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CONFLICT OF INTEREST IN PUBLIC PROCUREMENT

QUERY

How can we avoid conflict of interest in public procurement and make sure that members of the evaluation committee are neither shareholders of one of the bidding companies nor related or affiliated to some members?

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SUMMARY

Conflict of interest may arise at various stages of the procurement process whenever public officials' decisions can be influenced by their private interests. The evaluation and award of bids is often assessed as one of the most vulnerable phases, due to the high level of technical expertise required and the specific features of evaluation committees. Therefore, in order to prevent and avoid conflict of interest in public procurement, countries should enact guidelines with a clear definition of conflict of interest, as well as put forth requirements for officials involved in the procurement process to disclose information on their private interests and assets, in addition to excusing themselves from certain decision-making processes and prohibiting them from performing certain functions if the opportunities for conflict of interest exist.

In addition, access to information, stakeholder participation in key stages of the procurement cycle and clear review mechanisms are essential to transparency and accountability in public procurement, and therefore, are essential in preventing conflict of interest and other forms of corruption. Moreover, effective implementation and enforcement of the law are key to create a deterrent effect and ensure integrity during the process.

1 PUBLIC PROCUREMENT AND CORRUPTION

Overview

Procurement is one of the government sectors most vulnerable to corruption, due to the large amounts of funds and the high levels of discretion and bureaucracy often involved in such processes that provide both incentives and opportunities for rent-seeking behaviours (Transparencia Mexicana 2012). Corruption in procurement directly affects citizens' access to basic services, such as education, health and infrastructure.

Corruption in procurement can take many forms (for example, bribery, facilitation payments, conflict of interest and bid-rigging) and can occur at all stages of the procurement cycle – from the decision to contract, the specifications of the contract, the tendering process, evaluation and award to the contract implementation and final accounting. Yet, corruption risks are especially hard to detect because of the size, number and complexity of the transactions involved that often require high levels of technical expertise at all stages of the process (Transparency International 2010).

Conflict of interest in public procurement processes

Conflict of interest is defined as “a situation in which a public official has a private or other interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties” (Reed 2008). If not adequately identified and managed, these conflict of interest situations provide opportunities for public officials to take advantage of their public position for their personal benefit (OECD 2005).

In public procurement, conflict of interest may arise in various stages of the procurement process whenever public officials' decisions or actions are influenced by their private interests. For example, impartiality can be hampered if one of the procurement officers responsible for deciding which company will be awarded the contract has an economic interest in one of the bidding companies, or if any of his relatives or close friends are the owners of one of these companies (Heggstad et al. 2010). Conflict of

interest may also arise if procurement officers are offered future employment (post-public employment) in one of the bidding companies.

The bid evaluation and contract award are frequently assessed as the most vulnerable phases of the procurement process due to the high level of expertise required and the specific features of awarding and monitoring committees. Members of the evaluation committee may use their discretionary power, as well as their access to confidential information, to give preferential treatment to one of the bidders in accordance with their own private interests.

In such circumstances where public decision-making is biased, there is no guarantee that contracts are awarded in the public interest, that the government is benefiting from the best competitive offer and that value for money is being achieved (Arrowsmith et al. 2010). In addition, recurrent instances of impartial and unfair procurement processes can lead to public dissatisfaction and low trust in government institutions.

2 AVOIDING CONFLICT OF INTEREST IN PUBLIC PROCUREMENT PROCESSES

How to regulate

There are a number of legal instruments available for countries aimed at preventing and avoiding conflict of interest in public procurement. Countries may opt for addressing the issue by adopting legislation dealing specifically with the issue of conflict of interest, or by regulating integrity in public procurement in general. Requirements for declaration of interest may also be an efficient way of preventing conflict of interests. Similarly, codes of conduct may offer guidance on the main ethical issues faced during procurement processes.

What to regulate

Good practice in conflict of interest regulation typically includes a clear definition of conflict of interest, a clear process of how conflict of interest will be managed, publication of a register of interest of decision-makers (including past interests and positions to be updated regularly), as well as

provisions for trainings on integrity issues.

Therefore, in order to prevent and avoid conflict of interest in public procurement, three main issues should be regulated: functions and positions to be held by procurement officials; registration of interest; and steps to be taken when a conflict of interest is identified (Heggstad 2010; Transparency International 2006).

1. Public procurement officials or members of the evaluation committee should be prohibited to perform certain functions and/or hold certain positions.

In this case, conflict of interest legislation with regard to procurement is generally established through civil service legislation, conflict of interest legislation, codes of conduct, or procurement regulations or acts.

Provisions may forbid officials and members of the evaluation committee to hold ownership stakes in companies doing business with the government; to accept, for a certain period of time after leaving public office, a position in companies with which the government did business; to hold another position in a different branch of the government; or to hold a position in a statutory organ of a private entity.

Conflict of interest laws

In Spain, the Law on Conflict of Interest of April 2006 deals specifically with conflict of interest in public procurement processes. According to the law, procurement officials are not allowed to accumulate any other position, and high-ranking officials have to abstain from participating in the evaluation or award of contracts for companies that they or their families managed or represented in the two years prior to their appointment in public office.

In addition to the law on conflict of interest, the Spanish law on Public Sector Contracts of 2006 also provides for regulations on conflict of interest. For instance, officials in charge of procurement are prohibited from intervening in procurement procedures when they have an interest in the bidding company. In more general terms, the law established that companies are forbidden to contract with the public administration when any high-ranking public official or members of the government have investments in over 10 per cent of their capital

(OECD 2007).

In other countries, such as Egypt, Israel, Turkey and the United States, procurement officials are not allowed to undertake any other paid position while holding public office (OECD 2010).

However, where the salaries of public officials are too low, it is unrealistic to have regulations prohibiting officials from having an external source of income. In these cases, officials should be allowed to hold position in other legal entities, but they should be excluded from procurement processes that could generate a real, potential or apparent conflict of interest.

For instance, in Kenya, civil servants are not prohibited from owning shares or holding a position in a company, unless such sources of income could result in the public official's personal interests conflicting with his or her official duties (Reed 2008).

In order to guarantee impartiality throughout the procurement process, many countries provide rules to deal with situations that may occur inside contracting entities, such as the composition of a tender evaluation committee or a potential conflict of interest (OECD 2010). This could include, for example, the requirement to have different staff responsible for the bid evaluation and the award decision, and the requirement for members of the evaluation committee to sign, prior to all evaluations, a declaration stating that they do not have any "shared interest" with one or more of the bidders or subcontractors which could compromise the objective and impartial exercise of his or her duties.

For example, in Argentina, after problems regarding the contracting of school materials, the government enacted a series of measures to prevent conflict of interest in the procurement process. One of the measures was to establish specific rules to manage conflict of interest among the selection committee members, which included a mechanism to identify potential conflicts of interest, as well as guidelines for managing a conflict of interest.

As this specific case was related to school materials, which would require contact with publishing houses, the identification mechanism consisted of a sworn declaration by the committee member that included his or her research and academic history, teaching

experience, positions held in public agencies and private businesses, publications, relationships with publishing companies (work, ownership, and so on), and the sources of copyright royalties. These declarations were made public on Transparency International Argentina's website, allowing any other bidder (or any citizen) to indicate the existence of conflict of interest. Against this backdrop, members of the committee who were found to have a possible conflict of interest were excluded from the procurement process (Transparency International 2006).

Codes of conduct

Many countries have regulated conflict of interest through codes of conduct. Codes of conduct may be a helpful tool as they organise the institution's ethical framework in one single and comprehensive document – providing specific guidance for procurement officials on how to deal with difficult situations and ethical dilemmas, as well as on how to address and prevent conflicts of interest. It is also important to note that what is permitted by law, might not necessarily be ethical. The document is, therefore, supposed to provide clarity on these types of issues by identifying ways of addressing them through training, advisory services and enforcement mechanisms.

A clear system of enforcement and sanctions in case of breach of the code should be in place. Rules should also be clear and well defined in order to avoid implementation gaps.

Best practice example: Codes of conduct for procurement in Canada

In Canada, a specific Code of Conduct for procurement officials is in place. The code provides those involved in the procurement process with a clear statement of mutual expectations to ensure a common basic understanding throughout the process. The code consolidates the Canadian government's measures on conflict of interest and corruption, as well as other relevant procurement regulations, providing a single point of reference.

It is guided by the principles of transparency, fairness and openness. With regards to conflict of interest, procurement officials responsible for acquiring goods, defining requirements and evaluating bids, as well as those responsible for the collection, management or disbursement of public money, are required to arrange their private affairs in a manner that will prevent conflicts of interest between their private interests and their public duties.

Within this framework, procurement officials:

- Must avoid outside employment and activities that are incompatible with their duties or that could raise doubts on their ability to perform their duties objectively and with impartiality.
- Must not assist private entities or individuals in their dealing with the government if that results in preferential treatment.
- Must avoid or withdraw from procurement actions that would place them in a real, potential or apparent conflict of interest due to ownership of assets, liabilities, family relationships or other circumstances.
- Must not accept gifts, hospitality or any other benefits that may have a real or apparent influence on his or her decisions or that may place them under obligation to the donor.

In addition, the code sets rules regarding post-public employment for public officials leaving the administration in order to mitigate the possibility of potential conflicts of interest between their new employment and their responsibilities in the public service.

The Canadian Code of Conduct for Procurement is available [here](#).

2. Procurement officials or members of the evaluation committee should be required to declare their interest when assuming office and/or in specific cases.

Good practice demonstrates that procurement officials should also be required to regularly (at least once a year) declare their assets; liabilities; income from all sources, gifts, advantages and other benefits, as well as unpaid contracts and employments, unpaid boards and directorships; and participation in organisations, trade-unions, NGOs, as well as post-tenure positions and employments. It is also important to require the disclosure of precise amounts of all income and the identification of concrete sources, as well as to make such information available to the public in an easily searchable database. Finally, an independent and capable oversight agency is instrumental to safeguarding the correct implementation and enforcement of the law.

In order to prevent conflicts of interest, many countries have adopted disclosure of private interest requirements for selected officials working in risky-areas such as public procurement, tax and customs, and financial authorities. The level of detail and whether or not the information disclosed is made available to the public varies from country to country. In the Czech Republic, procurement officials are required to disclose information about their assets, liabilities, income source and amount, paid and non-paid outside positions they hold, as well as gifts received. The information can be made available to the public upon request (OECD 2010)

In the Netherlands, procurement officials have to disclose information on their previous employment, gifts received, income sources and amount, as well as paid and non-paid outside positions they hold. The information is available online free of charge (OECD 2010).

3. In matters where conflict of interest is identified, officials should be immediately excluded from participating in the process.

Many countries already have rules on conflict of interest in place, but a key challenge that remains concerns the effective implementation of these rules.

Countries should ensure that internal and external control and auditing bodies are independent and functioning effectively. It is also critical that their reports are accessible to the public, allowing for civil society and media oversight.

Any suspicions of misconduct should be investigated by the responsible authorities and the sanctions applied should be proportionate and dissuasive. Offenders, as well as the companies involved, should be held administratively and criminally accountable. In the case of conflict of interest occurring during the evaluation and award phase, the enforcement of the agreed rules, such as the effective exclusion of committee members in conflict of interest situations, should be sought.

Other factors contributing to avoiding conflict of interest

The accessibility of information, stakeholder participation in key stages of the procurement cycle, and the possibility of review and remedy in case of dispute are essential to transparency and accountability in public procurement, and therefore, are essential in reducing opportunities for conflict of interest and corruption in general. Moreover, effective implementation and enforcement of the law are key to create a deterrent effect and to ensure integrity during the process.

Promoting transparency

Transparency throughout the public procurement process is instrumental in preventing conflict of interest, corruption, misuse of public resources, as well as ensuring fair competition (OECD 2010).

With regards to managing conflict of interest, particularly between members of the evaluation committee and bidders, transparency may also play a key role, allowing competitors, the media, civil society organisations or any citizen to spot inconsistencies in the evaluation and contract award decision. For instance, several countries require procurement agencies to publicise the selection and evaluation criteria, as well as the justification for awarding the contract to the selected contractor. This is the case in Belgium, Japan and Mexico, for example (OECD 2010). Within this framework, detailed documentation of the decision-making process should be kept to be used in case of complaints or any other necessary

investigation.

Involving the private sector

Countries have adopted requirements of general integrity pledges where bidders must testify the absence of conflict of interest and corruption. A few countries require bidders to make a declaration that they fulfil the requirements to participate in the procurement process, including not being subject to exclusion from the award procedure, or that they have a satisfactory record of integrity (for example, compliance with anti-corruption laws) (OECD 2007).

In Illinois, United States, the procurement law states that, as a condition to receive an award or public contract, bidders must disclose their financial interests as well as potential conflicts of interest.

Financial disclosure shall include any ownership share that exceeds 5 per cent, including the names, address and value of the share of all individuals identified as holding more than 5 per cent of the shares. The bidder shall also disclose any potential conflict of interest of shareholders, including information on state employment (currently or in the previous three years); state employment of spouse, parents, son or daughter; elective status; relationship with anyone holding public office in the previous two years; and employment in the previous three years as or with any registered lobbyist, among others. The financial disclosure of each successful bidder then becomes part of the publicly available contract or procurement file maintained by the appropriate chief procurement officer.

In addition, if a bidder is represented by a registered lobbyist, the bidder shall, throughout the process, disclose information on any communication between the lobbyist and public officials which concern the bid or offer.

More information on financial disclosure requirements and conflict of interest in Illinois is available [here](#).

An example of the financial disclosure form is available [here](#).

Involving citizens and civil society organisations

The role of civil society and the public at large in public procurement should be strengthened. Civil society can play an important role providing additional oversight, as well as monitoring whether conflict of interest rules are being adhered to.

For instance, the Integrity Pact, developed by Transparency International in the 1990s, is a tool aimed at preventing corruption and conflict of interest in public procurement, which can be used to enhance civil society participation during the procurement process and to help prevent corruption and conflict of interest.

The pact is essentially an agreement between a government or government department and all bidders for a public contract. Besides defining rules and obligations for both parties, the pact also provides for a monitoring system increasing government accountability of the public contracting process, where an expert or members of civil society are appointed to participate and oversee different phases of the process. Their task is to ensure that the pact is implemented and that decisions are taken based on public interest (Transparency International 2006).

Integrity pact in Mexico

In Mexico, following amendments to the procurement law in 2009, procurement monitoring under the “Integrity pact and social witnesses” programme, pioneered by Transparency International’s chapter *Transparencia Mexicana*, became legally required in procurements above a certain threshold (*Transparencia Mexicana* 2012).

The social witness is an independent and respected technical expert in the field who acts as an external observer of the procurement process. The programme thus combines the integrity pact methodology with a social witness, guaranteeing intensive monitoring during all phases of the bidding process.

The programme is based on a knowledge network that includes more than 40 experts in legal and technical aspects of the bidding process. These experts take part in every single meeting regarding the discussion of terms of reference, its implementation, and the evaluation and award of the bidding process.

The programme has significantly reduced the costs of public contracts and has increased the number of bidders participating in the procurement process in Mexico (Transparencia Mexicana 2012). According to the government agency responsible for procurement at the federal level, the programme has had a positive impact on procurement procedures, and it has become a strategic element for ensuring the transparency and credibility of the procurement system.

Encouraging whistleblowing

Whistleblowers may also help to expose conflict of interest situations in procurement processes. For this, countries should seek to establish a well-functioning whistleblowing system, which will help to promote accountability by encouraging the disclosure of information about misconduct and possibly corruption, while protecting the whistleblower against retaliation.

Establishing clear complaint mechanisms for bidders

As mentioned, the involvement of key stakeholders during the procurement process may help to increase transparency and prevent conflict of interest and corruption in the procurement process. There is common recognition that an effective complaint mechanism for challenging procurement decisions could provide an opportunity for those who lost the bid to denounce any potential irregularity, including possible undeclared conflict of interest situations.

An effective complaint mechanism should provide timely access, independent review, efficient and timely resolution of complaints, and adequate remedies.

For example, in Canada, the Office of the Procurement Ombudsman (OPO) is an independent organisation tasked with strengthening the fairness, openness and transparency of federal procurement. It reviews complaints from bidders with the objective of solving them quickly and efficiently, possibly resulting in immediate relief to the supplier (Office of

the Procurement Ombudsman).

Training

A number of countries have used trainings as a means to raise awareness of possible risks to integrity and conflict of interest during procurement processes. It is instrumental that public officials are aware of integrity standards and able to recognise conflicts of interest between their private interests and public duties (OECD 2009). Trainings may take place as part of induction programmes for entry-level staff or can be offered on an on-going basis to tackle emerging corruption risks in the sector and to ensure that experienced procurement officials meet high professional standards of knowledge and integrity (OECD 2007).

3 REFERENCES

Arrowsmith; et al, 2010. *Public Procurement Regulation: An Introduction*.

(<http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf>)

Heggstad, M. et al., 2010. *The Basics of Integrity in Procurement: A Guidebook*. U4 Anti-Corruption Resource Centre. (<http://www.cmi.no/file/?971>)

OECD, 2005. *Fighting corruption and promoting integrity in public procurement*.

(http://wiki.bezkorupce.cz/_media/wiki/corrupt_proc_oecd-rapport-2005-aase.pdf)

OECD, 2007. *Integrity in public procurement: Good practice from a to z*,

OECD, 2009. *OECD principles for integrity in public procurement*.

(<http://www.oecd.org/gov/ethics/48994520.pdf>)

OECD, 2010. *Public procurement in EU member states - The regulation of contract below the EU thresholds and in areas not covered by the detailed rules of the EU directives*, Sigma Papers, No. 45, OECD Publishing.

(<http://dx.doi.org/10.1787/5km91p7s1mxv-en>)

OECD, 2011, *Detailed data on conflict-of-interest disclosure from the 2010 OECD survey on integrity, in government at a glance 2011*, OECD Publishing.

(http://dx.doi.org/10.1787/gov_glance-2011-72-en)

Office of the Procurement Ombudsman website.
(<http://opo-boa.gc.ca/index-eng.html>)

Reed, Q., 2008. *Sitting on the fence: Conflict of interest and how to regulate them*. U4 Anti-corruption Resource Centre, U4 Issue 2008:6.
(<http://www.u4.no/publications/sitting-on-the-fence-conflicts-of-interest-and-how-to-regulate-them/>)

Transparency International, 2010. *Corruption and public procurement*. Working paper # 5/2010.

Transparency International, 2006. *Curbing corruption in public procurement*.

Transparency International EU, 2012. *Increasing integrity and EU citizens' trust in public procurement*.
(http://transparency.org/whatwedo/pub/2012_regional_policy_paper_1_increasing_integrity_and_eu_citizens_trust_in)

Transparencia Mexicana, 2012. *A new role for citizens in public procurement*. Citizens & Markets Initiative.
(<http://corruptionresearchnetwork.org/marketplace/resources/C-M%20SERIES%20-%20A%20new%20Role%20for%20Citizens%20in%20Public%20Procurement.pdf>)

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