

## Citizen's Participation in Procurement: Some Pitfalls

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Citizen's participation in procurement is one of the central strategies of Transparency International to curb corruption. In particular, TI developed the Integrity Pact methodology as the springboard for citizen's participation. The rationale for the strategy is quite straightforward: In situations where rules for procurement are either insufficiently defined or not followed even when present, the institutional framework cannot be trusted to guarantee a fair competition. This opens an avenue of opportunity for civil society organizations to act as promoters of transparency. The Integrity Pact was developed to pave the way for civil society organisations to play this role.

In its broadest form, an IP allows for participants and public officials to agree on a set of rules to be applied to a specific procurement. Within such an IP, agreement is also reached regarding conditions for participation, decision criteria and other particularities. Finally, participants and officials also agree on an "honesty pledge", that is, a pledge by participants that they will not attempt to bribe officials and a pledge by officials that they will not accept bribes. A third party, in principle a civil society organisation, sponsors the IP. The latter may play a variety of different roles in the IP, among them being the moderator between the other parties.

Integrity Pacts (IP) provide means to move towards cleaner procurement procedures and decisions in many circumstances. However, they are not free of vulnerabilities. This paper addresses a few risks entailed by the IP methodology, looked at from a purely conceptual perspective. Actual application in particular cases and the experience thereof gained by NGOs are not referred to here.

### *The risks of honesty pledges*

The first and most obvious risk incurred in an IP arises from the honesty pledge. As the pledge is a statement about private behaviours, it is not feasible to ascertain whether it is in fact being honoured or not. If two persons agree among themselves to sign such a pledge and, at the same time, agree (explicitly or implicitly) that the pledge is just window-dressing for the benefit of a third party, the latter will not be able to independently check on it.

Moreover, for someone who is willing to pay bribes to win contracts, it is not clear why honesty pledges would function as deterrent. After all, irrespective of the legal environment, bribery is not a formally accepted behaviour. In order to break an honesty pledge, the participant must break the law. And if someone is willing to break the law, then breaking one's word is a minor inconvenience, if at all.

A further complication arises when it is recalled that winning contracts by bribery is seldom an affair involving one single firm. Public markets tend to be cartelised. Prices are fixed by consensus; it is also common that contracts are awarded to cartel's members in turn, according to organised pro-

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cedures. In this type of environment, signing honesty pledges while crossing one's fingers behind one's back would be considered as "business as usual".

Furthermore, it is not uncommon that, in cartelised sectors working with a limited number of traditional clients, representatives for the collective pay the bribes, and not individual firms. In such cases, procurement instances are not subjected to specific bribery: Monthly bulk sums are paid to cover all cases in omnibus fashion. Individual cartel members can then enter honesty pledges truthfully declaring that they are not paying bribes, while fully cognisant that the contest is corrupted.

In procurement in which there are both national and international participants, honesty pledges may entail a competitive disadvantage to foreign firms (especially if American). It is a well-known fact that, following the Lockheed scandal of a few years ago, in 1977 American legislation criminalized unlawful behaviour of American executives even if the acts were perpetrated abroad.<sup>2</sup> It is also a well-known fact that, according to the Anglo-Saxon legal tradition, committing perjury aggravates one's guilt.

In contrast, according to the Roman law tradition that is prevalent in many countries, particularly in Latin America, perjury has no consequence whatsoever. In Brazil, for instance, a defendant who lies to protect oneself – even in court – exercises an expected and legitimate right. In such an environment, lying in writing is commonplace, and there is no intrinsic reason to suppose that honesty pledges would be different.

Now, suppose that an American and a Brazilian firm participate in procurement in Brazil and both sign an honesty pledge. Suppose further that the Brazilian firm bribes someone to win the contract and the fact is discovered. From the purely legal perspective, the violation of the honesty pledge means nothing to the accused.

Suppose, now, that the roles are reversed and the culprit is not the Brazilian, but the American competitor. The American responsible (and this may reach the highest echelons) will not only be prosecuted for bribing, but also will be held further responsible for lying.

In other words, honesty pledges may establish an unbalanced environment in procurement involving international bidders in some countries. Conditions for competition are inherently unequal.

### *Fellow-travelling*

As mentioned above, much corruption in procurement is fed by cartels. Cartel assembling is an unavoidable economic tendency in any market, public or private, and affects all countries, irrespective

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<sup>2</sup> Foreign Corrupt Practices Act In particular, it requires companies which have issued securities registered under the Securities Exchange Act of 1934 to maintain reasonably detailed record-keeping and accounting practices of their domestic and foreign operations. The jurisdiction of the FCPA is very broad, reaching (i) publicly-owned business enterprises, (ii) managers, employees, and stockholders of such enterprises, and (iii) every issuer of a security registered pursuant to the Securities Exchange Act of 1934, including every officer, director, employee, agent or stockholder of such issuer. Enforcement authority of the FCPA is asserted beyond the territorial borders of the United States.

of their degree of development. One of the purposes of market regulation is exactly to curb cartels. Procurement regulations are not exceptions.

However, as the market for public goods and services is farther away from the public's eye than private markets, and as the consequences of market disfunctionalities are diffuse and much less evident, life tends to be easier on "public" cartels than on their private cousins. Regulations and interventions tend to concentrate on the overall legislation, something that does not happen frequently.

As a result, cartels of public providers tend to survive for extended periods of time, enjoying respectability through systematic reinforcement of values such as stability, security, responsibility, technical expertise and so on.<sup>3</sup> An IP built around a procurement in which competitors belong to a cartelised sector will run the risk of unknowingly becoming a pawn in the cartel's game, even in the absence of direct bribery.

Fellow travelling becomes an increased risk if no proper attention is given to the ultimate criterion of a fair competition: the winning price. The main objectives of cartels are to fix prices, to erect entry barriers to newcomers<sup>4</sup> and to secure stable conditions for continuing business. If the prices attained by IP-governed procurement are not constantly monitored and shown to be at least less than the historical local prices, then the whole rationale for the IP crumbles. A step further is to compare local prices with international prices.<sup>5</sup>

### *The role of the State*

Another potential risk of the IP methodology is feeding the known tendency of NGOs to become ideologically estranged from the institutional framework. Although there is no formal environmental limitation of the IP applicability, the soil for its growth seems to be the more fertile the more intense the perception is that the State does not function very well. Third World countries will more probably use IPs than Norway.

Within a full-fledged IP, the participants establish their own rules and conditions. Knowledge about how to do that is absorbed along the time by all concerned, but the NGOs that sponsor the IPs are in a privileged position, because they participate in a higher number of them. Under these circumstances, it is very easy for an NGO to fall into the trap of viewing itself as an ersatz of the State.

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<sup>3</sup> A notorious mechanism used to uphold cartels is legally establishing "experience" as a condition to enter markets. Only those firms with a certain "experience" can compete in certain public procurement. As experience can only be aggregated by experience, this gives rise to the well known "ladder doctrine", according to which a provider of public services must begin at the bottom and slowly rise the steps (of course by being subcontracted and underpaid). Stratified classes of providers are thus created, under the regulation of a strictly enforced pecking order. However, experience is an attribute of humans, and not organisations. Further, having done something in the past has no bearing whatsoever to the ability of doing the same thing in the future, and conversely. Often, it is argued that "experience" is also a requirement in private markets. This is partially true (price and contract stipulations having a much more compelling role), but with an all-important difference: No private market regulatory framework formally state "experience" as an entry condition.

<sup>4</sup> As the "experience" requirements mentioned above.

<sup>5</sup> More generally, unit prices.

It may very well be that in some environments the State is so weak that it can be relatively easy for private initiatives to take over part of its role. This, however, must be viewed as an anomaly to be corrected. Taking the opposite stance, namely, to posit that the State is inherently incapable of performing and that the answer is for civil society to develop ever-growing governing and monitoring tools goes in the opposite direction of the establishment of a healthy institutional environment.

Transparency in procurement have as a necessary condition a legislation that defends the public interest by eliminating entry barriers and guaranteeing fairness in competition. If it is supposed that fairness can only be attained by direct intervention of NGOs, then the result is self-defeating, as “normal” procurement will be condemned to unfairness.

The conception of the State as incarnating the organising backbone of society is indeed impressed in Transparency International’s strategy. TI advocates coalitions between the private sector, civil society – and governments. *À bas l’État* is incompatible with this.

What this amounts to is that, according to the viewpoint stated here, the IP methodology should not be taken as *the* answer to corruption-related procurement problems, but as a temporary remedy to be applied topically. Perfecting and reforming procurement legislation, striving to enhance its enforcement and building both institutional and civil society tools for monitoring and whistleblowing have enduring effects far surpassing what can be attained by initiatives necessarily limited to particular situations.