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Fighting Collusion and Corruption
in Public Procurement

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Overview of Presentation

Competition agencies are facing increasing pressure to deal with an ever-expanding set of challenging and time-consuming concerns – increasing consolidation/concentration, Big Tech, excessive pricing, sustainability etc

But the fight against cartels, especially those affecting public procurement, remains crucial.

Such practices may cause significant harm to a state and its citizens – vast sums of money and the vital nature of goods/services and works procured

Overview of Presentation

Public procurement processes especially prone to distortion by bid rigging – which may work hand in hand with corruption

Despite this – many jurisdictions not successful in combatting supplier collusion or corruption in this context

Proposals for improvements – especially through better coordination of public procurement, competition and anticorruption law and policy

Steps required will depend upon a careful diagnosis of weaknesses and targeted measures to address them

Covid-19 pandemic – highlighted the vital importance of efficient and effective public procurement and protecting it from these internal and external threats to it

Why is public procurement prone to corruption and collusion? Opportunities and Incentives

Public officials managing processes on behalf of beneficiaries/ those providing sums, may be tempted to award contracts in return for bribes or to trusted acquaintances (cronyism)

Rigging bids and/or paying bribes may ensure delivery of lucrative procurement contracts and enhanced profits to tenderers

Corruption and collusion may occur together and reinforce one another

A protected environment for bid rigging (bid suppression, cover bidding, market allocation, bid rotation etc)

The design of public procurement systems, combined with its value and frequency makes it prone to collusion:

- Constant/predictable demand
- Few competitors and BTE (eg regulation/ technical standards/ foreign firms)
- Standardisation and restrictive regulation/ product specifications
- Transparency
- Weak incentives for procurers to identify or even corrupt advisers?

Collusive schemes likely to flourish as firms can:

- Cooperate/ align behaviour
- Ensure internal stability by detecting/punishing deviations
- Manage external threats (especially from new entry)

Bid rigging designed to mask collusion and create impression of competition

Cases regularly uncovered/ reported even if economies perceived to be relatively 'clean'

Brazil

- OCW (especially construction)

Canada

- SNC-Lavalin (infrastructure contracts)

EU

- Elevators and escalators

Portugal

- Reactive glucose test strips

Singapore

- Electrical works and services

Spain

- Construction

UK

- Construction and marine hoses

Cases reveal the scale of incentives and harm that can exist

OCW: significant benefits for officials and tenderers

- One senior procuring official returned USD97 million (plea)
- Odebrecht found to have earned USD3.3 billion from USD788 corrupt payments
- Estimated to have caused USD billions to Brazil

Numerous reports and papers

- Outline the significant harm that flow from these practices eg to public funds/ public goods etc/ safety/ growth/development/ health/citizens' welfare

Efficient and effective public procurement system consequently requires:

A carefully constructed public procurement regime (minimising opportunities)

Robust competition and anti-corruption laws enforced by proactive and independent agencies

Effective enforcement mechanisms – able to deter and punish wrongdoing (benefits of infringement do not exceed costs)

BUT even where such a regime exists weaknesses in application and enforcement can undermine its effectiveness

For example, the UK

- Robust system exists with

Public procurement	Competition (bid rigging)	Anti-corruption Law
Regs derived from EU Directives	Civil and criminal offences	Stringent bribery laws and other criminal offences

- Respected agencies and few cases uncovered
- But reports and surveys indicate paucity of cases could be because conduct is not being exposed:
 - Weaknesses in procurement processes?
 - Limited enforcement of competition and anti-corruption laws and penalties insufficient to deter or punish?
 - Siloed regimes – lack of policy integration?

Weaknesses in Procurement Processes

- Weaknesses in legal regime
- Limited training
- Insufficient compliance and monitoring, scrutiny and oversight of processes
- Post-award contract modifications
- Weak remedies

Deterrents dependent on probability of detection + level of punishment. UK picture of limited enforcement

CA98 – Chap I (modelled on Art 101)

- Few decisions focusing on collusive tendering in public procurement (*Construction* (2009))
- Main sanctions corporate fines (with leniency/ settlements) – although recent use of CDOs

EA02 – criminal cartel offence

- *Marine Hoses* (2008)
- But only 5 individuals convicted in 17 years of cartel offence
- Previous CMA Chairman asked for CMA to be relieved of primary responsibility for enforcement

Bribery Act 2010

- Few cases involving domestic public procurement
- SFO greater focus on foreign bribery
- No institution tasked with coordination of domestic anti-corruption work

In the UK, as in other jurisdictions, more can be done to combat corruption and collusion and to:

Prevention

Safeguard against Risks

- Designing procurement processes to prevent risks
- Ensure measures designed to ensure internal integrity (eg transparency provisions) do not facilitate collusion

Deterrence and Punishment

Increase Risk of Detection

- Prioritise enforcement of competition and anti-corruption laws in this sphere
- Reactive and proactive techniques

Increase Sanctions Beyond Corporate Fines

- To punish and deter future infringements

Coordination and Policy Integration: Cooperation between procurers and agencies

Improving public procurement processes (protection and prevention)

Mandatory competition law training – to protect processes (procompetitive design), to encourage reporting of collusion suspicions

Competition advocacy – tender processes and procedures/ laws which deter entry

Anti-collusion tender clauses – CIBDs

Organisational culture – codes of conduct, electronic registers of conflicts on interest, gifts and hospitality etc + more effective auditing

Rewards eg for ethical behaviour or reporting bid-rigging suspicions -
Sanctions for not following procurement rules

The importance of more effective enforcement

Increased enforcement

- Not over-reliant on leniency schemes
- Independent enforcement will increase its effectiveness – foster detection
- Incentives for procurers and whistleblowers + screens/market monitoring
- Coordination and streamlining enforcement

Using full range of penalties

- Raise the stakes for those involved – individual as well as corporate sanctions
- A greater willingness to use debarment sanctions
- Greater use of recovery powers and routine use of damages actions (claw-back taxpayer money)

Increased policy coordination and cooperation

Recognition of interrelated nature of the issues – procurement and enforcement

Policies should not contradict one another (eg transparency measures not to facilitate collusion)

Cooperation – advocacy, training, placements etc – and coordination – eg transfer of evidence, task forces

A single offence encompassing bid rigging and bribery might facilitate enforcement?

Many competition agencies thinking about this, e.g AdC:

Fighting bid rigging
campaign – and bid rigging
in public procurement is a
priority

Importance of reactive and
proactive methods of
detection which reinforce
each other and use of
screens (detection or
supplement)

Close contact with
contracting agencies – how
to reduce risk of, and
identify, bid rigging (red
flags) and to encourage
informing

Collaboration to facilitate
access to information (e-
procurement database) to
enhance ex officio cartel
detection

Reforms will require careful diagnosis of weaknesses system and measures to address them

- In some situations – improved laws and better enforcement alone may be insufficient
- Eg where corruption entrenched – creating a collective action problem
- In Brazil – wrongdoing exposed by OCW systemic,
- Improved laws allowed widespread enforcement across multiple fronts, but seems cycle not broken
- Further reform + measures to target factors contributing to systemic corruption also required

Conclusions

Bid rigging and corruption are widespread practices that continue to plague many public procurement systems – more needs to be done to combat them

Steps required likely to involve improved cooperation and coordination between different regimes and vary from jurisdiction to jurisdiction

Measures to combat should help to prevent and deter practices which cause significant harm and to lower the costs, and improve the quality, of public purchasing

Crucial as countries grapple with the Covid-19 pandemic – increased quantity of public purchasing and pressure on the public purse

Thank you!

For further information see

- A Jones, Combatting Corruption and Collusion in UK Public Procurement: Proposals for Post-Brexit Reform (2021) *Modern Law Review*, <https://doi.org/10.1111/1468-2230.12626>
- [Alison Jones, Caio Mário da Silva Pereira Neto, Combatting corruption and collusion in public procurement: lessons from operation car wash](https://www.utpjournals.press/doi/full/10.3138/utlj-2021-0023) (2021) *University of Toronto Law Journal*, <https://www.utpjournals.press/doi/full/10.3138/utlj-2021-0023>