure
- **market sharing:** a competitor agrees to submit bids only in certain geographic regions or only to certain CAs
- **bid rotation:** competitors agree to take turns at winning contracts



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How does bid-rigging work?

Successful bid-rigging between companies is based on the following pre-conditions:

- agreement on prices/quantities/market segments/regions
- effective monitoring of rivals' actions
- enforcement, meaning the ability to punish deviant behaviour (e.g. cheating triggers retaliation in future market interactions)
- **no presence of “mavericks”**, i.e. firms that are difficult to discipline as they have more gain from undercutting a cartel (or less to gain from being part of it)
- **small number of competitors** in a given market
- **markets with standardized and/or simple products** are more prone to bid-rigging: under these circumstances it is easier for the companies to work out agreements and to have them last for a long time
- **little or no new market entrants**



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Geh'ts der Wirtschaft gut, geht's uns allen gut.

How to detect bid-rigging?

- **unusually high prices**
- **suspicious bidding patterns** (e.g. cover bidding, bid suppression, market sharing,...)
- **similarities** in the documents submitted by different suppliers (e.g. same wording, same alterations or changes, same miscalculations)
- a **“whistle blower”**, meaning a maverick, who reports to the competition authorities and will therefore not be punished for his participation in the cartel agreement



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What to do, if bid-rigging is detected?

Finding signs of bid rigging does not necessarily mean that bid rigging is occurring, it **simply shows that there might be a problem:**

- Contact the competition authority responsible for competition enforcement and request to investigate the signs detected!
- Do not tell the companies involved as they might destroy evidence!
- Keep all detailed notes, records and documents safe!
- If you work in a CA: withdraw your pp procedure and develop a new procurement strategy!



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How to prevent bid-rigging in public procurement?

- Develop Col provisions and/or foster the application of “integrity pacts”!
- Set up internal and external independent compliance units!
- Develop clear structures and responsibilities within CAs!
- Train CAs and review authorities (e.g. knowledge of the relevant markets, players and mechanisms; law)!



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How to prevent bid-rigging in public procurement?

- The larger the number of participants the lower the risk of bid-rigging. As the size of a would-be cartel increases, it gets more and more difficult to agree on how “to organise competition”.
- Symmetric economic operators (i.e. companies of similar capacity/dimension/market shares) find it easier to form cartels.
- When splitting a procurement project into lots for instance, a CA should try to create some asymmetries between economic operators and between lots.
- The number of lots should always be smaller than the expected number of participants.
- CAs should communicate clearly to suppliers that bid rigging is an unacceptable practice and will be reported to public prosecution and the competition authority.



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How to prevent bid-rigging in public procurement?

An anti-bid-rigging tender clause may be included in the tender documents to warn suppliers that the CA is aware of the risk. The clause should include:

- an explicit right of the CA to report all suspected signs of bid-rigging and share otherwise confidential tender information with the competent competition authority
- an explicit right of the CA to receive information and approve subcontractors
- an implicit guarantee that the bid has been developed independently without contact/communication/understanding between the suppliers.



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Anti-corruption measures: ICC Rules of Conduct

International Chamber of Commerce (ICC):

- forerunner of the drive for integrity in business life
- only a corruption-free system enables all participants to compete on a level playing field
- **compliance** by enterprises with **self-imposed rules** (self-regulation)
- “ICC Rules of Conduct to Combat Extortion and Bribery”
- based on good commercial practice but without direct legal effect
- fight against private-to-public corruption but also private-to-private corruption including pre- and post tendering stages (still “underdeveloped”)



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Anti-corruption measures: ICC Rules of Conduct

- enterprises prohibit bribery and extortion at all times and in any form whether direct or indirect through agents and other intermediaries
- enterprises include in their contracts provisions to terminate agreements with agents, if a bribe is paid
- transparency of charitable contributions and sponsorships
- establishment of reasonable controls and procedures
- establishment of transparent procedures covering the offer or receipt of gifts, hospitality or expenses
- corporate policies: “cultural” implementation of those principles - training schemes
- establishment of strict controls including severe sanctions for misconduct



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Anti-corruption measures: ICC Rules of Conduct

- proper and fair records of all financial transactions available for inspection by boards of directors and auditors
- establishment of independent auditing systems
- compliance with national tax laws
- clear definition of responsibilities
- appropriate public disclosure of the enforcement of its anti-corruption policies
- public awareness and political support for “zero” tolerance policy



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TI Integrity Pact

- since 1990: **written agreement** between government + all bidders to prevent corruption in public contracting
- neither side will pay, offer, demand or accept bribes
- neither side will collude with competitors to obtain the contract or engage in such abuses while executing the contract
- bidders are requested to disclose all commissions and similar expenses paid by them
- pact describes **sanctions**: loss or denial of contract; forfeiture of the bid or performance bond, damages; exclusion from bidding on future contracts; criminal and/or disciplinary action against government officials



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TI Integrity Pact

monitoring system: monitors from civil society with professional experience and of unquestionable integrity perform the following functions:

- overseeing corruption risks in the contracting process and the execution of work
- informing government of any corruption risks or irregularities detected
- offering guidance on possible preventive measures
- responding to the concerns of bidders or interested stakeholders
- informing the public
- bidders are advised to have a **company Code of Conduct**, clearly rejecting the use of bribes and other unethical behaviour



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TI Integrity Pact: Benefits

- enhanced access to information, which increases transparency and integrity in pp
- greater confidence and trust in public decision-making
- less litigation on procurement processes
- more bidders
- greater media coverage of anti-corruption activities resulting in increased public awareness
- encouragement of institutional changes such as simplification of administrative procedures, clear responsibilities, usw of CoC or ethics agreements
- e.g. Germany: Schoenefeld International Airport (€ 2.4 billion), Latvia: national library, concert hall and art museum, UK: defence sector



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Conclusion

- close cooperation between government and the private sector as a tool to maintain high standards of integrity
- governments should set clear integrity standards
- bidders should be encouraged by government to take voluntary steps to reinforce integrity (CoC, integrity trainings, corporate procedures to report corruption, internal controls, audits)



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