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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from Chile

-- Session V --

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

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-- Chile --

Introduction

1. The fight against corruption in Chile has traditionally been conducted separately from competition policy. The Competition Agency (Fiscalía Nacional Económica or FNE) has the duties of investigating and prosecuting competition infringement cases, and the Competition Tribunal (Tribunal de Defensa de la Libre Competencia or TDLC) is a judicial body that has the power to adjudicate and impose sanctions in competition matters. The final decisions of the Competition Tribunal are reviewed only by the Supreme Court. On the other hand, policies against corruption are in charge of other public bodies detailed in this document. The research for this contribution has generated an interesting opportunity to explore how an accurate co-ordination between these two policies may reinforce each other.

1. Size and policy objectives

1.1 *What fraction of your economy does public procurement account for?*

2. According to the OECD (2007),¹ public procurement accounts for about 15% of the GDP in OECD countries. In the case of Chile, the public current expenditure represents 20% of the GDP and public real investment about 2.5% of the GDP.² By mean of the e-procurement system, 5000 million USD were traded in 2008, representing about 50% of the addition of public current consumption of goods and services plus public real investment.³ The Public Works Ministry is directly responsible for around 50% of public real investment.⁴

1.2 *What are the principle policy objectives of public procurement?*

3. The principle policy objectives of public procurement are contained in several statutes applicable to public administration in general and to public procurement in specific. The general legal framework for public administration accounts for the principles of responsibility, efficiency, effectiveness, co-ordination,

¹ OECD, Bribery in Procurement, Methods, Actors and Counter-Measures, 2007.

² Dirección de Presupuestos, Ministerio de Hacienda, Chile, Estadística de las Finanzas Públicas 1999-2008, p. 130. Available at http://www.dipres.cl/572/articles-49739_doc_pdf.pdf. These percentages are for the year 2008 and include the central government, the regional government and the municipalities. Not all the items of current expenditure are necessarily relevant for corruption or collusion purposes. For example, salaries of civil servants accounts for 5% of GDP, pensions payments for about 5% of GDP and subsidies & state aids for about 6% of GDP.

³ Presentation of the Annual Report 2008 of the Head of Dirección de Compras Pùblicas (Chilean e-procurement public body) http://www.chilecompra.cl/cuenta_publica/doc/ChileCompra_v7.pdf.

⁴ Annual Budget of Public Works Ministry for the year 2008. Available at <http://www.dipres.cl/574/multipropertyvalues-14552-15192.html>.

probity, transparency and publicity, among others.⁵ In regard to public procurement and, in particular, to contracts for the supplying of goods and services to the administration, the legal framework states the following policy objectives of procurement by auctions:

Tender conditions shall provide for requirements that allow the achievement of the most convenient combination between all the benefits of the good or service that will be procured and all its current and future costs, direct and ancillary ones. In the case of frequent supplying services procured by means of periodical tendering, better work and salary conditions provided by a bidder to its workers will be highly ranked. These requirements cannot arbitrarily discriminate among bidders and winning criteria cannot be the bidding price solely. [...] In any case, the Administration shall aim at performing procurement with effectiveness, efficiency and saving public funds.⁶

2. Corruption

2.1 What is the cost of corruption?

4. There are no official statics or measures regarding the costs of corruption in Chile. International Transparency reports that for the year 2008 the Index on Perception of Corruption ranked Chile in 23rd position among 180 countries with a 6.9 score within a 0-10 scale.⁷

2.2 What factors facilitate corruption? Do some factors appear to be more important than others?

5. There are several factors that facilitate corruption among which it is worth mentioning the weakness of institutions and lack of co-ordination among different public bodies; the absence of effective control of government expenditures and of payments between public bodies or payments from public to private entities; the lack of transparency in government activities, the absence or incompleteness of accountability regarding projects and public investments; some established practices such as the tolerance by the community of minor acts of compensated favouritism by government officials. It is not easy to give more preponderance of any of these elements over another one, but pro-transparency reforms seem to carry good outcomes in the medium term.

2.3 How do transparency programs help fight corruption?

6. Transparency is a main instrument to fight corruption, since it allows civil society to have a complete access of most of government's decision-making proceedings and their grounds. When private entities interact significantly with public bodies, transparency is in addition a tool for deterring private incitations for corruption. Since a number of public decisions affect collective or public goods or general interests, transparency is a guarantee of their protection.

⁵ Act on General Legal Framework for Public Administration (Ley de Bases Generales de la Administración del Estado), art. 3.

⁶ Act on Contracts for public procurement of goods and services, Art. 6 (Ley de Bases sobre Contratos Administrativos de Suministro y Prestación de Servicios) N° 19.886/2003. Some amendments to labor law in 2008 introduced in public procurement law this indirect way of enforcing labor rights, maybe inappropriately blending two different policies.

⁷ http://www.chiletransparente.cl/home/inst_indice.html.

2.4 *What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?*

7. Training aimed at preventing corruption, within both the public and private sectors, is also fundamental.

8. The design of programs, jointly by government, civil society and business, which purpose is to fight corruption is also advisable. It is also recommended the drafting of codes of conduct setting standards of behaviour of individuals belonging to private and public entities, at the time of confronting the risk of corruption.

9. The development of interagency links and exchanges between different bodies interested in fighting corruption is also very important.

10. A well suited system for detection (*ex-officio* and complaints filling) and known proceedings for handling cases are significant requirements for a successful system. Complainants should be protected and should receive information of the different stages and of final outcomes of the investigation. The conclusions of the investigation should be publicised.

11. All public entities should comply with high accountability standards.

12. Developing indexes and other objective indicators of corruption seems to be also very important.

2.5 *Are firms required to certify during the procurement process that they have not bribed an official?*

13. Bidders in public procurement auctions and firms in public procurement in general are not required to sign any document, certificate or statement that they have not bribed civil servants.

2.6 *What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in Chile?*

14. A private individual who bribes or intends to bribe can be imprisoned up to 3 years.⁸ If a fraud against government is proved, sanctions of imprisonment can be higher.⁹ In addition, fines can be imposed up to 3 times the amount of the bribe offered or paid.¹⁰ Besides that, as sanctions, the individual's right to practice its profession can be suspended up to 3 years, and he can be deprived of his capacity to become a civil servant temporary or definitively.¹¹ According to public procurement law an individual sanctioned by this kind of crimes cannot supply to the government.¹² ¹³

15. Firms that have engaged in corruption or bribery have traditionally been excluded from prosecution. A new law enacted in 2009 introduced in Chilean criminal law the possibility of firms to be

⁸ Penal Code, art. 250 in connection with arts. 248, 248bis and 249.

⁹ Penal Code, art. 250 in fine, in connection with arts. 468, 473, 470 N°8.

¹⁰ Penal Code, art. 250 in connection with arts. 248, 248bis and 249.

¹¹ Penal Code, art. 250 in connection with arts. 248, 248bis and 249.

¹² Regulation of the Public Procurement Act, Decree 250/2004, as amended, art. 92 N° 1.

¹³ The prosecution of private individuals in corruption cases and the introduction of prison for bribing are the result of law amendments and changes in prosecution policies and jurisprudence of the last 10 years.

criminally sanctioned for the following crimes: money laundry, terrorism and bribery to national and foreign civil servants.¹⁴ According to this new law, firms sanctioned for corruption can be punished with a fine; with a temporary suspension of its activities in whole or in part; with the deprivation of its legal entity or the order to dissolve the company; with the lost of public benefits such as subsidies; also an order to cease and desist of performing the kind of transactions that have been criminally judged.¹⁵ According to public procurement law an individual sanctioned by this kind of crimes cannot supply to the government.¹⁶

16. The sanctions for civil servants who have engaged in corruption are contained in the statute of civil servants (administrative liability - lower sanctions) and in the penal code (higher sanctions). Criminal sanctions are similar to those explained above for the case of a private individual involved in bribery.

2.7 *Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?*

17. In general terms, every public entity has a disciplinary authority on its own officers. The lower chamber of the Congress (the chamber of the Deputies) also has a power to control the governmental acts of government. The competent authority with general powers to administratively prosecute corruption cases is the General Comptroller Office (Contraloría General de la República), a constitutionally independent body in charge of controlling *ex-ante* and *ex-post* the legality of the Administration's acts. The National Criminal Prosecutor (Ministerio Público), a constitutionally independent body is in charge of criminal prosecution of corruption before criminal judges. There is also a Prosecutor for the Fiscal Interest (Consejo de Defensa del Estado) that usually participates as a plaintiff in the prosecution of criminal corruption cases.

18. Recently, the Act for the Publicity of Public Information, N° 20.285/2008 created another public body, the Transparency Council. Its principal duties are to guarantee the respect of the principle of publicity of government activities and to legally enforce the duties of public entities in this field. It is an administrative body integrated by four prestigious professionals which nomination system assures the independence of the body's decisions. Its decisions can be challenged before courts.

19. Competition authorities do not have general authority to prosecute corruption cases beyond the disciplinary authority over their own officers.

3. *Collusion*

3.1 *What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?*

20. A wrong design of relevant procurement decisions or tender requirements by public entities can introduce excessive predictability for industry members and/or raise unjustified entry barriers. This allows firms to easier achieve an effective collusive agreement. When these internal risks are combined with some characteristics of the product or service and of the industry, such as those detailed in the OECD Guidelines,¹⁷ a strong scheme of incentives directs firms' behaviour towards collusive strategies.

¹⁴ Act N° 20.393 December 2nd, 2009, on criminal liability of legal entities.

¹⁵ Act N° 20.393 December 2nd, 2009, on criminal liability of legal entities, art. 8.

¹⁶ Regulation of the Public Procurement Act, Decree 250/2004, as amended, art. 92 N° 1.

¹⁷ OECD Guidelines for Fighting Bid Rigging in Public Procurement.

3.2 *What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?*

21. There have not been many punished bid rigging cases in Chile so far. An interesting case before the Competition Tribunal in 2006 involved the supplying of oxygen for public hospitals.¹⁸ Another one in 2008 involved the asphalt for roads industry.¹⁹ There are bid rigging cases pending before the Competition Tribunal involving ambulances²⁰ and advertisement agencies²¹ sectors.

22. The competition agency has not focused its competition outreach and advocacy activities before public procurement entities in actively helping the design of competitive procurement systems so far. The oxygen case is very interesting from the point of view of competitive improvements to a tendering process. Before the case was brought to the competition authorities, significant amendments had been made by a team of consultants in order to change the rules of tendering process and making them more competitive.²² These amendments are very illustrative of a pro-competitive improvement and regularly used as a benchmark in FNE's presentations for outreach activities before public procurement entities. In a number of other cases involving tenders for concessions or tenders for the sale of an essential facility or a scarce input, the Competition Agency has challenged directly before the regulator or before the Competition Tribunal some of the tender requirements.

3.3 *Does your country employ certificates of independent bid determination?*

23. There is no general legal provision imposing this requirement. However, as part of the outreach activities performed by the competition agency, the instrument has been advocated before several public bodies and the FNE recently achieved to introduce this requirement in an important tender by the regulator of the pension funds management industry. The aim of the FNE is to continue to advocate on this matter to promptly disseminate the use of this important instrument to many industries, and expect results in the near future.

3.4 *When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?*

24. No. This ancillary sanction was abrogated by a recent amendment to the Regulation of the Public Procurement Act.

4. *Fighting collusion and corruption*

4.1 *What cases from your jurisdiction have involved both corruption and collusion in public procurement?*

25. None of the cases above mentioned in paragraph 12 included corruption elements. However, since several collusion cases in the last year have been sent to the Competition Agency for investigation by

¹⁸ Ruling N° 43, Competition Tribunal, September 7th, 2006, 4 firms condemned. Decision overturned by the Supreme Court.

¹⁹ Ruling N° 79, Competition Tribunal, December 10th, 2008, dismissed. Decision affirmed by the Supreme Court.

²⁰ Case Number 163-08.

²¹ Case Number 177-08.

²² These include changes such as demand aggregation and reduction of the number of tenders (to only 3 in an industry with 4 firms), extending the contracting period to 5 years, and keeping reference price confidential, among others.

the General Comptroller Office - whose duties are closer to corruption than to collusion matters - some of these cases will likely include both wrongdoings. That is why it is currently relevant for our system to identify how corruption and collusion interact and how to co-ordinate the fight against them.

4.2 *Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?*

26. There is no public information available to answer, regarding corruption cases. All collusion cases mentioned in paragraph 12 occurred at a national level.

4.3 *What methods and techniques for fighting corruption would aid the fight against collusion?*

27. A first method that deserves to be mentioned is the use of general audits performed by the General Comptroller Office. It is worth mentioning that several criteria regarding collusion detection were additionally incorporated by this public body in its audits during 2009. This was an outcome of the joint work with the Competition Agency.

28. The periodical performance of internal audits at national, provincial and local government levels is another useful technique for increasing detection of both, corruption and collusion. It is very important for effectiveness in detection to identify in the risk matrix, the risks associated to both kinds of wrong.

29. It is also important to develop methods and working practices that foster inter-agencies work, with joint sessions, exchanges of information, collaboration, reciprocal training, parallel investigations, etc. Chile has recently advanced along this road.

30. Training of public procurement officers is also an important duty of agencies in charge of fighting corruption and collusion in order to increase awareness of procurement officers of these wrongs and for helping them in the definition of standards of behaviour.

31. Dissemination of toolkits and guidelines for prevention and detection easy to be used by civil servants can also be very effective.

32. Signalling to the private sector that different agencies are working together in a co-ordinated way can also prove to be a very effective deterrent. The FNE efforts have pursued this effect by broadly publicising most of the initiatives undertaken in this area, such as the 2008 Competition Day, entirely focused on bid rigging, and by issuing press releases each time a collaboration agreement has been subscribed which was the case with the General Comptroller Office and with the Ministry of Public Works, among others.

4.4 *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in Chile?*

33. There are no especial leniency rules for bribery or corruption crimes but the general Penal Code rules that provides for criteria for raising or diminishing the sanction.

5. **Advocacy**

5.1 *How do regulatory or institutional conditions help facilitate bid rigging and corruption?*

34. Several factors have been identified as corruption facilitators, such as the weakness or absence of controls of budgets expenditure or of transactions between different entities within the public sector or in

public-private rapports; the lack of transparency in government activities; and, the absence of clear career rules for civil servants regarding promotion, hiring and firing and inappropriate labour conditions.

35. A wrong design of relevant procurement decisions or tender requirements by public entities can introduce excessive predictability for industry members and/or raise unjustified entry barriers. This facilitates firms to achieve an effective collusive agreement. On the other hand, increasing the levels of transparency has been identified as a very good tool against corruption but it is well known that, at the same time, excessive degrees of transparency can give industry members too much predictability thus facilitating effective collusion.

36. The relevant question seems to be, depending on the context, whether to privilege pro-competition & anti-collusion strategies or pro-transparency & anti-corruption ones. As stated by the philosopher Sissela Bok, “*While all deception requires secrecy, all secrecy is not meant to deceive*”.

5.2 *In what ways can competition authorities work to improve efficiency of public procurement?*

37. One of the main expertises of competition authorities seems to be the identification of concentrated markets, which are riskier from the point of view of collusion and to denounce unjustified entry barriers that can be facilitating this structure. Since these are the basic conditions for collusion, in the dissemination of a competition culture within the public sector, competition agencies should share this expertise for identifying such fundamental conditions. Only once a competition problem has been identified, alternative solutions can be evaluated with the support of competition experts. Should we change tendering processes in order to make future tenders more competitive by the mean of reducing entry barriers? Should we initiate audits of closed past tender proceedings in order to detect a wrong that ought to be investigated and prosecuted? Both strategies need a strong commitment by both, the public procurement body and the competition authority. Other efficiency improvements of public procurement can certainly be made but these are beyond the competition authorities’ competences.

38. In summary, competition authorities should help in the identification of risky situations for collusion and once a risky situation is identified, help in the choice of a solution between the alternatives. In the preventative strategy, competition officers can collaborate in the design of changes oriented to introduce an incentives scheme for competition. In the ex-post strategy, competition officers should collaborate in developing detection mechanisms jointly with procurement entities.

5.3 *What steps have been taken to improve the efficiency of the public procurement process in Chile? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?*

39. An important step towards a more efficient public procurement process was taken in 2004 with the establishment of a public body in charge of managing an electronic platform for public procurement. Significant resources have been saved because of e-procurement.²³

40. Regarding measures aimed at reducing corruption, even though most of them aim at fighting corruption in general and not only confined to public procurement, it is worth mentioning the following.

²³ Savings of 70 million USD in 2005; 92 million USD in 2006; 118 million in 2007 and 140 million in 2008 are reported. http://www.chilecompra.cl/cuenta_publica/doc/ChileCompra_v7.pdf.

First, the subscription of international conventions concerning corruption prevention and detection.²⁴ Second, another public initiative has been the creation of Committees appointed by different Presidents of the Republic in order to tackle corruption issues: Comisión Nacional de Ética Pública (1994); Acuerdo Político-Legislativo para la Modernización del Estado, la Transparencia y la Promoción del Crecimiento (2003); and, the Agenda de Probidad y Transparencia (2006). Third, several amendments to different laws have been introduced oriented to increase transparency and to punish corruption conducts more severely. Finally, there have been some initiatives oriented to the identification and dissemination of best practices.

41. Regarding measures aimed at fighting collusion, in 2008 the Chilean Competition Agency, by the initiative of the OECD and the support of the OECD and the Competition Bureau of Canada, started a program oriented to increase awareness of public procurement officers and institutions of the problems of collusion and bid rigging and the relevance of a competitive tender design. This program has been a bridge between competition and public procurement worlds and resulted in the inclusion of the item ‘fight against bid rigging’ in the agendas of several public procurement bodies. Some amendments to tender procedures are beginning to be introduced and the number of investigation cases has been increasing, both as outcomes of these efforts.

5.4 *When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?*

42. We have not had a significant experience for supporting an answer to this question. The competition agency has not focused its competition outreach and advocacy activities before public procurement entities in actively helping the design of competitive procurement systems so far. However, some techniques such as certificates of independent bid determination are generating a raising interest among public procurement bodies; such was the case with the regulator of the pension funds management industry that effectively introduced the requirement in a tender, as reported in §13, supra.

5.5 *Has your competition agency undertaken competition advocacy in this area?*

43. In May 2008, the FNE brought together several public bodies and an association of public procurement officers, to a work team which was named *Comité Anti-Colusión entre Oferentes en Licitaciones de Abastecimiento Público* (hereinafter, the Interagency Taskforce). This team included representatives of the Bureau of the General Comptroller, the (E-) Public Procurement Bureau (body in charge of modernising the public contracting through electronic purchases), the Ministry of Public Works, and the Council for the Internal Auditing of Government and Redaba (an association of officers and staff in charge of procurement areas of different public bodies). Delegates of the Department of Housing and Urban Planning, the Transport supervisor and the Pensions regulator later joined the group. This Interagency Taskforce has held 9 work meetings during 2008 and 2009.

44. Because of this initiative, seminars and training activities took place, as a result of bilateral links with the taskforce members and also as a byproduct of installing the risk of collusion among bidders in the agendas of such bodies. Nearly 1000 public procurement officers have attended these activities.

45. An ongoing market study on the construction sector is also expected to become a useful tool for advocating regulatory reforms in the Ministry of Public Works.

²⁴ The Inter-American Convention Against Corruption (1996); the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

5.6 *If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?*

46. As stated before, the competition agency does not have any competence for prosecuting corruption in general.

47. Regarding collusive tendering cases, remedies sought have commonly been fines to firms. In other cases involving tender design - but not necessarily collusive tendering cases - some remedies regarding tender conditions or requirements, aimed at making the tender more competitive, have been requested to the Competition Tribunal.

48. In October 12th an amendment to the Competition Act came into force introducing provisions for fighting cartels more effectively.²⁵ It is expected that higher fines will be requested against bid riggers in the near future.

²⁵ Law N° 20.361/2009 gave powers to conduct dawn raids, to wiretap, and to institute a leniency program. Among others, it also raised the maximum amount of fines up to USD 20 million approx.