

# An overview of European good practices in public procurement

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## Abstract

*Public procurement has always been a major source of corruption in Europe, as acknowledged by national and European officials, by NGOs and by representatives of civil society. Too often, public procurement serves the personal interests of corrupt officials rather than the best interest of the community. During the last decade, anti-corruption efforts have increasingly focused on public procurement corruption. Most European countries, including European Union members, have tried to eliminate public procurement corruption by implementing new legal rules to ensure compliance with public procurement standards and by prosecuting offenders. After surveying a variety of good practices for eliminating corruption in public procurement in Europe, this paper concludes that the new rules have produced mixed results, with the most unfavourable outcomes occurring in Central and Eastern European countries where public procurement corruption is more virulent than elsewhere in Europe.*

*Keywords:* public procurement, corruption, anti-corruption practices

## 1. Introduction

Europe's public authorities are among those most exposed to corruption because they purchase substantial quantities of goods and services to satisfy communities' needs. Too often, they are tempted into corruption. As a result, their corrupt acts jeopardize their communities' good governance, weaken their communities' economy, and, ultimately, reduce the quality of life in their communities.

However, during the past decade, countries throughout the world have begun fighting corruption more vigorously. Most developed countries have

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increasingly targeted public sector corruption, especially public procurement corruption. The fight against public sector corruption must be pursued in tandem with the fight against private sector corruption because public procurement involves public-private partnerships.

Public procurement procedure is complicated. Corruption can occur at any stage of the public procurement process: the assessment of needs phase (demand determination), the preparation phase (project design and bid documents preparation), the contractor selection and award phase, the contract implementation phase, and the final accounting and audit stage (Transparency International, 2006). Investments for needs that do not exist, fake bidding processes that look more like bribing competitions, fake prices, poor quality of goods or services, and the like are but a few ways that corruption filters into public procurement (Popescu, 2014). Also, the chain of people involved in public procurement is usually long (administrative officials, politicians, bidders, sub-contractors, agents, consultants, business partners, managers), thus dissipating the responsibility and the blame.

In response, international organizations, international financial institutions, and intergovernmental and non-governmental organizations have variously created, promoted and applied standards and principles for public procurements. The United Nations (UN), the World Bank, Organization for Economic Co-operation and Development (OECD), World Trade Organization (WTO) and Transparency International (TI), for example, have focused their attention on advancing rules and procedures to ensure integrity, transparency, accountability, professionalism, fairness and efficiency in public procurement. Their recommended good practices include the exclusion of bidders involved in corruption scandals from the bidding process, the use of integrity pacts and pre-qualification procedures for assessing the bidders' technical and financial competence, the use of model laws on procurement of goods and services, and criteria and tools to evaluate and rank national public procurement systems.

Since 1995, many countries have used United Nations Commission for International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Constructions and Services as guidance for developing their national public procurement systems. Coupled with the UN Convention against Corruption, the UNCITRAL model law has been an important instrument for harmonising and strengthening national procurement systems worldwide and curbing public procurement corruption (Yukins, 2007).

In 2006, the Organization for Economic Co-operation and Development created an Assessment Tool for Public Procurement Systems in collaboration with the World Bank 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 procedures in many countries, including in Europe.

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

Facing such harms, European countries have joined the international efforts to fight public procurement corruption. The European Union's (EU) members are facing the same challenge - recent statistics show that possibly 20 to 25 percent of the value of EU 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" (Neilsen, 2013, p.1), sometimes even more. These statistics reveal the gap between legislative goals and actual outcomes, a gap partially attributable to the differences in the optics of national legislators and the efficiency of enforcement authorities.

## **2. European law and order**

Public procurement legislation has existed for more than 40 years in Europe, including at the European Union level. Recently, however, European and national politicians decided that this framework needed to be changed to better address corruption.

Currently, European countries have similar public procurement legislation. European Union member states, especially the Western European ones, are setting the pace toward modern, anti-corruption public procurement legal rules. European Union legislation now addresses all stages of public procurement procedure: planning, bidding, bid-evaluation, implementation and monitoring.

The main European Union directives containing public procurement provisions 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; and 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. They also include the 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; and 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. The numerous modifications were necessary to clarify, simplify and restructure the

existing provisions. The directives introduced a general exemption from the rules applicable to utilities for entities that operate in competitive markets and new, more flexible award procedures for complex contracts, including electronic procurement. To enhance enforcement, the directives imposed mandatory provisions on member states requiring the exclusion of corrupt suppliers from public contracts (Williams, 2006).

The general aim was to eliminate the discriminatory public procurement practices that generated a barrier against trade in the EU and, as a result, affected the proper functioning of the Internal Market. The modified provisions attempted to liberalise public procurement in the European Union by preventing domestic contracting authorities from favoring domestic suppliers, thereby increasing competition in the public procurement market (Beuter, 2006). The positive economic effects of such measures were reflected in a 34% decrease of the prices paid by the contracting public authorities for goods and services. A 5% of cost reduction has been estimated to generate 70 billion euros in savings (European Commission, 2004).

Still, the new provisions did not cover all the lacunas in the EU legislation. Until last year, transnational works concessions were still not dealt with under specific legislation; instead, they were dealt with under limited and general provisions (Directive 2004/18/EC). Transnational service concessions were only governed by EU Treaty principles. In 2011, however, the EU Commission proposed to revise the existing public procurement directives (Directives 2004/17/EC and 2004/18/EC) and to focus on vulnerable sectors such as water, construction, energy, transport, postal services, supply and service contracts and concessions (European Commission, 2014). The initiative was slowed by member states opposed to the additional costs for their national administrations the revisions would impose.

Despite various impediments, the new directives were approved by the EU Council in February 2014. As a result, Directive 2014/24/EC on public procurement and Directive 2014/25/EC on procurement by entities operating in the water, energy, transport, and postal services sectors repealed the old provisions. A new directive was created to cover concession contracts: currently, Directive 2014/23/EU. Member states have, until April 2016, to transpose the new provisions, except for the e-procurement rules that can be implemented as late as April 2018. At the same time, Directives 89/665/EEC and 92/13/EEC dealing with public procurement remedies were revised by Directive 2007/66/EC to improve the effectiveness of public procurement procedures when redress is sought from unfairly awarded contracts.

Other European Union provisions, such as Directive 2009/81/EC, address public procurement procedures in the field of defense and security since the award of such contracts require particular rules concerning the security of information.

As a whole, 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 European Union law.

The new legislation relies on the “most economically advantageous tender” principle and not on the “lowest price” one. Thus, social welfare, innovation and environmental protection are favored. The current EU rules are stricter for subcontracting and abnormally low bids - red flagging and alert systems have also been 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.

However, the European challenge remains the enforcement of public procurement legislation. The avalanche of legal reforms has meant that national operators are not always familiar with EU legislation or experienced working under it. This was especially true for the newcomers in the EU since 2005 (Trybus, 2006). In addition, inadequate publicity and transparency, discrimination, direct awards and unjustified amendment of contracts still occur. The majority of these shortcomings are in the road and railway construction sector, health, education, energy, water/sewage, IT products and service contracts.

The level of corruption generated by public procurement is still difficult to accurately estimate since European states, including EU members, do not provide enough data. However, at least at EU level, the new anti-corruption monitoring mechanism could actually determine member states to gather and provide information on their anti-corruption achievements in public procurement.

According to a 2013 Eurobarometer survey, 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 %)” (European Commission, 2014, pp. 24-25). Statistics prove that corruption is especially widespread in South Eastern and Eastern European countries.

Despite the many problems public procurement corruption is generating, some different solutions to fight it have been advanced by public and private entities. Some of these solutions have been successfully applied in practice, thus proving their efficiency in curbing public procurement corruption.

### **3. Solutions and good practices**

The solutions against public procurement corruption are focused on the need of transparency and efficiency. However, the amount of information

provided to the public has to be adjusted to the specific of public procurement procedure. The amount of information should be provided to the public on a case-by-case basis, taking into account the type of contract, the specificity of its object and the stage of the bidding process. Accordingly, the European countries have adopted different rules for ante-bidding, bidding and post-bidding phases.

For example, the French legislation relies on the proportionality principle in disseminating information about public procurement opportunities and on stronger rules concerning the accountability of public officials for low-value contracts for which bidder procedures are not necessary. Thus, contracts below 4000 Euros are exempt from mandatory publication of information. At the same time, information about contracts valued above 90000 Euros but under the threshold imposed by the European Union directives have to be published in the special section of public procurement affairs of France's official gazette. Information about public procurement bids that are above the European Union threshold have to be disseminated using both the Official Journal of the European Union and the aforementioned French publication.

In other European countries, such as Poland, the system is similar. However, in certain cases the control is stricter, requiring an ex-ante control of the award of public contracts such as public works contracts of at least 20000 Euros and public supplies and services contracts of 10000 Euros. The Polish law sanctions different law infringements that might occur before the conclusion of the contracts: negligent preparation of contract award procedures, incorrect evaluation of bids and requests, failure of demand to submit the necessary documents for the economic evaluation of the bidders and failure to exclude or reject bidders that do not qualify for participating at public procurement procedures. The results of this type of control are made public every six months on the website of Polish Public Procurement Office. This is, in fact, a preventive solution that according to statistics has discouraged this type of infringements and errors in Poland (OECD, 2007).

The information provided should be synchronized with the stage of public procurement process. Thus, the activities taking place before and after the bidding stage are not subject to transparency and accountability rules in most European countries. However, in Germany and Belgium solutions have been found for attracting a large number of participants, potential interested bidders with a variety of offers to choose from. Invitations to pre-bidding events that resume to consulting representatives of business sector or companies, meetings, on-line surveys or market studies are mostly used.

Over the years, Germany's and Austria's use of an integrity pact, including during the pre-bidding phase has been successful. It has discouraged public procurement corruption at the local level, meaning towns and municipalities, especially in the construction sector, one of the most vulnerable to corruption. 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. 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” (Transparency International, 2014, p. 27).

Other successful measures used in Germany 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 (European Commission, 2014).

A recent trend in the pre-bidding phase is having meetings with the bidders that are dedicated to discussing possible improvements in the public procurement process and to the exchange of information between potential bidders. This good practice is used in Belgium, Germany, United Kingdom and Ireland.

The communication of clear and prompt information is essential for efficient public procurement procedures. Thus, one of the most popular solutions that European states have been relying on is e-government. The Internet and the electronic platforms systems based on it proved to determine lower transaction costs, increase competition and decrease corruption through transparency and easy public procurement monitoring. E-procurement and e-invoicing are successfully used during the bidding stage in many European countries such as Portugal, Germany, France, Lithuania, Slovakia, and Slovenia, Estonia.

One of the good practices in this respect is the electronic public procurement platform used in Portugal. It is an application used for all public procurement stages, including contract management and payment. The National E-Procurement Portuguese Portal or simply BASE centralizes public procurement contracts, keeping extended records on public procurement transactions, especially those in the constructions and real estate areas. Also, the e-procurement platform offers the possibility of downloading documentation free of charge. It is also used to make public calls for tenders, to allow e-invoicing, and to receive queries from suppliers, and to upload and monitor public procurement contracts in any stage (OECD, 2007). Since its implementation in 2003, the system has proved its efficiency in saving time and money for both public and private partners and in keeping the public informed about the spending of public money.

Another good practice is the Open Local Government Initiative of Slovakia that 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” (European Commission, 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.

Similarly, the Slovenian database “Supervizor” ensures the transparency of public procurement procedures, providing information regarding contacting parties in business transactions using public money. It also contains 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 (European Commission, 2014).

In other European countries, transparency of public procurement process is also achieved by different practices such as the use of standardized, clear, documentation; the publication in a timely manner of evaluation criteria so bidders can prepare their offers (United Kingdom); the timely and simultaneous warning of bidders about the change of requirements using the e-procurement websites (Ireland, Belgium) or the official gazette (France, Romania, Hungary) and query mailboxes (United Kingdom). In the Czech Republic, the law requires that additional information to the bidder should be provided in at least 12 days before the time limit for receiving the bidding offers.

Another way to filter unlawful practices is the legality control that in some European countries such as Hungary is done not only after the public procurement procedures are finalized but also before the publication of public procurement notices are released. The Hungarian Public Procurement Council will force the bidder and public authorities to adjust their notices according to the law avoiding future complaints and burdensome remedies (OECD, 2007).

Different practices are used by the European countries to communicate information about the award of the contract. Confidentiality becomes an issue at this point, and, therefore, most countries provide minimum information about the name of the winning bidder and the reasons for the rejection of the other participants. However, in the United Kingdom, information is released on contractor’s name, nature of goods and services, award criteria, rationale for contract awards, headline price of winning bid, and the identities of unsuccessful bidders. Information about the competitor’s bid is held back due to confidentiality of business details. On the other hand, in Finland, the winning bid documentation can be consulted by all participants after the confidential information has been removed (OECD, 2007).

In most European countries, the winning contract is published both in the national gazette or/and the Official Journal of the European Union. Also, in Ireland and the United Kingdom, debriefing is also possible after the award of the



contract. It is the case of candidates in contracts that exceed the European Union threshold in the United Kingdom. Thus, the procuring authority and the bidders can be informed in writing or orally about the award procedure of public procurement contracts. This gives bidders a chance to improve their future offers and market strategies in order to better respond to the buyer's needs. At the same time, the suppliers establish a communication channel with a buyer that proves to do business in a transparent and fair manner. The debriefing has to take place within 15 days after the contract is awarded. The entire debriefing process has to be carried out by experienced, specialized personnel that will not give away any business secrets, but work their way around that kind of information.

According to European national laws, the transparency of public procurement procedure during the post-bidding phase is usually limited. In some countries, such as Denmark and Sweden, laws permit the disclosure of contract management information to the limit of business secrecy that is essential for the execution of the contract.

All of these examples prove that some European countries are making good progress in maintaining the integrity of their public procurement systems. Flexible but strict and promptly enforced rules combined with the use of new information technologies are ensuring enough transparency to discourage public procurement corruption. European countries, such as Romania, that have a weaker public procurement system should use this expertise as a model for improvement.

#### **4. Conclusions**

During the last decade, European countries have advanced different solutions and encouraged good practices that proved successful in limiting public procurement corruption. However, the integrity of such public procurement systems can only be maintained by advancing proactive rules, adapted to a dynamic reality where public needs meet business interests. Some European countries, including EU members, have understood this.

The European Union has also acknowledged the need for such measures and decided to upgrade its public procurement legislation, forcing its member states to abide by international standards.

As a result, some EU members have taken steps in the right direction by adapting their national public procurement legislation to the new requirements and enforcing the changes. Thus, the solutions and good practices in public procurement that minimise corruption exist in most Western European countries such as United Kingdom, Ireland, Belgium, France, Germany, Austria and Portugal. The situation is less favorable in the Central and Eastern European countries, where public procurement corruption is more virulent. However, positive results can be found in Poland, Slovakia, Slovenia, and Hungary. The situation is more critical in Romania and Bulgaria.

These mixed results prove that the main challenge for EU members remains the enforcement of the new and improved public procurement rules. As long as law enforcement disparities among EU member states exist, the EU Internal Market will continue to suffer from the lack of fair competition among potential public contract bidders. This will affect the free movements of goods and services and, in turn, cause short- and long-term economic harm.

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