

PUBLIC PROCUREMENT CORRUPTION IN THE EUROPEAN UNION

Ada-Iuliana POPESCU

Alexandru Ioan Cuza University of Iasi, Romania, Faculty of Economics and Business Administration
Iasi, Romania
ada.popescu@uaic.ro

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Abstract: *Public procurement is one of the sources for money draining in Europe. Corrupt officials agree to corrupt public procurement contracts that ultimately serve their personal interests instead of the public good. This undermines the states' welfare and rewards dishonesty, disloyalty, and venality. The EU is trying to manage this problem. The task facing it is huge, but it has made some progress. It needs to do more to ensure compliance with public procurement standard and prosecuting offenders. This paper presents an overview of main public procurement issues, including some of the recent good practices concerning public procurement in the EU.*

Keywords: *public corruption, public procurement, e-procurement, anti-corruption.*

INTRODUCTION

Fighting corruption has become the credo of most governments, international organizations, and NGOs. Fighting corruption helps to ensure good governance, a strong economy, and, ultimately, a better life for everyone. Of course, if this fight's goal is the utopist goal of eliminating corruption, the fight is likely to be never-ending, if not futile to some extent. As pessimistic as one might be, however, some countries, including EU member countries, are reducing corruption. For example, countries throughout the world have begun fighting private sector corruption more vigorously in the past five years. Also, most developed countries have been targeting public sector corruption. However, public sector corruption is harder to manage because of its spread into almost all public affairs. Public and private corruption often operates in tandem, particularly when the public procurement involves public-private partnerships, a place where the demand side and the supply side of corruption can easily meet.

Over the years, international financial institutions have developed their own standards and rules for financing public procurement contracts. The World Bank Guide is one of the most comprehensive set of rules in this respect, including addressing the bidder selection process. These guidelines provide for the exclusion bidders involved in

corruption scandals from the bidding process. They also recommend integrity pacts and pre-qualification procedures for assessing the bidders' technical and financial competence, where appropriate. In 1995, UNCITRAL presented a Model Law on Procurement of Goods, Constructions and Services based in the World Bank's guidelines. A year later, the WTO created the General Procurement Agreement, which its members signed and ratified.

The OECD addressed the issue by creating the 2006 Action Statement of Export Credit Working Group and the Benchmark and Assessment Tool for Public Procurement Systems in collaboration with the World Bank, which is designed to evaluate and rank national public procurement systems. The OECD also issued its Principles for Integrity in Public Procurement, which remains a reference for public procurement procedure.

The European Union is facing the same challenge. The Central, South Eastern and Eastern European member-states are behind the rest of the members in their anti-corruption fight. Consequently, the EU loses an estimated 120 billion euro to corruption annually. The weakest players; that is, the most susceptible to corruption, remain the political parties, public administrations, and the public sector (Mulcahy, 2012, p.3).

Possibly 20 to 25 percent of the value of public contracts is lost to corruption each year, and "public procurement contracts in the EU have an estimated worth of around 15 percent of the EU's total GDP" (Nielsen, 2013, p.1), sometimes even more.

Government purchasing legislation has existed for more than 40 years in the EU. However, adding anti-corruption provisions only started in 2012. Adding anti-corruption provisions is difficult because this required considering compliance costs, administrative burdens and their effects on competition. Another complication was the absence of a trustworthy way to measure corruption (Adving, 2011, p.5), which remains a challenge today.

Interested parties have advanced different solutions. Uniformly, however, the goals are to promote integrity, transparency, accountability, fair competition and professionalism. This means that clear and transparent procedural rules, codes of conduct for all participants, anti-corruption training, clear and proportionate sanctions, measures to detect corruption and to assess and identify risks ("red flags" or corruption indicators), and encouraging and protecting whistleblowers are all essential.

In addition, the internet can provide easy access for the public and for the stakeholders to important aspects of the public procurement process, avoiding secrecy and suspicion. Debarment has also been successful.

PUBLIC PROCUREMENT RISK OF CORRUPTION

During the past decade, the trend has been to implement a new type of public administrative management based mostly on projects coordinated through public-private partnerships. Its purpose is to improve the delivery of public services by working closely with private companies to meet the public's needs. Yet, this close working relationship can also increase the opportunities for corruption. Corruption does more than divert public funds from their proper purpose; it also corrodes public respect for government,

erodes the rule of law, distorts the economy, and, most tragically, burdens the poor the greatest.

Transparency International has created a comprehensive list of the effects of public procurement corruption. They run the gamut from harm to the environment, health and human safety to stifling innovation. Public procurement corruption distorts competition and endangers the economic development of the community as a whole (TI, 2014, pp. 9-10).

Public procurement procedure is complicated, limited in transparency and “impersonal” in that it public funds and not the funds of private investors. These three features make corrupt behavior hard to detect. Corruption can occur at any stage of the public procurement process: assessment of the needs phase (demand determination), preparation phase (project design and bid documents preparation), contractor selection and award phase, contract implementation phase, and the final accounting and audit stage (TI, 2006, p.17). Investments for needs that do not exist, a fake bidding process that looks more like a bribing competition, fake prices, poor quality of goods or services, and the like are but a few ways that corruption filters into public procurement.

Also favoring corruption is the number of people involved in public procurement process. Their diverse activities can easily provide cover for corruption. Their “one hard washes the other” attitude strengthens the unlawful operations, giving confidence to the actors. The chain is usually long (administrative officials, politicians, bidders, the sub-contractors, agents, consultants, business partners, managers) dissipating the responsibility and the blame.

The public sectors most affected by public procurement corruption in Europe and elsewhere are construction, public works, and the mining, oil and gas industries. (TI, 2014, p. 21)

Measuring the level of corruption, including public procurement corruption, is difficult because of the lack of accurate data from the EU states and the lack of a reliable way to measure corruption. Opinions differ over the results of the various econometric models for measuring corruption. One of the newest systems for identifying, measuring and helping to reduce public procurement corruption was commissioned by EU Commission as the result of a collaboration of OLAF, the European Court of Auditors, the OECD, and experts from PwC, Ecorys and University of Utrecht. The system estimates the direct material costs of corruption. It was tested on a sample of eight EU member states and five sectors where public corruption thrives: road and rail, water and waste, urban and utility construction, training, research and development. The EU member states investigated were France, Spain, Italy, the Netherlands, Lithuania, Hungary, Poland and Romania. The system found that public funds are lost through cost overruns, implementation delays or ineffectiveness. The amount of direct public loss from corruption was 13% of the overall budget of the project. The percent tended to be higher in projects with the smallest budgets. The bigger the budget, the larger the sums lost to corruption. The most vulnerable sector to corruption was the training one, where the relative loss rose to 44%, compared to the other sectors: 29% urban and utility construction, 20% road and rail, 16% water and waste, 5% research and development. In total, in 2010, the direct cost of corruption in public procurement in these five sectors, for

the eight member states, ranged from 1.4 billion euro to 2.2 billion euro and the most often encountered corruption was bid rigging, kickbacks and conflict of interest (OLAF, 2013, p.7).

Surveys focusing on the perception of and experience with corruption are published annually several institutions and organizations. Statistics by Eurobarometer, GRECO, Transparency International and OECD provide describe the severity of the problem, though not beyond question, most often directed at the accuracy of the data they use. However, as the anti-corruption fight increases its pace, states are more willing to provide truthful information.

According to Eurobarometer, in Europe, including the European Union, the United Kingdom has the least bribery (less than 1%) and a corruption perception of 64%, which is below the EU average of 74%. Denmark, Luxembourg, Sweden and Finland also have low bribery scores (less than 1%) but also have a most positive perception of corruption (20%, 42%, 44%, 29%, respectively), below the EU average. Germany, the Netherlands, Belgium, Estonia and France are following with a corruption experience index of under 2%. Opposite, there are most South Eastern and Eastern European EU member states that are registering high figures in favor of corruption. Greece, Romania and Bulgaria are causing concern since bribing looks to be an almost daily experience. Most of these scores match the Transparency International scores.

Still, data gathered responsibly and voluntarily delivered by EU states fall short. The new anti-corruption reporting system might force members to take action in the right direction and to solve this problem.

EU LEGAL FRAMEWORK AND LAW ENFORCEMENT

The EU development strategy, Europe 2020, focuses on employment, productivity and social cohesion. These goals cannot be reached without comprehensive and holistic anti-corruption legislation and effective enforcement. The European Commission in its “Communication for an European Industrial Renaissance” of January 2014 underlines ones more the importance of quality public administration as one of the factors to sustain EU growth (EU Report, 2014, p.3).

The EU member states’ have similar public procurement laws. This legal framework seeks to ensure integrity, transparency, accountability, fair competition and professionalism. However, more is needed. For instance, states should ensure their criminal laws adequately cover bribery and conflicts of interest. Once in place, these laws must be vigorously enforced. As an aid to this enforcement, legislatures should enhance whistleblower protection laws and require certain disclosures from the parties involved, including their ownership, subsidiaries, and other major assets.

Public procurement legislation in the European Union has improved in recent years, inspired by encouragement and standard offered by the UN, the OECD, the WTO, and the World Bank. Several directives specifically address the public procurement process. Other directives can be viewed as covering corruption generally, yet in ways that apply to public procurement such as transparency during the public procurement process, exclusion of corrupt bidders “certified” by court decision, minimum standards for

contractual remedies and modification of contracts. Certain provisions also deal with abnormally low tenders.

The main directives are Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities in the water, energy, transport and postal services sectors, Directive 2009/81/EC of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC, Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, Directive 2007/66/EC and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

Until this year, transnational works concessions were still not dealt with under specific legislation, but, instead, they were dealt with under limited and general provisions (Directive 2004/18/EC). Transnational service concessions were only governed by EU Treaty principles. However, in 2011, EU Commission proposed to revise the public procurement directives to focus on vulnerable sectors such as water, construction, energy, transport, postal services, supply and service contracts and concessions (EU Anti-Corruption Report, 2014, pp. 22-23). The initiative was slowed by member states opposed to the additional costs for their national administrations the revisions would impose.

The proposed modifications were regarding Directives 2004/17/EC and 2004/18/EC. Also, a new directive was created to cover concession contracts, today, Directive 2014/23/EU.

In spite of different impediments, the directives were voted by the EU Council in February 2014. Member states have until April 2016 to transpose the new provisions with the exception of e-procurement rules that can be implemented as late as April 2018.

The new, improved provisions address a number of key issues, including the following: prevention of conflict of interests, e-procurement, and simplification of documentation, better access to the market for small companies, monitoring and reporting on public procurement activity by member states for a rigorous and uniform enforcement of EU law.

Member states are allowed to decide as they see fit if public works and services should be performed by public or private entities.

The new legislation is relying on the “most economically advantageous tender” principle and not on the “lowest price” one. Thus, enduring quality, social welfare, innovation and environmental protection are favored. The use of a standard “European Single Procurement Document” during the bidding phase could reduce the bidding companies’ administrative costs by around 80%. Small firms are encouraged to bid by

new rules that permit contracts to be divided into lots. However, this might make the monitoring of the execution of the entire public work more difficult.

The new rules are stricter for subcontracting and abnormally low bids; red flagging and alert systems are also created to prevent and detect corruption.

Basically, Directives 2014/24/EU and Directive 2014/25/EU are meant to put a tighter filter on public procurement corruption using more flexible rules but without sacrificing strictness.

Besides legislation, the Tenders Electronic Daily (TED) database is offering a detailed list of tenders around Europe, providing for more transparency and publicity. The number of contract notices and contract award notices made public using this database has been growing during the past few years.

The EU challenge remains not the legislation but its enforcement. Thus, the European Commission monitors the correct implementation and enforcement of EU public procurement rules. It has been noted that in some member states infringements have occurred, such as lack of publicity and transparency, discrimination, direct awards, unjustified amendment of contracts. The majority of these cases were in the road and railway construction sector, health, energy, water/sewage, IT products and service contracts.

Since this year, the monitoring of public procurement rules enforcement was also coupled with the monitoring of anti-corruption fight. The first ever Commission anti-corruption report shows that in some member states, especially those from South Eastern and Eastern Europe, corruption of public sector is widespread and frequent. According to 2013 Eurobarometer survey, three out of ten construction and engineering companies were prevented to win a contract due to corruption, especially in Bulgaria, Slovakia, Cyprus, and Czech Republic. The most common corruption practices occurring in public procurement practices are: “tailor-made criteria for specific companies (57%), conflict of interest in bid evaluation (54%), collusive bidding (52%), unclear selection or evaluation criteria (51%), involvement of bidders in the design of specifications (48 %), abuse of negotiated procedures (47 %), abuse of emergency grounds to justify the use of non-competitive or fast-track procedure (46 %), amendments to the contract terms after conclusion of the contract (44 %)”. (EU Report, 2014, pp. 24-25)

SOLUTIONS AND GOOD PRACTICES

Monitoring the implementation and the enforcement of the EU anti-corruption provisions by the member states and intervening where needed is in itself a way of aiding the anti-corruption fight. Member states willingly or unwillingly have to take anti-corruption actions and they are going to be held responsible for them. The new EU anti-corruption reporting system is already proving this.

The EU Commission’s intent is to identify, share and promote good practices among its members creating a program in partnership with member states, NGOs, and other stakeholders. (EU Anti-Corruption Report, 2014, p. 5)

Solutions for dealing with public procurement corruption have been advanced by different public and private organizations. Reducing and eventually eradicating corruption can be achieved only by cooperation among public and private partners.

The concept of e-government is well-known today. It has been proven that e-government works only if three interrelated objectives are met: increasing the access to information, presenting the information in a transparent manner and increasing accountability by enhancing the ability to trace decisions/actions to individual civil servants (Bhatnaga, 2003, p.2).

Thus, the use of electronic communication can enhance government transparency and thus reduce administrative corruption. For instance, transparency makes financial and administrative transactions traceable, thereby showing how public money is spent and who is spending it.

The advantages of an e-procurement system, the one that EU is aiming for, are many: lower transaction costs, increased competition, decreased corruption, easy public procurement monitoring, and database creation.

E-procurement and e-invoicing proved to be efficient in the public procurement process exposing it to external scrutiny but not without fault. These solutions rely heavily on standardized and explicit rules and procedures meant to reduce the self discretion for partners involved in the procurement process. Also, the technical infrastructure is essential for e-procurement, involving connectivity, certified or tested e-procurement products, computers, trained personnel.

If the rules are not explicit and simple and the electronic system is not user friendly and if it is just an alternative solution to a hard paper one, then it will never target corruption.

From the same sphere of external monitoring, e-procurement can be coupled with civil society monitoring that involves representatives of civil society engaged in witnessing the public procurement stages (TI, 2014, p.29).

Price comparisons on-line interactive tools can be helpful in providing comparative information on public markets for municipalities: market shares, contracts distribution among municipalities and firms, quantities and unit price comparisons among different goods and services (TI, 2009, p. 97).

Another solution for curbing corruption in the public procurement process is the integrity pact promoted by Transparency International. The integrity pact between the government entity undertaking the procurement and the bidder stipulates that the first will prevent corruptive behavior of its officials and the later will abstain from bribery in order to secure a competitive advantage, including for the winning bidder until the full execution of the contract (TI, 2014, p.27).

The integrity pact reflects the best the collaboration and the efforts that have to be made by both partners to avoid corruption. Thus, under the pact, bidders have also the obligation to disclose all payments made in connection with the contract and to have a code of conduct and a compliance program for its implementation.

The sanctions for violating the rules vary according to the gravity of the offence: “denial or loss of the contract, liability for damages to the public entity or to other

competing bidders, forfeiture of the bid, performance bond or other security, debarment of the violation by the public entity for a certain period of time” (TI, 2014, p.27).

Integrity pacts have been used successfully in some European countries such as Austria and Germany, mostly for large-construction contracts.

Good practices concerning the public procurement process have been mentioned in the first EU Anti-corruption report issued in February 2014. Thus, it is evidence that good practices exist across the Union, but with more positive outcomes in Western member states.

The report notes that Germany had positive results not only in prosecuting corruption cases but also for taking preventive measures concerning public procurement at the local level, meaning towns and municipalities, especially in the construction sector, one of the most vulnerable to corruption. Some of these measures include establishing codes of conduct and central authorities for tender and awarding, rotation of staff, clear regulations on sponsoring and the prohibition on accepting gifts, organization of tender procedures, increased use of e-procurement, black lists or corruption registers, and other similar measures (EU Anti-Corruption Report, 2014, p. 28).

Italy has progressed in the field of establishing risk management and public procurement platforms. Several regional and local administrations have taken action against mafia infiltration in public structures and in public contracts to enforce transparency of public procurement at the regional level (EU Anti-Corruption Report, 2014, p. 29).

BASE is also the Portugal example of a unique national web portal used to centralize public procurement contracts, a way of keeping extended records on public procurement transactions, especially those in construction and real estate. Also, Portugal has an e-procurement platform that offers the possibility of downloading documentation free of charge, makes public calls for tenders, allows e-invoicing, and receives queries from suppliers, uploads and monitors public procurement contracts (EU Anti-Corruption Report, 2014, p. 32).

At the same time, Estonia, Lithuania, Poland, and Slovenia have made good progress in consolidating the fight against corruption. However, the business and civil society sectors in these countries are relatively weak. Nevertheless, the initiatives of Slovakian civil society have led to positive results concerning the accountability of local administration with regard to transparency of public spending. Transparency International runs a project in this field, focusing on independent monitoring. The Open Local Government Initiative of Slovakia ranks a hundred Slovakian towns using a set of criteria such as “transparency in public procurement, access to information, availability of data of public interest, public participation, professional ethics and conflicts of interests” (EU Anti-Corruption Report, 2014, p. 28).

Lithuania and Estonia have succeeded in implementing an e-procurement practice. More than 50% of the total value of public bids is done electronically, in total transparency, in Lithuania. The Estonian State Public Procurement Register is an electronic system providing for e-procurement and for other e-services. Its use tripled in just one year (EU Anti-Corruption Report, 2014, pp. 31-32).

Slovenia and Croatia have put in place electronic databases intended to remove corruption from public procurement contracts by tracking public money. The Slovenian database “Supervisor” contains information regarding contacting parties in business transactions using public money. It also provides information related to the management of all state-owned and state-controlled companies and their annual financial reports. The Croatian 2013 web portal and e-database is similar, providing information on public procurement procedures, on companies dealing with public funds and on public officials’ patrimonies (EU Anti-Corruption Report, 2014, p.30).

Among Eastern European EU members, Romania is only noted for improvement in enforcement of anti-corruption legislation. Romanian National Anti-Corruption Directorate (DNA), a specialized prosecution office for combating medium and high level corruption cases, has indicted around “4700 persons, 90% of these cases being confirmed and finalized by court decisions resulting in 1500 convicted persons” (EU Anti-Corruption Report, 2014, p.14). However, now, it is the time to prove that Romanian government is committed to curb public sector corruption, implementing the new EU legislation and enforcing it for notable results. Also, it should adopt the solutions advanced by different organizations such as integrity pacts for a more versatile, complex and complete anti-corruption toolbox.

CONCLUSION

The ongoing EU legislative reform is meant to facilitate cross border joint procurement by providing uniformity and avoid the legal and procedural hurdles created by national law conflicts. Its second purpose is to minimize if not eradicate corruption from public procurement process by bringing transparency, integrity and accountability.

Solutions and good practices exist and most EU members have taken steps in the right direction but sometimes too small and/or too few. It is true that public procurement corruption still strives in Eastern European EU countries compared to its Western ones. Too often, interests groups are acting on behalf of the citizens on false pretences, spending public money to serve their own interest and living the community with the false impression of progress. Urban development/construction and healthcare remain the most prone to corruption. Maybe the new legislation and the new anti-corruption review mechanism will force these member states’ governments to prioritize the anti-corruption fight and to act more responsibly for positive, even outstanding results.

The success of the new, improved EU public procurement legislation is to be seen since its implementation at national level is still in progress.

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